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THE
FEDERAL REPORTER.

VOLUME 161.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

THE TREMONT.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1908.)

No. 1,454.

1. COLLISION—STEAMSHIPS IN FOG—MUTUAL FAULTS.

A finding of the trial court that a collision between the steamships Tremont and Ramona off Marrowstone Point near Port Townsend was due to faults of both vessels affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 40.

Collision rules. Speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

2. SAME—DAMAGES RECOVERABLE—LOSS OF EARNINGS.

In finding the damages recoverable by a vessel injured in a collision as she was starting on a voyage an allowance cannot be made for loss of earnings in carrying the mails on the voyage, which were withdrawn on account of the delay caused by her injuries, and sent by another vessel where there is no evidence from which it can be ascertained with reasonable certainty what profit she would have made from such carriage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 282.]

3. SAME—EXPENSES DURING DELAY FOR REPAIRS—DEMURRAGE.

The expenses of a vessel during the time she was delayed in repairing injuries caused by a collision, such as wages of the crew, provisions, and the like are properly allowable as damages resulting from the collision, but insurance premiums and general office and agents' expenses during that time are not proper elements of such damages. The fixing of the per diem demurrage during such time on the basis of the vessels average daily earnings during three consecutive voyages held not prejudicial to such vessel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 283.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

W. H. Bogle and Charles P. Spooner, for appellants.

Samuel H. Piles, James B. Howe, and Charles H. Farrell, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This appeal grew out of a collision between the steamship Tremont and the steamer Ramona off Marrowstone Point, near Port Townsend, Wash., during a heavy fog. The trial court found both steamers in fault in certain specified particulars, and that the fault of each contributed to the collision; accordingly, it followed the established rule of dividing the damages. A careful consideration of the record satisfies us that there was abundant evidence to sustain the findings. No useful purpose would be served by reviewing it.

It is contended for the appellant that in fixing the damages sustained by the Tremont the court should have allowed as loss in the earnings of the voyage on which she was at the time bound what she would have earned by carrying the mails that were on board, and which mails, the record shows, were withdrawn by the government officials, and sent forward by other steamers because of the collision and consequent interruption of the Tremont's voyage. We would be disposed to sustain this contention of the appellant if there was any evidence from which the profits that would have been derived by the Tremont from carrying the mails so withdrawn could be arrived at with reasonable certainty; but there is no such evidence. The testimony of the witness Stewart, cited by the appellant to that point, is altogether too indefinite and uncertain.

The case shows that the Tremont was delayed 4 days in making temporary repairs, after which she completed the voyage in which she was engaged at the time of the collision, then made two other voyages, after which permanent repairs upon her were made, consuming with the 4 days, during which the temporary repairs were made, a total of 18 days. The record further shows that the voyage here in question occupied 3 days longer time than the immediately preceding similar voyage of the Tremont, during which her average net proceeds were \$328.44 per day, but was made in 5 days' shorter time than the immediately succeeding similar voyage of the steamer, during which her average net profits were \$221.47 per day, whereas during the intermediate voyage—that in question—her average net earnings per day were only \$91.49. In fixing the demurrage for the 18 days during which the Tremont was laid up for repairs, the court below allowed the net average earnings per day for the three voyages; that is to say, \$213 a day. Whether the facts were such as to justify a resort to an average of the net earnings of the three voyages has not been challenged by an appeal on the part of the Ramona. We think the Tremont has no just ground of complaint on that ground.

In addition to the daily demurrage of \$213 allowed by the court below, the appellant was also allowed the expense of the ship during the 18 days, such as wages of the crew, provisions, and the like, but the court below correctly refused, in our opinion, any allowance for insurance premiums and general office and agents' expenses during that period.

The judgment is affirmed.

HOLT v. CALIFORNIA DEVELOPMENT CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1908.)

No. 1,484.

1. CORPORATIONS—SUIT BY STOCKHOLDER—SUFFICIENCY OF BILL.

A bill by a stockholder against the corporation and a railroad company alleged that a contract was entered into between the two companies by which the railroad company agreed to lend to the other a large sum of money, taking as security a pledge of a majority of the latter's stock, with power to vote the same on default in repayment of any installment of the loan, and an agreement by which it was to name the president and general manager and three of the seven directors of the borrowing company, and which provided that the other directors should not be objectionable to it; that large sums were advanced by the railroad company which were in fact expended for its own benefit, but ostensibly for the benefit of the other company to which they were charged; that by reason of the latter's control by the railroad company so secured it was wholly unable to extricate itself from its indebtedness, and would be absorbed by the railroad company, as was the fraudulent intention when the contract was made; and that the other stockholders would be deprived of their property. The bill prayed for a cancellation of the contract; that an accounting be had in respect to the advances made and the equities of the parties determined. *Held*, that such bill was for the benefit of the corporation of which complainant was a stockholder, and that under its allegations he was not required to tender repayment of the sums advanced by the railroad company.

2. SAME—CONTRACTS—ULTRA VIRES—CONTRACT.

Section 12 of the New Jersey Corporation Act (P. L. 1896, p. 281), in force in 1896, provides that the business of every corporation shall be managed by its directors who shall be stockholders, and shall be chosen annually by the stockholders, and section 13 provides that every corporation shall have a president, secretary, and treasurer who shall be chosen either by the directors or stockholders as the by-laws direct. *Held*, that a contract made by a corporation organized under such act, by which it agreed to cause three of its seven directors to resign; that their successors should be named by another corporation, and one of such members should be elected president and general manager; that the other directors should be not objectionable to such other corporation; and that such officers and directors should remain in office until a loan should be repaid to the other corporation which did not all become due for six years—was in violation of such provisions of the statute and ultra vires and void, and was not validated by the fact that it contained a further provision by which the outside corporation acquired the right to vote a majority of the stock of the New Jersey corporation.

3. SAME—SURRENDER OF CONTROL TO ANOTHER CORPORATION.

The purpose of a grant of corporate power is that the corporation shall exercise its powers and carry on its business through its own officers and agents, and an agreement by which it surrenders the management and control of its affairs and business to another corporation organized for a wholly different purpose and carrying on a different business is ultra vires.

4. SAME—SUIT BY STOCKHOLDER FOR CANCELLATION OF ULTRA VIRES CONTRACT—ESTOPPEL.

A contract made by a corporation which is ultra vires in the true sense is void, and neither the corporation nor a stockholder is estopped to attack its validity by the fact that the corporation or the other party has acted under it, nor by delay in bringing suit for its cancellation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1556-1564.]

Ross, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of California.

Walter Malins Rose and Hunsacker & Britt, for appellant.

J. S. Chapman, E. A. Meserve, E. S. Ives, and J. W. McKinley, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This suit was commenced in the Circuit Court of the United States for the Southern Division of the Southern District of California. The plaintiff is a citizen of the state of California residing in the city of Los Angeles in the Southern Division of the Southern Judicial District. The defendant the California Development Company is a corporation organized and acting under the laws of New Jersey, having an authorized capital of \$1,250,000 divided into 12,500 shares of the par value of \$100 each. Its principal offices are in the city of Los Angeles, with property and business situate largely in San Diego county. The defendant the Southern Pacific Company is a corporation organized and acting under the laws of Kentucky, and operating a line of railroad extending through the Southern Division of the Southern Judicial District of California, with executive and administrative offices in the city of Los Angeles. The plaintiff is, and ever since the 1st day of November, 1900, has been, the owner and holder of 170 shares of the capital stock of the defendant the California Development Company. The defendant the California Development Company is the owner of all the capital stock of the corporation known as "La Sociedad de Yrrigacion y Terrenos de la Baja California (Sociedad Anonima)," which is referred to in the bill of complaint as the "Mexican Company."

In an amended bill of complaint filed February 12, 1906, the plaintiff seeks to obtain a decree against the defendants, the California Development Company and the Southern Pacific Company, declaring a certain contract entered into between the defendants on June 20, 1905, ultra vires, invalid, and not binding upon the defendant the California Development Company, and that the same be surrendered up and canceled; that a receiver be appointed to take possession of the assets and business of the California Development Company; that the defendant the Southern Pacific Company, its agents, servants, and employes be enjoined, during the pendency of the suit, from enforcing or attempting to enforce any of the terms of the instruments set forth in the complaint, or making new or different contracts relating thereto, or making other or further advances to the defendant the California Development Company under and by virtue of said contracts, and that the defendant the Southern Pacific Company be required to account for all advances theretofore made to the defendant the California Development Company. Plaintiff alleges that the principal object which the organizers and promoters of the organization of the defendant the California Development Company had in view in the formation of said corporation was to acquire the right to divert and apply to beneficial uses water flowing in the Colorado river at a point in San Diego county, Cal., near the international boundary line be-

tween the United States and the Republic of Mexico, and to convey the same for irrigation and other beneficial uses by means of an intake, heading, canals, and ditches from said river to certain arable lands lying in said San Diego county near said international boundary, and in that portion of Lower California in the Republic of Mexico adjoining said boundary upon the south; that a very large body of arable land in said vicinity, comprising upwards of 100,000 acres in said Lower California, and upwards of 800,000 acres in said San Diego county, was and is capable of irrigation from said Colorado river at reasonable outlay, by reason of the fact that said lands are lower than the bed of said river at or near said point and that said lands are in large part below the level of the sea.

From this and other allegations contained in the amended bill of complaint it appears that the lands referred to are located in the desert region between the Colorado river and the Salton Basin below the level of the sea in San Diego county, Cal., and in the adjoining territory of a similar character on the south in Lower California in the Republic of Mexico. Plaintiff alleges that in the month of May, 1900, in pursuance of the purpose set forth in the bill, the California Development Company acquired by appropriation under the laws of the state of California the right to 500,000 miner's inches of the water of the Colorado river, and thereafter, by the expenditure of large sums of money, the California Development Company constructed a heading and intake for the diversion of said water, and about 70 miles of canals and ditches, whereby said water was diverted and conveyed to and became available for the irrigation of about 500,000 acres of the lands described; that prior to the application of water to these lands they were part of an arid and desolate desert, wholly unproductive and valueless; that the enterprise of reclaiming these lands from the desert was undertaken and carried out by the California Development Company prior to the act of Congress of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511), authorizing the expenditure of public moneys in aid of the irrigation of arid lands, and was of vast magnitude and created many million dollars' worth of wealth where none had existed before, and has been, and is, of great public benefit and advantage; that said water right is a prior right upon the waters of the Colorado river and of very great value, plaintiff being informed and believing that it is reasonably worth the sum of \$1,500,000; that in furtherance of the purpose of the California Development Company to acquire the right to divert and apply to beneficial uses 500,000 miner's inches of the water flowing in the Colorado river, the company, on or about July 1, 1900, executed a deed of trust conveying all of its property to a trustee to secure a bond issue to the amount of \$500,000, and the company thereafter issued and sold its bonds and used the proceeds thereof in and about its said business and in furtherance of its purposes as aforesaid; that the principal security for said bonds is the water right of the California Development Company and the heading, intake, and canals of the company, all of which are covered by and included in the deed of trust whereby said bonds are secured. Plaintiff further alleges that in the spring and summer of 1904, by reason of the incompetency of

one C. R. Rockwood, the engineer of the California Development Company, silt was allowed to accumulate in the intake for said water in that portion of the canal adjacent thereto, whereby it was difficult to divert the needed water from the Colorado river into the canals of the California Development Company; that thereafter, and in the month of September, 1904, the Mexican Company caused a cut to be made in the bank of the Colorado river and in the Republic of Mexico, and at a place where the bed of the river was much higher than the Mexican Company's canal; that the soil was loose and unstable at that point, and the river gradually widened making a breach in its bank at that point until it became impossible to control or manage the flow of the river; that the intake gradually became the bed of the entire Colorado river along and upon which the entire waters of the river flowed; that the lands irrigated by the water so appropriated and diverted by the California Development Company are all below sea level, and much lower than the bed of the Colorado river from which the water is taken; that further westward is a vast area or basin known as the Salton Basin, into which the water from the Colorado river has been caused to flow through the new cut in the bank of the river, and that this water covers about 400 square miles of this basin and is continually rising therein.

Plaintiff further alleges that the Southern Pacific Company operates a line of railroad through and across said Salton Basin, which line at some points is more than 200 feet below sea level; that some time in the month of February or March, 1905, the inflow of water from the Colorado river to said Salton Basin began to approach and threaten to submerge the railroad tracks of the Southern Pacific Company at different points in the Salton Basin; that about that time the Southern Pacific Company realized that a continuance of the inflow of the Colorado river into the Salton Basin would compel it to remove the line of tracks to higher ground, which would involve great expense to it; that thereupon the Southern Pacific Company conceived the purpose of acquiring control of the California Development Company upon the pretext of being interested in aiding said company in its colonization and development work, but in reality for the purpose of making large expenditures to protect its right of way and tracks in the name of and as an indebtedness against the California Development Company, and of saddling a large amount of indebtedness therefor upon said company in the form of loans from the Southern Pacific Company; that at the time the Southern Pacific Company conceived the purpose of gaining control of the California Development Company as aforesaid, that company was in financial straits and its credit greatly impaired; that by reason of such financial difficulties said company was constrained by its necessitous condition to accept a loan of \$200,000 offered by said Southern Pacific Company in the month of May, 1905; that by the terms of said loan the California Development Company agreed to give the Southern Pacific Company control of its board of directors and of all its officers until such time as it should repay said loan with interest. In addition and at the same time the Southern Pacific Company secured by way of pledge 6,300 shares of the capital stock of the California Development Company,

such number of shares being a majority of the 12,500 shares of the capital stock of that corporation; that said agreement was so worded and drawn that it became forthwith hopelessly impossible for the California Development Company ever to extricate itself from the terms thereof; and the Southern Pacific Company thereupon became a creditor in possession with complete dominion and control over the assets of the California Development Company. The agreement, as set out in the amended bill of complaint is dated the 20th day of June, 1905, and contains the following, among other, provisions: It recites that the California Development Company is desirous of borrowing from the Southern Pacific Company the sum of \$200,000 to be used by it in paying off certain of its floating indebtedness, and in completing and perfecting its canal system and that of the Mexican Company; that the Southern Pacific Company is to loan and advance to the California Development Company and at once pay into its treasury the sum of \$200,000 which said loan is to be repaid by the California Development Company to the Southern Pacific Company on or before March 1, 1911, in installments as follows: \$20,000 on or before March 1, 1907; \$30,000 on or before March 1, 1908; \$40,000 on or before March 1, 1909; \$50,000 on or before March 1, 1910; \$60,000 on or before March 1, 1911—all deferred payments to bear interest from date of advancement and payment of the money to the California Development Company until paid, at the rate of 6 per cent. per annum, payable semiannually. To secure this loan and the repayment thereof with interest as provided the California Development Company agrees to procure certain of its stockholders to pledge 6,300 shares of its capital stock; said stock to be deposited in pledge for such purpose with a trustee to be selected by the Southern Pacific Company, and not to be transferred on the books of the corporation during the life of the pledge unexpired, but to remain in the names of the owners thereof, who shall have the right to sell and transfer their respective interests in the same, subject always to said pledge and the purpose thereof; at the time of so depositing said stock in pledge the respective owners thereof shall execute to the trustee or pledgee, as selected by the Southern Pacific Company, irrevocable powers of attorney or proxies, giving to said trustee the right to vote said stock at all meetings of stockholders of the California Development Company held after 90 days' default in payment of any installment of said loan or in performance of any other of the agreements of the California Development Company therein contained, and while such default continues.

It is also provided in the agreement that to secure the loan and the repayment of the same, and to secure the Southern Pacific Company in making the same, it is agreed that during the continuance of the whole or any part of said loan unpaid the Southern Pacific Company is to have three members on the board of directors of the California Development Company, one of whom shall be, during said term, the duly elected president and general manager of the company and its business; to that end the California Development Company agrees to cause three members of its board of directors as then constituted to resign, and in their places and steads to cause to be elected three par-

ties to be selected for that purpose by the Southern Pacific Company, upon which being done the California Development Company is to cause the other members on its board of directors then in California to vote for and elect one of the three directors so selected and named by the Southern Pacific Company to the office of president and general manager of the California Development Company and its business. And in the event of any vacancy occurring in the office of director held by either of said persons elected by the Southern Pacific Company or in said office of president, then the California Development Company shall cause such person to be elected to said office as the Southern Pacific Company shall designate. Provided that such president shall be acceptable—that is, not objectionable—to at least two members of the board other than those named by the Southern Pacific Company. It is further provided that in addition to having the right of nominating three members of said board of directors as in the agreement provided for, all members of said board shall be acceptable—that is, not objectionable—to the Southern Pacific Company; that the president and general manager so selected shall have the power to name the California Development Company's secretary, treasurer, attorney, superintendents, chief engineer, and consulting engineer; the parties so named, however, to be acceptable to at least two members of the board of directors other than those named by the Southern Pacific Company. It is further provided in the agreement that the California Development Company, being the owner of nearly all of the stock of the Mexican Company, it will cause the board of directors of said Mexican Company to be composed of men satisfactory to the Southern Pacific Company, and that failure at any time while any part of said loan remains unpaid to elect as members of the board of directors of the California Development Company the three parties named therefor by the Southern Pacific Company, or failure to elect one of said parties as the president and general manager of the California Development Company as in the agreement provided, shall operate to cause and render all the balance of said loan then unpaid to become immediately due and payable. It is further provided that whenever the loan, principle, and interest has been repaid the stock deposited with the pledgee or trustee shall be returned, and then, and not before, the Southern Pacific Company will cause its three directors of the California Development Company to resign as such directors, and the California Development Company will thereupon "resume the full control and management of its affairs and its business." In a contract entered into between the California Development Company, the Mexican Company and the Southern Pacific Company on the same day as the foregoing, it is recited that it is the understanding of all the parties to the contract that a large part of the money so loaned to the California Development Company is for the real use and benefit of the Mexican Company in the work of repairing, constructing, and perfecting its canals and canal headings in the Republic of Mexico, the said loan being entirely made to the California Development Company instead of partly to that company and partly to the Mexican Company for the reason and because of the fact that the Mexican Company is a foreign corporation having all its properties in a foreign country beyond the jurisdiction of the

courts of the United States, and because of the further fact that the proportions of the said loan to be used by the California Development Company and by the Mexican Company cannot in advance be ascertained and determined. It is also recited in the contract that at the time of the agreement to make the loan it was agreed by the Mexican Company that it should guarantee the loan and the repayment thereof. The contract accordingly provides for such a guarantee on the part of the Mexican Company, and that it will cause its board of directors to elect the president and general manager of the California Development Company its general manager, and it will give to said general manager power and authority to handle and dispose of its properties in the Republic of Mexico, with power to contract and agree to furnish water for use on lands in Mexico at a rental of not less than 50 cents gold per acre per foot of water delivered. The contract also provides for the keeping of regular books of account showing the amounts of money advanced or paid out by the California Development Company for the Mexican Company and the amounts of money received by the former company belonging to or for the latter company.

Plaintiff further alleges that the California Development Company has an authorized capital of \$1,250,000, divided into 12,500 shares of the par value of \$100 each, and that all of said capital stock is outstanding; that the control and management of the affairs of the California Development Company is committed to a board of seven directors, and that said board was at the time of the execution of the contract of June 20, 1905, composed of certain persons whose names are given; that immediately after the execution of said contract three of the persons named resigned as directors, and three other persons were chosen as directors in their places as the representatives of the Southern Pacific Company; that these three directors were at that time and still are agents, employes, and servants of the Southern Pacific Company, and are acting as directors for the benefit and at the behest and under the direction and domination of the Southern Pacific Company; that immediately after these three representatives of the Southern Pacific Company were chosen as directors of the California Development Company one of them was chosen as president of said company, and ever since has acted as president in the interest of the Southern Pacific Company. Plaintiff further alleges that immediately after the execution of the aforesaid contract the Southern Pacific Company took and assumed full control and management of the business and affairs of said California Development Company and ever since has held and still holds such control and management and that the California Development Company has not paid, and by reason of such control by the Southern Pacific Company cannot pay the obligation of \$200,000 created under and pursuant to said contract so as to be able to "resume the full control and management of its affairs and business" as provided by said contract; that \$150,000 of said sum of \$200,000 agreed to be advanced was loaned and advanced to the California Development Company by the Southern Pacific Company on or about July 22, 1905, and the remainder of \$50,000 was loaned and advanced on or about September 22, 1905. Plaintiff further alleges

that under the provisions of the contract requiring that the other members of the board of directors of the California Development Company should be "acceptable—that is, not objectionable"—to the Southern Pacific Company, it was possible for the latter company to exclude, and it did exclude, from said board all save persons who would be subservient to the wishes and desires of the Southern Pacific Company; that accordingly the resignation of a fourth director was secured, and two persons were caused to be elected to fill the vacancy in succession, one after the other, and that both are wholly subservient to the Southern Pacific Company; that the object of the Southern Pacific Company in entering into the said contract was the saddling of debts for the maintenance of its right of way upon the California Development Company; that the Southern Pacific Company has railroad interests of vast magnitude and importance compared with which its interests as creditor of the California Development Company is insignificant; that it is indifferent to the interests of the bondholders and stockholders of said corporation; that since securing control of the California Development Company and dominion over its property and assets, the Southern Pacific Company has made large expenditures of money loaned and advanced to the California Development Company under said contract for the benefit of itself—the Southern Pacific Company; that said expenditures have not been made for the benefit of the California Development Company or the said Mexican Company at all, and have not benefited either or both of said companies, and it is charged that upwards of \$300,000 has already been expended by the Southern Pacific Company in this way for his own benefit and without benefit to the California Development Company and the said Mexican Company, and saddled upon the California Development Company in the form of a debt to the Southern Pacific Company. Plaintiff further alleges that it is the purpose of the Southern Pacific Company so to manipulate the affairs and assets of the California Development Company that the holdings and interests of the stockholders will be rendered wholly valueless, and the Southern Pacific Company further purposes and intends, after having eliminated the rights and holdings of all the present stockholders of the California Development Company, to sell the valuable water rights of the California Development Company at a large price to the Reclamation Service of the United States, and to reap all the profit and benefit thereof themselves and to the injury of the plaintiff and all other stockholders of the California Development Company; and to accomplish this purpose by means of divers and sundry fraudulent and unlawful devices carried out through its agents and servants who have been made president and directors of the California Development Company, and by virtue of the control and dominion which the Southern Pacific Company has over the California Development Company and its assets and affairs under said contract.

To this amended bill of complaint both the defendants, appearing by the same counsel, demurred, on the ground that the plaintiff, by his own showing, was not entitled to the relief prayed for against the defendants or either of them; that the court had no jurisdiction to hear or determine the suit, and that the bill of the plaintiff is wholly

without equity. The court sustained the demurrer and entered a decree dismissing the bill. The plaintiff has appealed.

It is urged as an objection to the bill that it is without equity, because the money loaned under the contract which it is the object of the suit to cancel has not been restored, and there is no offer of restoration. In our opinion the objection is based upon an erroneous view of the cause of action. The plaintiff does not bring this suit to establish any individual right of his own, but for the benefit of the California Development Company, of which he is a minority stockholder. He has received nothing in the transaction which is the subject of this controversy, and therefore has nothing to restore. His authority to speak for the corporation is to pray the court to do equity in determining the rights of the parties. But the important feature of the cause of action as set forth in the amended bill of complaint is that there is nothing to restore to the Southern Pacific Company by the California Development Company or its stockholders. It is distinctly alleged that the "Southern Pacific Company has made large expenditures of money loaned and advanced to said California Development Company, under said contract * * * for the benefit of itself—the said Southern Pacific Company; that said expenditures have not been made for the benefit of said California Development Company or said Mexican Company at all, and have not benefited either or both said companies * * *; that upwards of \$300,000 has already been expended by said Southern Pacific Company in the above way, * * * and without benefit to said California Development Company and said Mexican Company, and saddled upon said California Development Company in the form of a debt to said Southern Pacific Company." There are other allegations in the amended bill charging acts on the part of the Southern Pacific Company to secure the control of the California Development Company for the purpose of making large expenditures to protect its right of way and tracks in the name of and as an indebtedness of said California Development Company and of saddling a large amount of indebtedness therefor upon said California Development Company in the form of a loan by the said Southern Pacific Company. If these allegations are true, and they must be so treated in determining the sufficiency of the bill upon the demurrer, the Southern Pacific Company has appropriated to its own uses and purposes the money it has pretended to loan to the California Development Company, and this it has accomplished under the terms of the contract giving it control of that corporation. The appeal to equity is that the California Development Company may be relieved of this assumed indebtedness by a cancellation of the contract. In this aspect of the case it is manifest that neither the plaintiff nor the California Development Company should be required to offer to restore money the corporation has never received for its own use or benefit. If the court shall hereafter ascertain the fact to be otherwise than as alleged in the bill, it will direct the parties to do equity in accordance with such facts.

The next question to be determined is whether the contract is ultra vires. Section 12 of the act of the Legislature of New Jersey (P. L. 1896, p. 281), under which the California Development Company was incorporated on or about the 23d day of April, 1896, provides:

"The business of every corporation shall be managed by its directors, who shall respectively be shareholders therein; they shall be not less than three in number, and, except as hereinafter provided (the exception is not material in this case), they shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead."

Under the law the control and management of the affairs of the California Development Company was committed by its incorporators to seven directors. In paragraph 2 of the agreement of June 20, 1905, the California Development Company by its president and secretary agreed to cause three members of its board of directors as then constituted to resign and in their places and steads to cause to be elected three parties to be selected for that purpose by the Southern Pacific Company. The provision of the statute that the directors shall be shareholders and shall be chosen annually by the stockholders appears to be set aside by this agreement as to three of the seven directors, and the selection of these three directors vested in the Southern Pacific Company "during the continuance of the whole or any part of said loan unpaid."

Section 13 of the New Jersey act provides that:

"Every corporation organized under this act shall have a president, secretary and treasurer, who shall be chosen either by the directors or stockholders, as the by-laws may direct, and shall hold their offices until others are chosen and qualified in their stead."

In paragraph 2 of the agreement it is provided that upon the election of the three directors selected by the Southern Pacific Company the California Development Company is to cause the other members on said board then in California to vote for and elect one of the three directors so selected and named by the Southern Pacific Company to the office of president and general manager of the California Development Company and its business. It is further provided in the agreement that in the event of any vacancy occurring in the office of director held by either of said persons elected by the Southern Pacific Company or in said office of president, then the California Development Company shall cause such person to be elected to said office as the Southern Pacific Company shall designate, provided that such president shall be acceptable—that is, not objectionable—to at least two members of the board other than those named by the Southern Pacific Company. It is further provided that in addition to having the right of nominating three members of said board of directors as provided in the agreement all members of the board shall be acceptable—that is, not objectionable—to the Southern Pacific Company. Under the agreement, the president of the corporation, instead of being chosen either by the directors or stockholders, as the by-laws may provide, is selected by the Southern Pacific Company. The law requires that the secretary like the president shall be chosen either by the directors or stockholders as the by-laws may direct. In paragraph 3 of the agreement it is provided that the president and general manager of the California Development Company so selected shall have the power to name the secretary, acting superintendent, chief engineer and consulting engineer of the corporation, the persons so named, however,

to be acceptable to at least two members of the board of directors of the corporation other than those named by the Southern Pacific Company. These provisions of the agreement are clearly contrary to the provisions of the law under which the corporation was organized, and are contrary to the laws of this state, under which it is exercising its authority and doing business as a corporation.

There is, however, another provision of the agreement to be considered in this connection. It is provided in paragraph 4 of the agreement that to further secure the loan and its repayment with interest the California Development Company agrees to procure certain of its stockholders to pledge 6,300 shares of its capital stock to be deposited with a trustee to be selected by the Southern Pacific Company, the owners of the stock to execute to the trustee so selected irrevocable powers of attorney or proxies giving to said trustee the right to vote said stock at all meetings of stockholders of the California Development Company held after 90 days' default in payment of any installment of said loan or in performance of any other of the conditions of the agreement on the part of the California Development Company and while such default continues. Does this power of control given to the Southern Pacific Company over the affairs of the California Development Company by the transfer of a majority of its shares of stock render immaterial the method provided in the agreement for the selection of the officers of the corporation and their terms of office? In other words, if the Southern Pacific Company has secured the control and management of the California Development Company by procuring the control of a majority of its shares, and is thus enabled to elect its officers and direct its affairs, is it of any consequence that the agreement provides a method wholly at variance with the law for the selection of such officers and their terms of service?

We are of opinion that the method provided by the statute for the election of the officers of the corporation, their qualification, and their terms of service cannot be set aside even by the vote of the majority of the shareholders. But, aside from the conflict between the terms of the agreement and the law under which the California Development Company was incorporated, the action of the corporation in carrying out the terms of the agreement as alleged in the bill amounts to a complete surrender of the management and control of the California Development Company to the Southern Pacific Company, another corporation formed for a different purpose and carrying on a wholly different business. The purpose of a grant of corporate power is that the corporation shall exercise its powers and carry on its business through its own officers and agents and not through officers and agents selected by another corporation. 1 Mor. Priv. Corp. p. 431; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 429, 18 L. R. A. 252, 36 Am. St. Rep. 71. And that it shall maintain an independent corporate existence, and not surrender the control of its affairs or the exercise of its power to another corporation. *Anglo-American Land M. & A. Co. v. Lombard*, 132 Fed. 721, 736, 68 C. C. A. 89. There are undoubtedly instances where the control and management of one corporation by another is justified by the character of the business in which they are engaged, and the complete harmony of

interests existing between the two corporations. The control and management of the Mexican Company by the California Development Company as set forth in the bill appears to be such a case, but we have found no case where the courts have sanctioned such control and management where there are conflicting interests of the character charged in the bill as existing between the California Development Company and the Southern Pacific Company with respect to the business and affairs of the former corporation. The surrender of corporate authority on the part of the California Development Company, as set forth in the bill, is manifestly against public policy, and the contract under which the surrender is made so clearly contrary to the law under which the corporation was created that it must be declared *ultra vires* and void.

The defense of estoppel is not applicable to the facts as stated in the bill of complaint. If the money loaned under the agreement by the Southern Pacific Company to the California Development Company has been expended by the Southern Pacific Company for its own use and benefit, and not for the use or benefit of the California Development Company or the Mexican Company the rule of estoppel does not apply, nor does it apply to the *ultra vires* agreement alone. The Supreme Court of the United States in *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 59, 11 Sup. Ct. 478, 35 L. Ed. 55, has stated the rule applicable to this case as follows:

"A contract of a corporation, which is *ultra vires* in the proper sense—that is to say, outside the object of its creation; as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

The rule is also applicable to the further objection that the plaintiff has been guilty of laches, and is therefore estopped by his conduct from maintaining this action. Furthermore, the agreement in controversy is dated June 20, 1905. The amended bill was filed February 12, 1906. When the original bill was filed does not appear. There is therefore nothing in the record that would justify the court in determining that the plaintiff had been guilty of laches in bringing the action. In any view of the case the court cannot apply the law of estoppel to plaintiff's conduct.

The decree of the Circuit Court is reversed, with directions to overrule the demurrer.

ROSS, Circuit Judge (dissenting). I am unable to agree to the judgment in this case. The appellant sued as a dissatisfied stockholder

of the California Development Company, and as such only. Manifestly, therefore, he can have no other or greater right to maintain the suit than would that corporation, were it the complainant. *Smith v. Ferries & C. H. Ry. Co.* (Cal.) 51 Pac. 715, 716; *Chetwood v. Cal. National Bank*, 113 Cal. 425, 45 Pac. 704; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; 10 Cyc. 1160. Would the California Development Company be entitled to the relief here sought upon a like bill? I think not. In the bill, these, among other facts, are expressly alleged:

"12. Your orator shows that heretofore and some time in or about the spring and summer of 1904, by reason of the incompetency of one C. R. Rockwood, the engineer of said California Development Company, silt was allowed to accumulate in the intake for said water in that portion of the canal of said company adjacent thereto, whereby it was difficult to divert the needed water from said Colorado river into the canals of said California Development Company; that thereafter and some time in or about the month of September, 1904, said Mexican Company caused a cut to be made in the bank of said Colorado river and in the Republic of Mexico, and at a place where the bed of said river was much higher than said Mexican Company's canal; that the soil was loose and unstable at said point, and the said river gradually widened a breach in its said bank at said point until it became impossible to control or manage the flow of said river; that said intake gradually became, and now is, the bed of the entire Colorado river along and upon which the entire waters of said river flow; that the lands irrigated by the water so appropriated and diverted by said California Development Company are all below sea level and much lower than the old bed of the Colorado river, from which said waters are taken; and that further westward is a vast area or basin lying many feet below sea level, into which said waters were, by said new cut and point of diversion, caused to flow, and now are flowing, which said basin is known as 'Salton Basin.' That said waters have now covered about 400 square miles of said basin and are gradually rising therein.

"13. Your orator further shows that the defendant Southern Pacific Company operates a line of railroad through and across said Salton Basin, which line at some points is more than two hundred feet below sea level; that some time in the month of February or March, 1905, the inflow of water from the Colorado river to said Salton Basin began to approach and threaten to submerge the railroad tracks of said Southern Pacific Company at different points in said Salton Basin; that, as your orator is informed and believes, and upon such information and belief alleges, at or about said time said Southern Pacific Company realized that a continuance of said inflow into said Salton Basin from the said Colorado river would compel it to abandon many miles of its said railroad or remove the same to higher ground, which would involve great expense to it; and that, at or about said time, said Southern Pacific Company conceived the purpose of acquiring control of the defendant California Development Company, upon the pretext of being interested in aiding said company in its colonization and development work, but in reality for the purpose of making large expenditures to protect its right of way and tracks in the name of, and as an indebtedness against, said California Development Company, and of saddling a large amount of indebtedness therefor upon said company, in the form of loans from the said Southern Pacific Company. * * *

"15. That, at the time said Southern Pacific Company conceived the purpose of gaining control of said California Development Company as aforesaid, said California Development Company was in financial straits and its credit was greatly impaired, and its then president, A. H. Heber, had been obliged to pledge his personal assets to obtain loans for the company; and that, by reason of such financial difficulties, said company was constrained, by its necessitous condition, to accept a loan of \$200,000, offered by said Southern Pacific Company some time in or about the month of May, 1905; that, by the terms of said loan, said California Development Company agreed to give to the Southern Pacific Company control of its board of directors and of all its affairs, until

such time as it should repay said loan with interest, and in addition and at the same time said Southern Pacific Company got control of a majority, to wit, 6,300 shares of its capital stock, by way of pledge; that said agreement was so worded and drawn that it became forthwith hopelessly impossible for said California Development Company ever to extricate itself from the terms thereof, and said Southern Pacific Company then and there became a creditor in possession and having complete dominion and control over the assets of said California Development Company; that all of the foregoing and other provisions of said agreement more fully appear from said agreement," which agreement, together with the agreement between the development company, the Mexican Company, and the Southern Pacific Company, which is annexed to and made a part of that between the development company and the Southern Pacific Company, are fully set out in the bill—that between the development company and the Southern Pacific Company reciting:

"That, whereas party of the first part (the development company) is desirous of borrowing from party of the second part (the Southern Pacific Company), on the terms hereinafter set out, the sum of two hundred thousand (\$200,000.00) dollars to be used by it in paying off certain of its floating indebtedness, and in completing and perfecting the canal system of first party and of that certain corporation known as the Mexican Company; and whereas, on the terms and conditions hereinafter set out, party of the second part is willing to make such loan; now therefore, in consideration of the premises aforesaid and of the several mutual covenants and promises herein contained, the parties hereto do hereby covenant, promise and agree as follows, to wit: 1. Party of the second part is to loan and advance to party of the first part, and at once pay into its treasury the sum of two hundred thousand (\$200,000.00) dollars; which said loan is to be repaid by first party to second party on or before March 1st, 1911, in installments as follows: Twenty thousand (\$20,000.00) dollars on or before March 1st, 1907; thirty thousand (\$30,000.00) dollars on or before March 1st, 1908; forty thousand (\$40,000.00) dollars on or before March 1st, 1909; fifty thousand (\$50,000.00) dollars on or before March 1st, 1910; and sixty thousand (\$60,000.00) dollars on or before March 1st, 1911—all deferred payments to bear interest from date of advancement and payment of the money hereunder to first party, until paid, at the rate of six (6) per cent. per annum, payable semiannually, and which said sum, with the interest thereon, first party agrees to pay to second party in installments as above fixed and set out,' etc., etc., and the annexed agreement between the development company, the Mexican Company, and the Southern Pacific Company, reciting: 'That whereas parties of the first (the development company) and third (the Southern Pacific Company) parts, at the time of the execution hereof as a part of this same transaction, have entered into and executed the foregoing and annexed contract or agreement in writing; and, whereas, under said agreement, party of the third part (the Southern Pacific Company) is to loan and advance to party of the first part (the development company) the sum of two hundred thousand dollars (\$200,000.00) therein mentioned under the terms and conditions and for the purposes mentioned in said foregoing contract; and, whereas, it is the understanding of all the parties hereto that a large part of the money so loaned to party of the first part (the development company) is for the real use and benefit of party of the second part (the Mexican Company) in the work of repairing, construing (constructing) and perfecting its canals and canal headings in the Republic of Mexico, the said loan being entirely made to party of the first part (the development company) instead of partly to party of the first part (the development company) and partly to party of the second part (the Mexican Company), for the reason and because of the fact that party of the second part (the Mexican Company) is a foreign corporation having all of its properties in a foreign country, beyond the jurisdiction of the courts of the United States, and because of the further fact that the proportions of the said loan to be used by party of the first part (the development company) and by party of the second part (the Mexican Company) cannot in advance be ascertained or determined; and, whereas, at the time of the agreeing to the making of said loan, it was agreed by party of the second part (the Mexican Company) that it should guarantee the said loan and the repayment thereof; now, therefore, in consideration of

the premises aforesaid, and in consideration of the entering into and execution of the foregoing contract hereto annexed, the said parties of the first and second parts do hereby covenant, promise, and agree' as specifically set forth in the agreement."

The bill further expressly alleges "that \$150,000 of said sum of \$200,000 so agreed to be advanced was loaned and advanced to said California Development Company by defendant Southern Pacific Company on or about July 22, 1905, and the remainder, to wit, \$50,000 was so loaned and advanced on or about September 22, 1905."

The twentieth paragraph of the bill is as follows:

"Your orator further shows that since securing control of said California Development Company and dominion over its property and assets, as hereinabove stated, defendant Southern Pacific Company has made large expenditures of money loaned and advanced to said California Development Company, under said contract set forth in paragraph 15 hereof, for the benefit of itself—the said Southern Pacific Company; that said expenditures have not been made for the benefit of said California Development Company or said Mexican Company at all, and have not benefited either or both said companies, and your orator is informed and believes, and upon such information and belief charges the fact to be, that upwards of \$300,000 has already been expended by said Southern Pacific Company in the above way, and for its own benefit and without benefit to said California Development Company and said Mexican Company, and saddled upon said California Development Company in the form of a debt to said Southern Pacific Company."

It thus appears from the express averments of the bill itself that the Southern Pacific Company loaned to the California Development Company, and paid into its treasury, the sum of \$200,000 upon the terms and conditions stated in the two agreements above referred to, and while the bill does allege in the paragraph last above quoted that the Southern Pacific Company "has made large expenditures of money loaned and advanced to said California Development Company, under said contract set forth in paragraph 15 hereof, for the benefit of itself, the said Southern Pacific Company, and that said expenditures have not been made for the benefit of said California Development Company or said Mexican Company at all, and have not benefited either or both said companies," it does not allege how much of the money so loaned and advanced to the California Development Company the Southern Pacific Company has expended for its own exclusive benefit. There is no averment that all of the money loaned by the Southern Pacific Company to the development company was expended by the former for its own benefit. The general allegation contained in paragraph 20 of the bill "that upwards of \$300,000 has already been expended by said Southern Pacific Company in the above way, and for its own benefit and without benefit to said California Development Company and said Mexican Company, and saddled upon said California Development Company in the form of a debt to said Southern Pacific Company," is far from being an averment that all of the money loaned by the latter company to the California Development Company was expended by the Southern Pacific Company for its own benefit. It should be remembered that the rule is well established that pleadings must be taken most strongly against the pleader, and that a demurrer admits only the truth of such facts as are well pleaded. Nei-

ther the alleged conclusions nor inferences of the pleader amount to anything.

In my opinion the court below was right in holding the complainant's suit subject to the maxim that "he who seeks equity must do equity," and that without the return of at least such of the money loaned by the Southern Pacific Company to the development company, of which the complainant was a stockholder, that was not expended by the Southern Pacific Company for its own exclusive benefit, he could not be entitled to the relief sought.

KRAUS et al. v. CONGDON et ux.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1908.)

No. 1,474.

1. TAXATION—ACTION TO RECOVER LAND SOLD FOR TAXES—LIMITATION UNDER WASHINGTON STATUTE.

Code Wash. 1881, § 2939, limiting the time for bringing suits to recover lands sold for taxes to three years, was a part of Act Dec. 1, 1881, "to provide for the assessment and collection of county and territorial revenue," and was repealed by Act March 15, 1893, p. 385, c. 124, § 137, which expressly repeals "all acts and parts of acts heretofore enacted by the Legislature of the territory or state of Washington providing for the assessment and collection of taxes in this state."

2. SAME—PLEADING—ADMISSIONS IN BILL.

In a bill to set aside a tax title, which sets out the proceedings for selling the property, and alleges their invalidity, a statement that a deed was issued, "whereby and by the terms of which said county treasurer granted and conveyed" the property to the grantee, cannot be construed as an admission that the title passed by such deed.

3. SAME—RIGHT TO MAINTAIN.

In a suit under Ballinger's Ann. Codes & St. Wash. § 5521 (Pierce's Code, § 1156), by one in possession of lands, to set aside a tax title thereon, plaintiff is not required to plead title in himself, nor to prove it even if alleged.

4. TRESPASS—TITLE TO SUPPORT ACTION—TAX TITLE—CONSTRUCTIVE POSSESSION BY PURCHASER.

An invalid tax deed does not give the holder constructive possession of the property, so as to render another who enters upon and takes actual possession of it a trespasser, nor does the continued payment of taxes thereon by the holder of such deed.

5. QUIETING TITLE—SUIT UNDER WASHINGTON STATUTE—POSSESSION TO SUPPORT.

Under Ballinger's Ann. Codes & St. Wash. § 5521 (Pierce's Code, § 1156), which authorizes any one in possession of real property to maintain a suit to determine an adverse claim thereto, it is immaterial that possession was taken for the purpose of instituting the suit, if it was not tortious or in violation of the prior possession of another.

6. COURTS—FEDERAL COURTS—ENFORCEMENT OF REMEDY GIVEN BY STATE STATUTE.

A right given by a state statute to one in possession to maintain a suit to quiet title may be enforced in the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 972, 973.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

Ross, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

Fred Parker, for appellants.

E. B. Preble and A. L. Agatin, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. As the facts in this case are set forth in the dissenting opinion in this case, it is unnecessary to state them here. It is not contended in this court that a valid tax title to the premises in controversy was ever acquired by the appellants, but it is urged that the court below erred in ruling that the suit was not barred by that provision of the act of the Legislature of Washington, approved Dec. 1, 1881, which was embodied in the Code of that year as section 2939. That section provides as follows:

"Any suit or proceeding for the recovery of lands sold for taxes, except in cases when the taxes have been paid or the land redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter, except by the purchaser at the tax sale."

We think there can be no doubt that this provision of the statutes has been repealed. When adopted, it was a part of an act entitled "an act to provide for the assessment and collection of county and territorial revenue," which purported to be a complete system of taxation. A new revenue act and system of taxation went into effect on March 15, 1893, p. 385, c. 124, § 137, of which provides:

"All acts and parts of acts heretofore enacted by the Legislature of the territory or state of Washington, providing for the assessment and collection of taxes in this state, shall be, and the same are, hereby repealed."

Section 2939 of the Code of 1881 was a part of the revenue act of that year, which provided for the assessment and collection of taxes. Being a part of that act, it is repealed by the subsequent act of 1893. The Supreme Court of Washington so construed the law in an analogous case. *Tacoma School Dist. v. Hedges*, 13 Wash. 69, 42 Pac. 522.

Should the demurrer to the bill of complaint have been sustained on the ground that the appellees made contradictory allegations therein as to the title, and in substance admitted the title to be in the appellants? We find no ground for so holding. The bill alleged title in fee and possession of the premises in the appellees, the delinquency of taxes on said property, the entry of a pretended judgment and lien for the unpaid taxes, the sale under the pretended judgment, and the purchase thereof by one of the appellants, and the execution of a tax deed to such purchaser, and then set forth the defects in the tax proceedings, which show on their face the invalidity of the title thereby attempted to be acquired. It alleged that, by reason of these defects so set forth, the tax deed under which the appellants claim is and was wholly void and of no effect, and the prayer was that it be so adjudged and decreed by the court. These allegations are not contradicted by the language of the eighth paragraph of the bill, in which, in describing the conveyance made to the defendants, it is alleged that a tax deed was issued bearing date May 18, 1901, "whereby and

by the terms of which, said county treasurer granted and conveyed unto said Charles F. Kraus, his heirs and assigns, the real estate and premises aforesaid, which said deed was in the form prescribed by law and purported to have been given pursuant to the aforesaid judgment." It is clear that the pleader intended to, and did, by this allegation describe only the purport and tenor of the conveyance. It is true that, by the terms of that deed, so far as its mere terms are concerned, the county treasurer granted the described property to Kraus, and his heirs and assigns; but it does not follow that by so stating the appellees alleged that title passed thereby. On the contrary, the bill distinctly alleged that title did not pass thereby. Such was the understanding of the pleading by court and counsel in the court below. Counsel for the appellants accepted the bill as sufficient in that respect, and they make no contention in this court, and we may presume that none was made in the trial court, that the appellees had alleged the title to be in the appellants. There was a demurrer, on the ground that it appeared from the bill that the complainants therein had no title to the property; but that was based solely on the contention that the defects in the tax proceedings as set forth were not such as to invalidate the alleged tax title. It has not occurred to the ingenuity of counsel for the appellants to contend that the eighth paragraph of the bill expressly alleged the title to be in them.

The appellants earnestly contend that the trial court erred in holding that the appellees had an interest in the subject-matter of the suit such as to authorize them to maintain the suit. The bill alleged that the appellees were the owners in fee, and were in the possession of the premises in controversy. On the trial they produced no proof of their title. The statute under which this suit was brought does not require that the plaintiff shall have the title or any interest in the property. "Where the statute authorizes any one in possession to maintain the suit, mere possession without title is sufficient to maintain it as against a trespasser or one who establishes no title in himself." 17 Ency. of Pleading & Practice, 314; *Gillis v. Downey*, 85 Fed. 483, 488, 29 C. C. A. 286; *Durell v. Abbott*, 6 Wyo. 265, 44 Pac. 647; *Scorpion v. Marsano*, 10 Nev. 370; *Calderwood v. Brooks*, 45 Cal. 519. Since they were not required to plead the title, the appellees were not obliged to offer proof of title when they had pleaded it. *Wilder v. City of St. Paul*, 12 Minn. 192 (Gil. 116).

We find no ground for the assumption that the appellees were trespassers, or that their possession was obtained by fraud, collusion, or other wrong. There is nowhere in the record any suggestion of fraud or collusion. In order to make their entry a trespass, there must have been possession at the time in the appellants; for it is a well-settled rule that in order to maintain trespass *quare clausum fregit*, there must be either actual possession in the plaintiff at the time of the trespass, or a constructive possession based upon the legal title. Actual and constructive possession are the only forms of possession known to the law. Constructive possession, or legal possession as it is sometimes called, is that possession which the law imputes to the holder of the paramount title to unoccupied land. 28 Ency. of Law, 239. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 442, 12 Sup. Ct.

239, 35 L. Ed. 1063. The defendants clearly had no constructive possession, because they had not the legal title. There is no such thing as constructive possession based on color of title. Had they the actual possession? The appellants in their brief admit that the lots were "vacant, and not occupied by any one," and that there were no improvements thereon. The utmost of their contention in that regard is that they claimed the lots and had paid the taxes thereon. Their mere claim of ownership was no act of possession, and the same is true of their payment of the taxes. "The payment of taxes upon land does not constitute actual possession of it" (1 Cyc. 992), and the weight of authority is that the payment of taxes is not even to be regarded as a circumstance to be considered with other facts as proof of possession (Id., and cases there cited).

The question here is not what motive had the appellees in entering into possession, but what rights of the appellants were invaded thereby. It is immaterial that the possession was taken for the purpose of instituting the suit, so long as the appellees did not act tortiously or disturb a prior possession in another. *Apperson v. Allen*, 42 Mo. App. 539. The Supreme Court of the state of Washington has held that, under the statute, possession is sufficient to warrant the action to quiet title. *Bird v. Winyer*, 24 Wash. 276, 64 Pac. 178; *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151. The case last cited was decided on the averments of the complaint. The plaintiff therein, instead of simply alleging title and possession, proceeded to set up the source and deraignment of its title. It was held that, inasmuch as the plaintiff had set out the nature of its claim of title, the court was called upon to pass on the question whether it had title, and found that it had none. But the court said: "We understand the rule to be that, in the absence of any showing to the contrary, possession, as a matter of evidence *prima facie*, establishes title"—and further said: "It may be that all that the appellant was required to do to make out a *prima facie* case was to establish possession."

A right so created by a state statute and interpreted by state courts will be enforced in the federal courts in the same manner in which other equitable rights of parties will be enforced. In *Central Pac. R. Co. v. Dyer*, 1 Sawy. 641, Fed. Cas. No. 2,552, Field, Circuit Justice, held that the statute of Nevada, identical with that of Washington, enlarges the class of cases in which the jurisdiction of equity was formerly exercised in quieting title, and that the right thereby created would be enforced in the national courts. In *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, it was held that a statute of Nebraska, giving a right to one, whether in possession or not, claiming the title to real estate against any person or persons who claimed an adverse estate therein, to quiet the title thereto, created an enlargement of equitable rights, which may be administered in the federal courts as well as in the courts of the state.

The decree is affirmed.

ROSS, Circuit Judge (dissenting). The appellees filed in the court below a bill against Charles F. Kraus, Ethel Kraus, his wife, and

Ada Maud Kraus, to quiet their alleged title to three certain, separate, and distinct, but adjoining lots of land, known and described as lots 1, 2, and 3 of block 231, in the city of North Yakima, state of Washington. In their bill it is expressly alleged that on the 31st day of January, 1898, certain taxes, that had theretofore been levied upon each of the lots, became a lien thereon for a certain specified sum; and, remaining unpaid for the years 1891 to 1895, inclusive, there was on said 31st day of January, 1898, duly issued, under and in pursuance of the tax laws of the state then in force, certain certificates of delinquency, covering each of the lots, by virtue of which the county treasurer "duly sold, assigned, transferred, and set over unto the county of Yakima or its assigns, the lien of the state of Washington, of the county of Yakima, in and to each of said lots, respectively, and that the amount for which each of said certificates of delinquency was thus issued to said county on said day by said treasurer was respectively the sum of \$27.68, and for no other or different sum, the same being the full amount due for all taxes and interest on each of said lots, and remaining unpaid and delinquent for the aforesaid years, 1891 to 1895, inclusive."

The bill further expressly alleges that thereafter, and on the 1st day of February, 1901, for the stated consideration of \$27.68, principal, and \$12.48, interest, the said county treasurer, by an instrument in writing bearing that date, duly sold and assigned, to the defendant Charles Kraus, each of the said certificates of delinquency, upon which he, on the 15th day of February, 1901, commenced suit in the superior court of the state in and for Yakima county, against one W. N. Pratt, to foreclose his lien upon each of said lots, in which action a "pretended" judgment was given and entered May 2, 1901, "whereby it was, among other things, adjudged and decreed that said Charles F. Kraus had a good and lawful lien against said lots of land for the following sums, to wit: The sum of \$68.01 against lot 1, the sum of \$67.44 against lot 2, and the sum of \$67.45 against lot 3, which said amounts, respectively, were adjudged to be several judgments against said lots of land, and said judgment further directing and ordering the county treasurer of said county to sell, according to law, the premises aforesaid, or so much thereof as might be necessary to satisfy the judgment, with interest and costs." The bill further expressly alleges that thereafter, and on the 18th day of May, 1901, the county treasurer, acting under and by virtue of the "pretended" judgment, proceeded to sell, and—

"did sell, at public auction each of said lots, respectively, and that each of said lots was bid in and struck off to said Charles F. Kraus, for the following amounts, respectively, to wit: Lot 1 for \$68.01; lot 2 for \$67.44, and lot 3 for \$67.45. That thereupon, and on the 18th day of May, 1901, the aforesaid county treasurer issued and delivered to said Charles F. Kraus, under the provisions of the tax laws of the state of Washington, in such case made and provided, a tax deed bearing date on said May 18, 1901, whereby and by the terms of which said county treasurer granted and conveyed unto said Charles F. Kraus, his heirs and assigns, the real estate and premises aforesaid, which said deed was in the form prescribed by law, and purported to have been given pursuant to the aforesaid judgment of superior court of Yakima county, made and entered on May 2, 1901, and the statute in such case made and provided, which said deed was thereafter, and on the same day, duly

recorded in the office of the auditor of said county, in Book 7 of Deeds on page 5. That by force of the provisions of the tax laws of the state of Washington the tax deed so made is intended to vest in the grantee, his heirs and assigns, the title to the property therein described, without further acknowledgment or evidence of such conveyance. That after the execution and delivery of said tax deed, and on or about the 24th day of May, 1901, the said defendant Charles F. Kraus (and) his wife, by deed of conveyance bearing said date, conveyed to the defendant Ada Maud Kraus, lot 1 in said block 231, and that the only title or estate which said Charles F. Kraus and wife had in or to said lot was founded and predicated upon the aforesaid tax deed and tax judgment sale, and not otherwise, and that said Ada Maud Kraus claims no title to said lot from any source other than as aforesaid, and that said defendants Charles F. Kraus and Ethel Kraus, his wife, neither have nor claim any right, title, or interest in and to said lots 2 and 3, except by virtue of the tax deed and sale as aforesaid."

The bill proceeds further, and sets out in full the summons issued in the suit brought by Kraus to foreclose the tax liens, and the affidavit for its publication, and then alleges that the affidavit was insufficient to justify the publication of summons, that the summons itself was insufficient, and that the judgment was and is void for various reasons stated in the bill.

The defendants demurred to the bill on the grounds that it appears from the bill itself that the complainants have no interest in the subject-matter of it; that they are not entitled to the relief sought, or to any relief, and that it appears from the bill itself that the cause of action, if the complainants ever had any, is barred by the statute of limitations of the state of Washington. The demurrer was overruled by the trial court; and, the defendants standing upon their demurrer, an order was entered to the effect that a decree be taken pro confesso against each of the defendants. This order was subsequently set aside in so far as it concerned the defendant Ada Maud Kraus, who was a minor, and for whom a guardian ad litem had been appointed. The minor by her guardian ad litem subsequently filed an answer, and the suit as to her came on for trial on its merits. And this was the entire evidence introduced on the part of the complainants to sustain their alleged title:

The judgment roll in the suit of Charles F. Kraus against W. N. Pratt, the deed of May 18, 1901, by the treasurer of Yakima county to Charles F. Kraus for the three lots in question, the deed of May 24, 1901, from Charles F. Kraus and his wife, Ethel Kraus, to Ada Maud Kraus for lot 1 of block 231, and the following witnesses: Allen S. Davis, whose testimony was only to the effect that he was present on the 17th day of February, 1906, and saw E. B. Preble tender to the minor defendant, on behalf of the complainant Chester A. Congdon, \$140.15 for the taxes, penalties, and interest that had accrued on the lot covered by the deed to her, to wit, lot 1 of block 231. Next, Albert S. Congdon, a brother of the complainant Chester A. Congdon, testified to the effect that he had resided in North Yakima for eight years, during which time he knew the lots of land in question, and the defendant Charles F. Kraus; that he, the witness, was then engaged in the real estate business, and knew the value of the lots in question; that lot 1 was worth a little over \$5,000, and the three lots

the aggregate amount of \$15,000. This witness was then questioned, and answered on direct examination as follows:

"Q. On the 17th of February, 1906, at the time of the commencement of this suit, who was in possession of said lots 1, 2, and 3 in block 231? A. I don't know the date the action was commenced. We took possession after the fence was built, and have ever since; but whether that was on the 17th of February, 1906, I don't remember. Prior to that time, I suppose Mr. Kraus was in possession. I and Preble, acting in employ of defendant (complainant) Chester A. Congdon, took possession. Q. Prior to that time, do you know whether the lots were vacant? A. They were vacant."

The record proceeds:

"Cross-examination by Mr. Parker: Q. About the time this action was commenced, a fence was built around these lots, was there not, Mr. Congdon? A. Yes, sir. Q. Who built that fence? A. I had it built. In building it I was acting in employ of Chester A. Congdon. Q. Prior to that time—I mean prior to the time you had the fence built—who was in the possession of the lots? A. I suppose Mr. Kraus claimed to be the owner of it. I presume that he was in possession of it. Q. How did you get possession of it? A. By building a fence and putting a man in charge of it, and commencing this action, I suppose, was part of the possession. Q. You built the fence against the objection of Mr. Kraus, did you not, or had it done? A. Yes, sir. Q. He was in possession of the property, and forbid you entering upon the land and building the fence at the time, did he not? A. I was not there at all. I just simply sent a man there, and what conversation Mr. Kraus had with the man I have no knowledge of.

"Redirect examination by Mr. Preble: Q. As a matter of fact, prior to the time that the fence you have referred to around these lots was constructed, there was no fence around them, no structure on them, and no one in the apparent possession of them, was there? A. No."

The county treasurer of Yakima county then testified, in substance, that lot 1 of block 231 was sold by the treasurer of the county on the 18th day of May, 1901, to C. F. Kraus for \$68.01, in pursuance of the judgment of foreclosure entered in the suit brought by Kraus, and that subsequent to that sale to him Kraus had paid the taxes upon that lot as follows:

"For the year 1901, the amount of \$4.86 was paid by Charles F. Kraus February 8, 1902, receipt No. 159. For the year 1902 the amount paid was \$4.66, paid by Charles F. Kraus February 5, 1903, receipt No. 54. For the year 1903, \$5.28 was paid by Charles F. Kraus February 2, 1904, receipt No. 32. For the year 1904 the amount was \$15.63, paid by Charles Kraus February 28, 1905, receipt No. 837. For the year 1905 the amount was \$17.06, paid by Charles Kraus February 5, 1906, receipt No. 15," which amounts included "all sums paid upon said lots in the way of taxes, penalties, interest, and costs or otherwise, according to the books in the treasurer's office by said Charles F. Kraus."

The only other testimony in the case is that of Mr. Preble, whose direct testimony should be, and is, here set out in full:

"My name is E. B. Preble. I reside, and for about nine years last past, have continuously resided at North Yakima, in Yakima county, state of Washington. I am, and for several years last past have been, personally acquainted with the complainant Chester A. Congdon. I am, and since the commencement of this action have been, the solicitor in the said suit of and for the said complainants, Chester A. Congdon, and Clara B. Congdon. I have also acted, since a time prior to the beginning of this suit and to the filing of the bill therein, as the agent or attorney in fact of the said Chester A. Congdon, in respect to lots 1, 2, and 3 in block 231 of and in the city of North Yakima,

in Yakima county, state of Washington, according to the official plat and survey thereof of record in the office of the county auditor for said county. I was so authorized by said Chester A. Congdon some time prior to the middle of February, 1906, some time about the last of January, to act for and in his behalf in respect of the said lots, and I was then instructed by him, as his agent, to take physical and tangible possession of the said lots in his behalf, and I then undertook said employment in his behalf and entered upon the same. Prior to that time—that is, up to and prior to the time that I was so employed by Mr. Congdon, and up to the time that I did, as I propose to hereafter testify, take physical and tangible possession of said lots—the said lots were, and for a long time, and so far as I have known the same, had been, vacant and unoccupied and uninclosed and without fencing, structures, or residence or inhabitation thereon, in short, were vacant and unoccupied at the time that I took physical possession thereof, and for a long time prior thereto had been vacant and unoccupied.

“In pursuance of my employment, and acting for and in behalf of Mr. Congdon as aforesaid, in the month of February, 1906, in behalf of Mr. Chester A. Congdon, I entered upon said lots, the same being one tract of land lying contiguous to each other, the same being, at the time of my entry, vacant and unoccupied and uninclosed; and I forthwith, upon said entry, in conjunction with Albert S. Congdon, caused to be constructed a substantial post and board fence, entirely around and inclosing the said lots, excepting, as I remember now, the east side of the tract consisting of said lots had a fence that served as a partition of these lots and the adjacent tract of land on the east (the fence that I built connected with this line fence, and was supposed to be on the line), and together with it, surrounded the lots; that is to say, I built a fence on the three sides of the lots connecting with a fence that was already existing at or near the east boundary of said lots and separating them from the adjoining tracts. I also, immediately upon my entry, in behalf of Mr. Congdon, caused to be put upon the said tract of land comprising said lots a residence, consisting of a tent erected upon board floors, and caused an employé of Mr. Congdon, employed by me, to immediately go thereon and to reside in the said tent, and at the time this action was commenced, which was on February 17, 1906, and at the time this bill of complaint herein was filed, which was on the date last aforesaid, Mr. Congdon was in the actual, physical possession of the said lots, and all thereof, in the manner aforesaid, said fence then being around the said lots, and said tenant of Mr. Congdon, or employé of him through me, being then living upon the said lot in said tent, and ever since that date—that is, ever since the commencement of this action, and ever since a time prior to the said action, when the said fence was built, and when the said tent was built and the same employé, or tenant as the case might be, moved into said tent—there has been residing upon the said lots, at all times, continuously, some one living in a structure or tent upon said lot, and residing there by the consent of myself, and put thereon by me, acting for and in behalf of Mr. Chester A. Congdon; and I may add that the possession of Mr. Congdon, through me, acting conjointly in part with Albert S. Congdon, has been an exclusive possession and dominion over said lots; that, acting as Mr. Congdon's agent and in pursuance of his instructions, I have frequently, and from time to time since the construction of said fence, and since a time prior to the beginning of this action, been upon said lots, and exercised a general supervision over them for Mr. Congdon. I may say that the people who have resided upon said lots by my permission were different people, but that the residence of one always was immediately succeeded by the residence of another; that in some instances these people were employés of me, acting as the agent of Mr. Congdon; that in other instances they were tenants at will of Mr. Congdon on the property. I may also add that, in addition to the acts of residence upon said property by the consent and by arrangement with Mr. Congdon, acting through me, a Mr. Ludlow, acting in behalf of some religious denomination, was by me permitted to pitch a large tent upon a part of said tract, and to occupy the same, together with the religious congregation, for the holding of divine services.

“I am acquainted with Charles F. Kraus, with Ethel Kraus, and with Ada Maud Kraus, the defendants in this suit. I have been quite familiarly ac-

quainted with Charles F. Kraus for a number of years, from five to seven, or longer, I don't know exactly how many; I have seen and met the wife of Charles F. Kraus, Mrs. Ethel Kraus, and I also have some slight acquaintance with Ada Maud Kraus and have known of her, and known her as Mr. Kraus' daughter, for a number of years, just how long I don't know. She is a young girl, about 15 years old. I think her mother told me that was her age. About a short time before this action was commenced, in February, shortly prior to the commencement of this action—I won't say whether it was on the same day or just a little prior thereto—acting for Mr. C. A. Congdon and in his behalf, I called at the house of Charles F. Kraus where he resided, together with his wife, Ethel Kraus, and his daughter, Ada Maud Kraus, I there met Mrs. Ethel Kraus and Ada Maud Kraus, two of the defendants in this suit. I called for the purpose of tendering to Ada Maud Kraus the moneys that have been paid for the taxes, penalties, interest, and costs upon lot 1 in block 231, and I informed Mrs. Kraus, and also Ada Maud Kraus, that that was my business there. I explained to Ada Maud Kraus (I think her mother was present all or nearly all the time, perhaps not all the time), in detail my business, told her that I was the agent of Chester A. Congdon, and told her that he, Chester A. Congdon, claimed to be the owner of said lot 1 in block 231; called her attention to the fact that it appeared that her father, Charles F. Kraus, had purchased said lot at a tax sale thereof, and called her attention to a further fact that it appeared from the records that her father and mother had, after said tax sale, conveyed the said lot to her, Ada Maud Kraus. I told her that it appeared from the tax records that the aggregate sum paid by her father at the tax sale for the said lot 1, and the taxes subsequently paid by him up to the date of my talk with her, together with all penalties and interest on said sums, amounted, as I figured it, to \$140.15. I think I told her that, in fact, it was a little less than that, but that I wanted to be sure to tender her enough to cover said sums. I then produced to her gold coin amounting to \$140 and 15 cents in fractional currency. I exhibited this money to her, counted it to her, and without reservation offered to turn it over to her for the purposes aforesaid. She declined to receive it, and did not receive it. I then told her that I had been instructed to commence a suit by Mr. Congdon to establish his title to said lot, together with the other lots, and that I would pay the money that I had just tendered her to the clerk of the Circuit Court of the United States for the Eastern District of Washington, and that she could get it, any time she wanted it, at said clerk's office; and immediately after the tender, or very soon after the tender, I did in fact pay to Mr. Lee C. Delle, who was then and now the deputy clerk of said court for the Southern division, the said \$140.15, and paid it to him for Ada Maud Kraus, and instructed him, upon her request or upon the request of any one legally acting in her behalf, to pay the money to her, and the money, as I am informed by the said clerk, Mr. Delle, was kept by him for that purpose, at any rate I know he received it from my hands for that purpose.

"As I stated before, I have been acquainted with the defendant Charles F. Kraus, the father of Ada Maud Kraus, and the husband of the defendant, Ethel Kraus, intimately, for a number of years, and Mr. Kraus and his family, including his said wife and his said daughter, at the time of the commencement of this action, being February 17, 1906, were residing at North Yakima, in Yakima county, state of Washington, and were inhabitants of the Eastern district of the state of Washington—that is, the Eastern judicial district, I mean, of the state of Washington—and Mr. Kraus and his said wife, family, and daughter, for years prior to the commencement of this action, and prior to the date last aforesaid, had continuously resided at said North Yakima, and were inhabitants of the territory comprised in said Eastern judicial district of the state of Washington. I may say that the said \$140.15 includes all sums paid by Charles F. Kraus at the tax sale for said lot, and all sums paid subsequently to the said tax sale by him upon said lot 1, and also interest at the legal rate, computed upon said respective sums from the time of said respective payments to the commencement of this action, February 17, 1906, said amounts, upon which the interest was computed, and aggregating the said sum of \$140.15, being the sums given by the treasurer, who was a witness in this cause."

On cross-examination Mr. Preble was questioned, and answered as follows:

"Q. Now, you knew at the time you entered upon this land, as you say, in behalf of Mr. Congdon, that she (Ada Maud Kraus) claimed to be the owner of lot 1, did you not? A. Yes, I understood at any rate that she claimed to own that lot. * * * Q. Now, how long did it take you or your employé to build the fence? A. I am unable to say exactly. I presume that from the time I commenced operations of getting the lumber, the posts, and the boards, down there, and hiring the men and getting it all done, the whole thing may have covered a day or two, or, perhaps, three days. Q. How long was it after the posts and lumber were actually on the ground that the fence was built and the tent up? A. I think that the fence was actually up the same day that the lumber was actually on the ground, though I would not swear absolutely positive to that. Q. Then you hired a man to go there and live in the tent in order to hold the semblance of possession of this land? A. No, sir; not the semblance of possession. I employed a man, when the fence was first up, to live there and maintain actual physical possession, and subsequent to that time, I leased it to various persons. * * * Q. Did all these people occupy this lot 1, or were they on another lot? A. They occupied indiscriminately the entire tract. In my contracts with them I gave them the right to occupy, and charged them with the duty of occupancy of the entire tract that was inclosed with that fence. Q. They were there, as a matter of fact, for the purpose of maintaining possession of the land? A. They were there for the purpose of maintaining a physical and tangible possession of said property; and, as Mr. Congdon had instructed me to exercise a dominion over it, his instructions to me were to take the physical possession of that property for him, he claiming to be the owner thereof, to exercise a general supervision over the property in his behalf, to care for it for him, and to keep off intruders, and that was what I was trying to do, and did."

The foregoing embodies the entire substance of the testimony and evidence in respect to the merits as between the complainants and the minor defendant, who is one of the appellants from the decree of the court below quieting the complainants' alleged title to all three of the lots as against all three of the defendants to the suit.

I think it clear that the decree is erroneous in so far as concerns lot 1. In the proof introduced by the complainants on the merits there is not a particle of evidence of any kind or character even tending to show any title in the complainants to the lot covered by the deed to the minor defendant, and under which, according to Preble's own testimony, she claimed title to that lot at the time when (one day only before he instituted the suit) he intruded into its possession to build a fence, which, connecting with a fence already on the lot, effected its inclosure. Nowhere in the proof are the complainants in any manner connected with the title of the original owner or owners of either of the lots in question. Assuming that the tax proceedings alleged in the bill and introduced in evidence were ineffectual to divest the title of the true owner, they, and the deed from Kraus and his wife to the minor defendant, undoubtedly constituted color of title under which the latter claimed and held lot 1 at the time of Preble's unlawful entry upon it in behalf of the complainant Congdon.

It is true that a statute of the state of Washington, as do statutes of many other states, authorizes any person in possession of real property to bring an action against any person or persons claiming an interest in such property, or any part thereof, or any right thereto, adverse to him, for the purpose of determining such adverse claim,

estate, or interest. Section 5521, Ballinger's Ann. Codes & St. Wash. (Pierce's Code, § 1156). But can such an action be maintained in a court of equity upon possession only, where the complainants' own proof shows that such possession was obtained and is held by him as a mere naked trespasser? I think not. I am aware that it was held by the Supreme Court of Nevada, in the case of *Scorpion S. M. Co. v. Marsano*, 10 Nev. 370, founded upon a similar statute of that state, that the mode of acquiring possession is of no consequence, and that such an action can be maintained upon bare possession, even when the possession was obtained by force; and that in *Calderwood v. Brooks*, 45 Cal. 519, it was held that a possession obtained by collusion was sufficient to sustain such an action, based upon a similar statute of California. But to the contrary, it was adjudged by the Supreme Court of the United States in the case of *Stark v. Starr*, 6 Wall. 402, 18 L. Ed. 925, which was a suit in equity, founded upon a similar statute of Oregon, that the possession which will support such a suit "must be accompanied with a claim of right—that is, must be founded upon the title, legal or equitable—and such claim or title must be exhibited with the proofs." To the same effect is *King v. French*, 2 Sawy. 441, Fed. Cas. No. 7,793, and *Tichenor v. Knapp*, 6 Or. 205. It is difficult to see how it can be otherwise, for it is surely contrary to the very first principles upon which courts of equity proceed to establish, by a decree of a court of equity, right and title to real property in one whose sole claim thereto rests upon its possession obtained by fraud, collusion, or other wrong.

It is true that the federal courts are bound to enforce rights based upon a state statute in accordance with that law as determined by the highest court of such state; and if the Supreme Court of the state of Washington had decided that a suit to quiet title to real property, founded upon the statute here in question, can be maintained where the complainants' sole claim thereto rests upon possession obtained by an unlawful trespass, fraud, collusion, or other wrong, I should feel obliged to follow it in respect to real property situated within that state; but I do not find any such decision. It is true that in the case of *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178, the Supreme Court of the state cited section 5521 of Ballinger's Ann. Codes & St. reading: "Any person in possession * * * of real property * * * may maintain a civil action against any person or persons * * * claiming an interest in such real property or any part thereof or any right thereto adverse to him * * * for the purpose of determining such claim, estate or interest," etc., and said:

"This section, it would seem, needs no argument in support of its construction. There is no requirement here that the plaintiff must have or claim to have title, as in some other states. Under the common-law action to remove clouds, the plaintiff must be in possession, and must have been disturbed in his possession, and he must have established his right by successive judgments in his favor. *Allen's Equity*, p. 202; *Pom. Eq. Juris*. § 248; *Bispham Eq.* (5th Ed.) § 568. The section above quoted, for obvious reasons, has done away with the provisions of the common law, and also in common statutes in other states in the Union has obviated the necessity of alleging and proving title. Any person in possession may maintain the action for the purpose

of quieting his own or his adversary's claim thereto, so as to avoid any uncertainty in his holding."

The rule is thoroughly established that the language of a court must be taken and construed in connection with the facts about which the court is speaking. In the case of *Bird v. Winyer* there was nothing tending to show that the plaintiff acquired the possession of the property there in question by any unlawful or wrongful means; but, on the contrary, the proofs there showed that the plaintiff, who was an Indian, located upon and thereafter continuously possessed and improved the land in question under the terms of a treaty between the United States and the Indian tribe of which he was a member, and under and in pursuance of an allotment made to him of the land under and pursuant to the treaty.

In the later case of *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151, the Supreme Court of Washington distinctly adjudged that, in order for a person successfully to invoke the interposition of equity under the provisions of section 5521 of Ballinger's Ann. Codes & St:

"Two things must be established: (1) The validity of his own title in law or equity; (2) the invalidity of his opponent's. The first inquiry, then, is, has the appellant established any title?" 26 Wash., page 130, 66 Pac., page 153.

In that case the appellant was in the actual possession of the land at the time of commencing the suit, and its proof also showed the basis of its claim of title thereto. The court decided against the validity of that title, saying in its opinion, page 132 of 26 Wash., page 153 of 66 Pac.:

"We understand the rule to be that, in the absence of any showing to the contrary, possession, as a matter of evidence prima facie, establishes title. *Horn v. Jones*, 28 Cal. 195; *McGovern v. Mowry*, 91 Cal. 383, 27 Pac. 746; *Steele v. Fish*, 2 Minn. 153 (Gil. 129); *Wilder v. St. Paul*, 12 Minn. 192 (Gil. 116). When, however, it is shown, in addition to possession, what the title is under which such possession is claimed, the court is then required to pass upon the question as to whether or not the one so claiming has title, and incidentally as to the lawfulness of his possession. The title claimed by the plaintiff is through a contract with the state. Under it we have held that the appellant had no title to the land within the calls of lot 2. His possession then becomes immaterial as evidence of title. It may be that all the appellant was required to do in order to make out a prima facie case was to establish possession. Here, however, the appellant has gone further than the mere allegation of possession. It has deraigned its title by apt averments, and relies on possession by virtue of the ownership of such title; and from these averments the court is able to determine that it is a mere trespasser on tide land within lot 2, as it has no title to the same. Appellant's title having failed, it is unnecessary to inquire whether or not the respondents had title to any portion, and, if so, what, within the meander lines of said lot 2."

It seems clear to me that the decision of the Supreme Court of Washington last cited is in accord with the decision of the Supreme Court of the United States in *Stark v. Starr*, supra, and with the view I have taken of the present case. I am also of opinion that the decree appealed from is erroneous as respects the appellants Charles F. Kraus and Ethel Kraus, for the reason that the demurrer to the bill should have been sustained. While it is true that in one part of the bill it is alleged that the judgment, entered in the suit brought by

Charles F. Kraus against W. N. Pratt to foreclose the tax liens, and all proceedings thereunder, were void and of no effect, it also expressly alleges the validity of the tax assessments against all three of the lots, the validity of a lien on each of them for such taxes, the due issuance of a certificate of delinquency, under and pursuant to the statutes of the state, covering each of the lots, by virtue of which the county treasurer duly sold at public auction each of the lots to Charles F. Kraus, and thereupon issued to him, pursuant to the provisions of the tax laws of the state, a tax deed, whereby and by the terms of which the county treasurer "granted and conveyed unto said Charles F. Kraus, his heirs and assigns," the lots in question, and that Kraus and his wife subsequently "conveyed" lot 1 to their daughter, Ada Maud Kraus.

The averments of a bill of complaint should be clear, certain, and consistent, and the rule is universal that a pleading is to be taken most strongly against the pleader. While the intention of the pleader in this case may be guessed at, I do not think that a bill, which in one part alleges that certain specified tax proceedings resulted in the conveyance of the title to the property to the purchaser under those proceedings, and in another part alleges that the proceedings were void and of no effect, should be sustained as against a demurrer challenging its sufficiency.

Accordingly, I think the judgment should be reversed, and the case remanded to the court below, with instructions to enter judgment in favor of the defendant, Ada Maud Kraus, as respects lot 1 of block 231, and, as respects the remaining lots in controversy, to sustain the demurrer to the bill, with leave to the complainants to amend.

FEIDLER et al. v. BARTLESON.*

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,439.

1. COURTS—FEDERAL COURTS—CREDITORS' SUIT—JURISDICTION.

A creditor's bill may be maintained in a federal Circuit Court to enforce a domestic judgment of the state court.

2. SAME.

The fact that complainant submitted himself to the jurisdiction of a state court when he recovered a judgment against F., and that the jurisdiction of such court was sufficiently broad to afford complainant all the relief prayed for in a creditors' suit, did not deprive him of the right to institute such suit in the federal courts against defendants who were not parties to the action in the state court.

3. SAME.

Where complainant sought to enforce a judgment against F. out of the proceeds of an alleged partnership in the hands of the administratrix of the deceased partner, the fact that the judgment was recovered in the superior court of King county, Wash., on the probate side of which the administration of the estate of the deceased partner was pending, did not require prosecution of the creditor's bill in that court, the equity and probate jurisdiction of which is separate and distinct, complainant not being able to procure appropriate relief in the probate proceedings.

*Rehearing denied June 10, 1908.

4. CREDITORS' SUIT—OTHER REMEDY.

A judgment creditor was entitled to enforce his judgment by an original bill in equity, notwithstanding he might have obtained relief at law by garnishment proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Creditors' Suit, § 6.]

5. COURTS—FEDERAL COURTS—JURISDICTION—CITIZENSHIP.

Where a creditor's bill in a federal court to enforce a state judgment sought to establish the existence of a partnership only for the purpose of subjecting the interest of the surviving partner in the partnership funds to the payment of complainant's judgment, the bill was not demurrable on the ground that complainant sought thereby to compel defendants, who were both residents of the state, to litigate in the Circuit Court a demand which one had against the other.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

6. APPEAL AND ERROR—PLEADINGS—PREJUDICE.

Where matter constituting no defense to the bill was excepted to, and the court overruled the exceptions, but announced that the matter pleaded would be wholly disregarded on final hearing, and that any expense added to the proceedings by reason thereof would be taxed to the defendants, the appellants were not prejudiced thereby.

7. CREDITORS' SUIT—ANSWER—SUFFICIENCY—CONSPIRACY—FRAUD.

Where a creditor's bill sought to compel payment of a judgment against an alleged surviving partner out of the assets of a firm in the possession of the administratrix of the deceased partner, allegations that the judgment had been obtained by complainant against such surviving partner, based on various accounts which had been assigned to complainant by parties doing business in the eastern states, and that such surviving partner had entered into a conspiracy with complainant and others to defraud the estate of the deceased partner, and that he had no interest in the suit, but was permitting his name to be used in furtherance of the conspiracy; that complainant was not the real party in interest and that the accounts on which the judgment was based were barred by limitations, were insufficient to show either a conspiracy or fraud sufficient to invalidate the judgment.

8. ASSIGNMENTS—VALIDITY—ASSIGNMENTS FOR COLLECTION.

An assignment of claims to complainant for collection may be lawfully made under the statutes of Washington.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 126.]

9. CREDITORS' SUIT—VALIDITY OF JUDGMENT—CLAIMS.

Where various claims against a surviving partner were assigned to complainant and merged in a judgment valid on its face and unimpeachable for fraud, complainant's right to enforce payment of the judgment was as unimpeachable as if the judgment had been based on a valid debt originally payable to him.

10. SAME.

The rule that whenever a judgment is sought to be enforced to the detriment of a third person, he may avoid its effect by showing that the party to the former action colluded and procured the judgment to defraud him, has no application where the judgment creditor is seeking to compel payment out of funds equitably belonging to the judgment debtor.

11. JUDGMENT—FOREIGN JUDGMENT—ANCILLARY ADMINISTRATION—JUDGMENT—CONCLUSIVENESS.

A decree in ancillary administration proceedings in the United States Commissioners' Court at Nome that no partnership existed between decedent and a judgment debtor was not conclusive against complainant's right to pursue assets in the hands of distributees of such decedent within

the jurisdiction of the federal Circuit Court for the District of Washington by a creditor's bill filed in such court, on the ground that a partnership in fact existed.

12. APPEAL AND ERROR—EVIDENCE—ADMISSION.

Where, after the admission of certain objectionable testimony before an examiner, the competency of similar testimony was submitted to the court who ruled that it was incompetent, and no further testimony of that nature was received, it would be presumed on appeal that the testimony already introduced was disregarded by the court, and therefore constituted no ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3766.]

13. PARTNERSHIP—FINDINGS—EVIDENCE.

Evidence *held* to sustain a finding that a partnership existed between a judgment debtor and his deceased brother.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 75-80.]

Appeal from Circuit Court of the United States for the Northern Division of the Western District of Washington.

For opinion below, see 149 Fed. 299.

The appellee brought a suit in equity in the nature of a creditor's bill to enforce the payment of a judgment which he had obtained on June 25, 1904, in the superior court of King county, Wash., against F. J. Feidler for the sum of \$2,881.75 and costs, upon which judgment execution had been issued, and returned nulla bona. The suit was brought against F. J. Feidler and Edith M. Feidler, as administratrix of the estate of Ed. L. Feidler, deceased. The bill alleged that F. J. Feidler and Ed. L. Feidler were brothers and partners in a business conducted at Nome and other points in Alaska, under the name of the Progreso Trading Company, which partnership was entered into in May, 1900, and continued during the years 1901, 1902, and 1903; that, by the partnership agreement, each partner contributed an equal sum to the copartnership fund, and that after 1901 Ed. L. Feidler personally conducted the business in Alaska, while F. J. Feidler remained at Seattle to purchase goods and ship the same to Nome and other Alaskan ports; that Ed. L. Feidler died at Nome on October 19, 1903, and at that time the amount of assets in the copartnership was \$29,150, subject to the payment of the debts of the copartnership, amounting in the aggregate to \$10,000; that on November 28, 1903, Edith M. Feidler was appointed administratrix of the estate of Ed. L. Feidler, deceased, in the superior court of King county, Wash., and on May 19, 1904, she caused to be filed in that court an inventory and appraisement of the estate of Ed. L. Feidler, in which the assets were valued at more than \$29,000; that the appraisers of the estate, without warrant or authority of law, attempted to adjudicate the interests of F. J. Feidler, and reported to the court that he had no interest in the business of the Progreso Trading Company, and was not a partner therein during the year 1903, and that Edith M. Feidler, if permitted to administer the estate, intended to distribute the same in disregard of any interest or claim of F. J. Feidler, and to the injury of the appellee; that F. J. Feidler had no property other than his interest in the assets of said partnership, then in the hands of said administratrix. Edith M. Feidler, administratrix, interposed a demurrer to the bill for want of equity, and also for want of jurisdiction, in that it was sought to enforce a domestic judgment of the superior court of King county, and to litigate in a federal court a demand which the complainant in the bill claimed that his judgment debtor, a resident of the state of Washington, had against said Edith M. Feidler, who was also a resident of that state. The demurrer was overruled, and thereupon the said administratrix filed her answer, admitting certain of the allegations of the bill, but denying that F. J. Feidler was ever a partner with Ed. L. Feidler, or had any interest in the Progreso Trading Company. Further answering, she set up as affirmative defenses: First, that as the duly ap-

pointed, qualified, and acting administratrix of said estate she had published notice to creditors to present their claims within one year from December 19, 1903; that F. J. Feidler had presented no claim against the estate within a year thereafter, wherefore the claim was barred under the provisions of the statutes of the state of Washington. Second, that on October 20, 1903, C. G. Cowden was appointed administrator of the estate of Ed. L. Feidler at Nome, and on April 16, 1904, he made his first report and filed the same in the United States Commissioner's Court for the District of Alaska, in the Nome precinct, in which he inventoried the assets of the Progreso Trading Company as the property of Ed. L. Feidler, deceased, and on June 5, 1904, made a second report in which the property was again inventoried as the property of Ed. L. Feidler, deceased, and all claims against the Progreso Trading Company were scheduled and allowed as claims against Ed. L. Feidler; that on July 11, 1904, the said Cowden made his final report to the United States Commissioner's Court at Nome, whereupon notice of final settlement was made and published according to law, and on September 15, 1904, said final report was approved, and the estate of Ed. L. Feidler was ordered to be distributed, one-half to his widow, Edith M. Feidler, and the remaining one-half to his two minor children; that at said final settlement there remained in the hands of said Cowden, after payment of all debts, costs, and allowances, the sum of \$7,181.72, which was thereupon transmitted by the said Cowden to Edith M. Feidler at Seattle; that F. J. Feidler never at any time presented any claim to the administrator, Cowden, to any part of the assets of the Progreso Trading Company. Third, that F. J. Feidler never at any time presented to said administratrix any claim under oath, as required by law, against the estate of Ed. L. Feidler, deceased, or any claim to any interest in the assets of the Progreso Trading Company; that he did, however, some time after the death of Ed. L. Feidler, notify said administratrix, both orally and in writing, that he claimed to be a partner of Ed. L. Feidler, and requested that he be recognized as such; that she notified him that she had never before heard of such a claim, and that she had always understood that Ed. L. Feidler was the sole owner of the Progreso Trading Company, and she requested said F. J. Feidler to present some evidence of the partnership other than his naked statement, and was informed by him that there was no agreement, and that there was no writing of any kind or description and no reference either by letter or otherwise to any such partnership; that the three commissioners appointed by the superior court of King county to appraise the estate of Ed. L. Feidler fully investigated the alleged claim of F. J. Feidler, and in their inventory and appraisal reported that they failed to find any evidence to support his claim; that F. J. Feidler was authorized by Ed. L. Feidler, prior to his death, to sign the name of the latter to checks, and that F. J. Feidler, immediately upon learning of the death of his said brother, took from the Puget Sound National Bank, the sum of \$1,500, and collected other amounts belonging to Ed. L. Feidler, aggregating between \$2,300 and \$5,000, all of which he illegally appropriated to his own use. The answer admitted that, in the year 1900, both Ed. L. Feidler and F. J. Feidler shipped a quantity of supplies to Nome and Teller City, Alaska, and both accompanied said shipment and were partners in that venture; that after that year Ed. L. Feidler was in business for himself and alone, under the name of the Progreso Trading Company; that during the years 1901, 1902, and 1903, Ed. L. Feidler sent checks and other cash securities from Nome to F. J. Feidler in Seattle, with instructions to deposit the same and to pay out certain amounts on designated claims; that he also sent orders for goods to F. J. Feidler; that, otherwise, F. J. Feidler had no connection whatever with the Progreso Trading Company, and that Ed. L. Feidler usually, upon his return from Alaska in the fall, paid said F. J. Feidler for such services. Upon the filing of this answer the appellee filed an amended bill of complaint for the purpose of responding to the matters set up in the answer, and also to bring in as additional parties the two minor children of Ed. L. Feidler. In the amended bill, in addition to the matter set up in the original bill, the appellee alleged that said, Cowden, the administrator at Nome, in disregard of the rights of F. J. Feidler, inventoried the property of the Progreso Trading Company as belonging to Ed. L. Feidler; that F. J. Feidler presented to the administratrix a written statement that he was part-

ner with Ed. L. Feidler, whereupon she made a pretended investigation of the claim, and after such investigation reported that she was without evidence sufficient to convince her that he was such partner; that thereafter F. J. Feidler employed attorneys to represent him, and said attorneys entered into an agreement with the attorney of the administratrix, by which the latter was to proceed to Nome, have the administration there closed, and the assets of the estate transmitted to the administratrix, after which said F. J. Feidler was to have a reasonable time to establish by such legal proceedings as his counsel should deem proper and necessary his interest and ownership in such assets; that said attorney for the administratrix, in violation of such agreement, procured the filing of said reports by Cowden and the distribution of the funds of the estate to Edith M. Feidler individually and to herself as guardian of her minor children; that the entire proceedings in the Commissioner's Court at Nome were illegal and of no binding force and effect upon F. J. Feidler and his claim to an interest in the assets, and that that court was without jurisdiction.

The trial court, upon the proofs upon the final hearing, found that F. J. Feidler was a partner with Ed. L. Feidler, deceased, and decreed that the appellee's judgment be paid out of his share of the partnership assets.

Bo Sweeney and G. E. Steiner, for appellants.

James A. Snoddy, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the demurrer to the original bill should have been sustained for want of jurisdiction and for want of equity. It is said that there was want of jurisdiction in the fact that the appellee sought by his bill to enforce in the Circuit Court a domestic judgment of a state court. But that such a judgment may be the basis of a creditor's bill in the federal court is well sustained by the authorities. First National Bank of Chicago v. Steinway et al. (C. C.) 77 Fed. 661; Alkire Grocery Co. v. Richesin (C. C.) 91 Fed. 79; Bidwell v. Huff (C. C.) 103 Fed. 376; National Tube Works v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070. Further challenge to the jurisdiction is presented in the argument that because the appellee submitted himself to the jurisdiction of the state court when he brought his action against F. J. Feidler, and because the jurisdiction of that court was broad enough to afford him all relief which he here seeks, he had no right to invoke the aid of the court below against the appellants, who were not parties to the action in the state court. We find no merit in this. The appellants had no interest in the matter in controversy in the state court, and could not have been made parties thereto. The judgment in that action established the debt of F. J. Feidler to the appellee. It remained to the appellee to enforce its payment by any proper proceeding. The amount involved and the citizenship of the parties being such as to give jurisdiction to the court below, he had the right to bring his suit therein. It is true that the judgment had been rendered in the superior court of King county, and that the administration of the estate of Ed. L. Feidler was conducted in that court. But the equity and probate powers of the superior courts of the state of Washington are separate and distinct, and the appellee was not bound to file his bill in that court from the mere fact that, on the probate side, the same court had jurisdiction of the estate, nor

could he have obtained appropriate relief in probate proceedings. *Stewart v. Lohr*, 1 Wash. St. 341, 25 Pac. 457, 22 Am. St. Rep. 150; *Winston v. Crowe*, 28 Wash. 65, 68 Pac. 174; *In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593. Assuming, as contended by counsel for appellants, that the superior court could have granted full relief to the appellee under the provisions of the statutes of Washington relating to probate and garnishment, the appellee was not limited to those remedies. He had the right to proceed by an original bill in equity, notwithstanding that he might have enforced the payment of his judgment at law by garnishment proceedings. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Fiske v. Gould* (C. C.) 12 Fed. 372.

It is urged, further, that the demurrer should have been sustained for the reason that the appellee sought by his bill to compel the defendants therein, who are both residents of the state of Washington, to litigate in the Circuit Court a demand which one had against the other. To this it is only necessary to say that the bill is not brought to permit or to compel the defendants therein to litigate between themselves. It is a bill to establish the existence of a partnership between Ed. L. Feidler and F. J. Feidler, only for the purpose of subjecting the interest of the latter in the partnership funds to the payment of the appellee's judgment.

The ruling of the court below on the exceptions of the appellee to the answer to the amended bill is assigned as error. The exceptions were directed against portions of the answer which set up as a defense to the bill certain allegations to the effect that the judgment obtained against F. J. Feidler by the appellee was based upon various accounts, 23 in number, which had been assigned to the appellee by parties doing business in various eastern states, that F. J. Feidler had entered into a conspiracy with the appellee and other parties to defraud and pilfer the estate of Ed. L. Feidler, deceased, that F. J. Feidler had no real interest in the suit, but was permitting his name to be used in furtherance of the conspiracy, that the appellee was not the real party in interest, and that said accounts were incurred in the year 1898, and when the action was begun in the state court, were barred by the statute of limitations. The trial court, while ruling that the matters so alleged were no defense to the suit, held that, under the rules of equity practice, exceptions could not be taken to parts of an answer save for scandal, when the complainant had waived an answer under oath, and on that ground overruled the exceptions, but announced that the matter so pleaded would be wholly disregarded upon the final hearing of the case, and that any expense added to the proceedings by reason thereof, would be taxed to the defendants in the bill. The appellants were clearly not prejudiced by this ruling. The matters so excepted to in the answer constituted no defense to the bill. The appellants have no concern with the defense which F. J. Feidler might have interposed to the action at law. He was not bound on their behalf or on his own, to plead the statute of limitations. The facts so set forth in the answer fall far short of showing a conspiracy or fraud such as to invalidate the judgment. An assignment of claims to the appellee for the purpose of collection, could lawfully be made under the statutes of the state of Washington. Those claims being merged in a judgment, valid

on its face, and unimpeachable for fraud, the judgment creditor's right to enforce its payment is as unimpeachable as it would be if the judgment had been based upon a single debt originally due and payable to him. *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248; *Alkire Grocery Co. v. Richesin* (C. C.) 91 Fed. 79. The appellants cite authorities to the proposition that whenever a judgment is sought to be used to the detriment of a third person, he may avoid its effect by showing that the parties to the former action colluded together, and thereby procured the judgment for the purpose of defrauding him, but that doctrine has no application to the present case, for here there is no showing whatever of a purpose to defraud the appellants, or to use the judgment to their detriment. What they are required to do by the final decree is to pay to the appellee herein money which in equity belonged to F. J. Feidler, and not to the appellants, money which they had no right to retain.

It is contended that the judgment on the final settlement of the estate in the Commissioner's Court at Nome is a final adjudication that Ed. L. Feidler, deceased, was the sole owner of the property of the Progreso Trading Company, and that the appellee is bound thereby. But the court at Nome was but a court of ancillary administration, and it may be doubted whether within the jurisdiction conferred upon that court, F. J. Feidler could have established his equitable interest in the property in the possession of the court. But, however this may be, the appellee was not barred by the final decree of that court from pursuing the assets in the hands of the distributees within the jurisdiction of the court below. In a similar case, *Borer v. Chapman*, 119 U. S. 587-599, 7 Sup. Ct. 342, 30 L. Ed. 532, the court said:

"The administration of the estate of Gordon, in California, was merely ancillary; the primary administration was that of the testator's domicile, Minnesota. Chapman was not a citizen of California, nor resident there; he was no party to the administration proceedings; he was not bound to make himself such. If he had chosen he could have proved his claim there and obtained payment, but he had the right to await the result of the settlement of that administration, and look to such assets of Gordon as he could subsequently find in Minnesota, whether originally found there or brought there from California by the executors or legatees of Gordon's estate."

It is urged that testimony of F. J. Feidler concerning the partnership transactions between him and Ed. L. Feidler deceased, was improperly admitted in evidence. We find from the record that, while testimony was being taken before the examiner, the question of the competency of the testimony of F. J. Feidler as to his transactions with his deceased brother was certified to the court below, and that the court ruled that the witness should not be permitted to testify as to transactions with, or statements by, Ed. L. Feidler. Prior to that ruling, some testimony had been given by F. J. Feidler as to such transactions or statements, but thereafter none such was taken. We assume, of course, from the ruling of the court below, that such testimony was disregarded by that court as it is disregarded in this court. Its admission, therefore, is no ground for reversal.

Upon the evidence which is found in the record, we discover no ground to disturb the conclusion of the court below upon the principal

question of the case—the question whether or not F. J. Feidler was a partner with Ed. J. Feidler at the time of the death of the latter. The evidence shows beyond dispute that in the year 1900 they went together to Nome, with a stock of merchandise, and that during that year and the following year they were both engaged as partners in business at Nome, under the name of the Progreso Trading Company. After 1901, F. J. Feidler remained at Seattle, where he occupied an office for the firm and attended to the business of the copartnership at that place, which was the point of purchase and shipment of all the goods of the firm. He received from Ed. L. Feidler remittances of large sums of money from Nome, and he purchased the goods which were shipped to Nome. There is no evidence that a dissolution of the copartnership was ever had or announced. There was testimony of admissions of Ed. L. Feidler made in the years 1902 and 1903, tending to show that at that time F. J. Feidler was his partner, and there was testimony, on the other hand, that Ed. L. Feidler, at different times subsequent to 1901, stated that he was the sole proprietor of the Progreso Trading Company, and that he was paying his brother for his services. But it is not shown that any of these statements were made in the presence of F. J. Feidler or were communicated to him. There was other evidence tending to show copartnership, notably a letter written by Edith M. Feidler to F. J. Feidler on February 18, 1904, indicating that at that time she considered him a partner. The preponderance of the evidence is in favor of the finding made by the court below.

We find no ground for reversing the decree. It is affirmed.

THE ALLIGATOR et al. THE ALLIGRIPPUS et al. THE PHENIX et al.

(Circuit Court of Appeals, Third Circuit. February 17, 1908.)

Nos. 34, 55, 56.

1. MARITIME LIENS—SERVICES RENDERED TO VESSEL—PRESUMPTION OF LIEN.

While there may be a maritime lien for services rendered to a vessel, either foreign or domestic, and there may be a presumption that such services were rendered on the credit of the vessel such as in case of salvage or pilotage services, whether such presumption arises, or whether the lien exists, depends on the nature of the services and the circumstances under which they are rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 12.]

2. TOWAGE—LIEN—WAITING UPON DREDGES.

The owner of a tug which was verbally hired by the day by the owner of three dredges to "wait upon" such dredges while engaged on certain work, the services rendered being the carrying of coal and water to the dredges, the towing of scows and of the dredges themselves when necessary is not entitled to a maritime lien on all or any of such dredges for a balance due on the contract which was not one for ordinary towage services to the vessels themselves.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 9.]

3. MARITIME LIENS.

A maritime lien does not attach for a supposed credit given to a vessel unless the service or supplies are clearly shown to have been rendered or furnished to the particular vessel to which the credit is given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 13.]

4. SAME—SUIT TO ENFORCE LIEN—STATE STATUTES.

Although the admiralty courts will take judicial notice of state statutes creating liens they will not undertake to adjudicate rights thereunder in the absence of the allegations and proofs necessary to an issue and controversy in that behalf.

Appeal from the District Court of the United States for the District of New Jersey.

For opinion below, see 153 Fed. 216.

E. G. Benedict, for appellant.

Robert Carey, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. These are appeals in three separate suits, one against each of the dredges named. The suits are identical, and it was stipulated by the prosecutors of the respective parties, that the testimony taken in one of the above cases should be used in each of the others. The libels and answers are substantially the same, and in the court below, as here, the cases were argued together. The facts, as found by the court below, are briefly as follows:

There was no written contract between the parties. The libelant owned the tug boat "Harold," which rendered the services for which claim is made in the libels. In the fall of 1904, he made a verbal contract with Thomas Potter, the owner of the dredges "Alligator," "Alligrippus," and "Phoenix," for the employment of his tug boat for general towing and waiting on the above-named dredges; the tug was to do whatever the captains of the dredges required, "such as getting coal and water, waiting on them in general, pumping scows and taking scows to them, and generally bring them away, and general work." The dredges had no motive power of their own. The price agreed upon for the services between the libelant and the owner of the dredges, was \$20 per day. The libelant claims that the services rendered by him under the above-named contract, amounted in all to the sum of \$5,370, of which sum there still remains due a balance of \$2,820; that of said sum of \$5,370, there was due from the "Alligator," for services rendered her \$3,080, of which sum there has been paid on account \$1,275, leaving \$1,805 due; that from the "Alligrippus," there was due for like services rendered her, \$2,060, of which \$1,275 had been paid on account, leaving \$785 due; and that from the "Phoenix," there was \$230 due for like services. Payments on account were made by checks and notes, by Potter, to the order of the libelant. The payments were general, and without reference to the services rendered to any particular dredge, but they seem to have been arbitrarily applied by libelant, in the manner above stated.

The evidence on behalf of the libelant shows that the dates when the tug was engaged in the services of the dredges, were put down by

its captain in a book, which is said to have been subsequently stolen from the tug, and that reports had been made by the captain from this book, monthly or semimonthly, which original reports had been destroyed. Certain statements, however, testified to have been copies from them, were produced, and have been offered in evidence. They are nearly all in the general form of "Report of Tug 'Harold'" for a certain month, "Account Thomas Potter, waiting on dredges 'Alligator' and 'Alligrippus' at Ellis Island," followed by a short statement of services performed each day of the month, in carrying stores, water, and coal to the dredges, or towing dredges or scows, footing up a certain number of days. No specification for the services performed for each dredge is made. It was evident the account was afterward made out by multiplying the whole number of days in which the tug was engaged, by \$20, and afterwards dividing the aggregate sum thus obtained into the portions charged arbitrarily against each of the three dredges respectively. The same arbitrary appropriation was apparently made of the partial payments by the owner of the dredges. Upon this showing, the libelant claims maritime liens upon the three dredges respectively, for portions of the balance due under his contract with the owner thereof.

It may be conceded at once that the dredges are to be considered in admiralty as "vessels," and as such, subject to the general maritime jurisdiction, and that the contract between the owner of the tug and the owner of the said dredges was a maritime contract. No claim is made, however, for the existence of a maritime lien against them, on the ground that they were other than domestic vessels. On the contrary, the learned counsel for the libelant contends, that the service was, so to speak, a technical towage service, and a necessary service, as rendered to vessels having no motive power of their own, and being clearly a maritime service, that there is, under the circumstances, a presumption that it was rendered on the credit of the vessels, and that by the admiralty law a lien for the value thereof attaches, and that the burden lies on the one who disputes the lien, to overthrow such presumption by satisfactory evidence. Moreover, it is contended that this presumption of lien exists independently of any question as to the foreign or domestic character of the vessels, and that in this respect the case differs from one in which there is a claim for a lien for supplies, where the question of domestic or foreign vessel becomes important, because, in the absence of a state statute or express agreement, there is no lien against a domestic vessel for supplies. We do not propose, nor is it necessary, to deny that there may be this general line of demarcation between claims for services and claims for supplies, with respect to the presumptions of liens arising therefor, or that generally a towage service is properly classified with a pilotage service, or with that of a seaman, and others, as to which there is a prima facie presumption of lien against the res to which the service was rendered. We must not, however, press too far such distinctions. They rest upon rules peculiar to the general admiralty law, as administered in the United States. This law imposes upon a vessel, as a consequence of certain situations and conditions, when established by evidence, the peculiar lien known as a maritime lien. Owing to the underlying

necessities of commerce, and to the wandering character of its great instrument, a ship, courts of admiralty will infer, in the absence of proof to the contrary, that, where supplies necessary for the accomplishment of the ship's voyage are furnished in a foreign port on the order of the captain of a ship, or the ship's agent, and even under some circumstances by the owner, they are furnished on the credit of the ship, and a lien for their value attaches by operation of law. In other words, these facts and conditions being proved, are held ground for the reasonable presumption of credit to the ship and a consequent lien. The same presumption is held to arise as to certain maritime services rendered to a ship, independently of its character as domestic or foreign.

The lien to which the ship is thus subjected, is created, not so much for the benefit of the creditor, but for the benefit of commerce. Merchants and others are thereby encouraged to furnish supplies and render services necessary to the continuance of the ship's voyage and to the commercial enterprise of which she is the instrument. In the United States, at least, these reasons for creating a lien in the absence of express contract, in judicial contemplation, cease to exist in the home port and with reference to a domestic vessel. The presumption, or rather the burden of proof, in such cases, therefore, is shifted, and when supplies are furnished to such a vessel, the burden is upon the furnisher, to show a mutual understanding that they were furnished on the credit of the vessel. As already observed, there are maritime services which are usually rendered under circumstances which make them so essential to the movement of a vessel, and to the performance of her primary function, as an instrument of commerce, that the admiralty law presumes they are rendered on the credit of the vessel, in the absence of proof to the contrary, and creates a maritime lien in their favor, independently of the question whether it be a domestic vessel, or not. Notable examples are the lien for pilotage services, the lien for seamen's wages, for towage services and for salvage services. The reasons for the rule in these cases are obvious, and arise out of the necessities of the situation. It would be an obstruction to commerce, as well as unreasonable, if a sailor were required to show a mutual understanding between himself and the captain, that there should be a lien upon the vessel for his wages, or that the pilot who goes over the ship's side as she approaches a port, or in a dangerous channel, should be called upon to show a like mutual understanding. So in the case of salvage, much of the world's wealth would be put in jeopardy, if the salvor could only claim a lien on the property saved, by showing a mutual understanding to that effect before the service was undertaken. The peculiar exigency of the situation in all these cases, supplies the reason for the rule of presumption of lien, as it has been long recognized in the administration of the general admiralty law. The exigency for such services, as are above enumerated, so generally exist, that the rule of presumption of lien is sometimes dissociated from the reason upon which it is founded. The service of a diver can be imagined as rendered under circumstances so exigent as to come within the reason of the rule of presumption of lien, as the service may have been necessary to prevent the immediate sinking of a vessel,

but the service of the same diver in examining a sunken wreck, or the bottom of a ship lying in port, to discover whether its general condition required that the ship should be docked, would come within a different rule. So a towage service, as ordinarily performed, is a maritime service, which from the peculiar situation of the parties and of the circumstances of necessity surrounding it, and in the absence of proof to the contrary, creates a presumption of credit given to the vessel and a consequent lien. But why, where the relation of the parties and the circumstances attending the performance of the service are different from those ordinarily obtaining, should this same rule of presumption apply? If the reason ceases, why should not the law cease? In the admiralty courts of the United States, the exemption of a domestic vessel from this rule of presumption of lien, rests entirely on the supposed absence of the reasons obtaining therefor in the case of a foreign vessel. Towage service in the present case was not one rendered under the ordinary conditions to which we have just adverted. There was no question of being in a foreign port, nor was there the ordinary exigency presented when a ship is to be towed into and from a harbor, or from place to place in a harbor, as a single service. It was not, therefore, a necessary service, in the sense in which that word is used in regard to the ordinary towage service, a service to be performed instantly, in order that a ship may not be delayed on her voyage, or in preparing for the same. The tug might be said to be part of the necessary equipment of the dredge, just as the scows were part of such equipment. It supplied a continuous motive power in the peculiar work for which dredges are built. It was a contract for what may be called a quasi towage service, made with the owner of certain dredges in the waters of New York Harbor, not for a single towage of the dredges from place to place, but a service which consisted of "waiting upon" the dredges, carrying supplies of water and coal to them, as occasion required, and the towing of the scows used in the dredging operations.

The towage of the dredges themselves are the least important part of the service. The contract between the owner of the tug and the owner of the dredges, was not for a single act of towage, but for a continued service, at a compensation to be paid by the owner, at so much per diem, and that service embraced other things than mere towage, being, as we have said, largely for "waiting upon" the dredges in the way of carrying coal, water, and other supplies from the shore to the dredges. It was, therefore, a mixed service in which, so far as towage was concerned, the towage of scows, not dredges, was that principally stipulated for. The service, therefore, was as different as possible from what is ordinarily called a towage service, as to which a presumption of lien obtains. The stipulated price of \$20 a day, for "waiting upon" the dredges, indicates how different the conditions were from those which are considered as justifying a presumption of lien. The charges against the separate dredges were arbitrarily made upon statements of service, not to the dredges singly and separately, but, to them as grouped. It would be an abuse of the administration of the law of maritime lien, to decree a lien for services not clearly proved to have been entirely maritime and rendered to the par-

ticular res upon which the lien is claimed. A lien does not, and should not, attach for a supposed credit given to a vessel, unless the service or supplies are clearly shown to have been rendered or furnished to the particular vessel to which the credit is given.

It only remains to advert briefly to the last point urged by the appellant, viz., that even if the court should find that appellant's contention, that there was a true maritime lien in this case, is erroneous, still, under the statute of New Jersey, there was a lien for services of the kind in question, performed within the state, which an admiralty court will enforce.

The material parts of the statute referred to are as follows:

"That whenever a debt shall be contracted by the master, owner, agent, or consignee of any ship or vessel within this state, for either of the following purposes:

* * * * *

"3. On account of the towing of such ship or vessel and the wharfage of such ship or vessel, and the expenses of keeping such ship or vessel in port, including expenses incurred in taking care of and employing persons to watch such ship or vessel; such debt shall be a lien upon said ship or vessel and the tackle, apparel and furniture, and continue to be a lien on the same until paid, and shall be preferred to all other liens thereon except mariners' wages."

Appellant makes this point for the first time in this court, and admits that this statute was not called to the attention of the court below. Conceding, for the sake of the argument, that libellant had a lien under the New Jersey statute, which could have been enforced in a court of admiralty, such lien was not asserted in the pleadings, or even alluded to in the proofs. It is true that, in a certain sense, a case in admiralty is heard *de novo* on appeal, but it is heard on the record as made in the court of first instance.

The allegations of the libels are very meager, and are only such as go to support the assertion of a maritime lien. There is not in them a single statement that would bring the cases within the terms of the state statute. Neither the residence of the libellant, nor the place where the service was performed, is directly or indirectly alleged to be in the state of New Jersey. It may also be added that no proof was offered by the libellant as to these matters, though it would have been immaterial if he had done so. Though courts will take judicial notice of state statutes, it is hardly necessary to say that they will not undertake to make rights under such statutes justiceable before them, in the absence of the *allegata* and *probata* necessary to an issue and controversy in that behalf.

The decree of the court below is affirmed.

SCHODDE v. TWIN FALLS LAND & WATER CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,380.

1. WATERS AND WATER COURSES—APPROPRIATION OF WATER FROM STREAM—RIGHT TO CURRENT AS APPURTENANCE.

An appropriator of a certain quantity of water from a stream does not acquire as an appurtenant to his water location the right to the current of the stream as a means of operating devices used by him to divert the water from the stream, nor is such current subject to appropriation as a water right under the Constitution and laws of Idaho.

2. SAME—MEANS OF DIVERTING WATER—IDAHO STATUTE.

Rev. St. Idaho 1887, § 3184, which provides that owners of lands adjacent to a stream shall "have the right to place in the channel of, or on the banks or margin of, the same rams or other machines for the purpose of raising the waters thereof to a level above the banks requisite for the flow thereof to and upon such adjacent lands," gives a mere license to use an appropriate method for raising the water, but the particular method or means adopted does not attach as an appurtenance to the appropriation of the water as against other appropriators from the same stream.

3. SAME—LIMITS TO RIGHT OF APPROPRIATION.

The right to appropriate water from a stream is not an unrestricted right, but must be exercised with regard to the rights of the public and other appropriators, and a single appropriator who has adopted as a means of raising water to his land water wheels operated by the current of the stream has no right of action because of the construction of a dam below him designed for the irrigation of a large area of land, the property of many owners, which destroys the current of the stream at the place of his location, and makes it necessary for him to adopt some other means of diverting the water off his land.

In Error to the Circuit Court of the United States for the District of Idaho.

The plaintiff in error was plaintiff in the court below in an action against the defendant in error to recover damages alleged to have been sustained by the plaintiff by reason of the defendant having constructed a dam across Snake river in Idaho, so as to back the water of the river up stream to and beyond plaintiff's premises, to the injury and damage of his water right in said stream.

Plaintiff's complaint contains three counts. Briefly stated, the cause of action as set out in the three counts of the complaint is as follows: Plaintiff is the owner of three tracts of land on the banks of Snake river, containing in the aggregate 429.96 acres. Two of these tracts, containing 263.96 acres, are on the south bank, and one tract of 160 acres is on the north bank. One of the tracts on the south bank is agricultural land, and the other is partly agricultural land and partly mining ground. The tract of land on the north bank is agricultural. In the year 1889 plaintiff's predecessors in interest, and in 1895 the plaintiff himself, appropriated certain quantities of water of the flow of Snake river for use on said lands. In the first count the quantity is stated in cubic feet per second; in the second and third counts the quantities are stated in miner's inches. The aggregate of water appropriated as alleged in the three counts is referred to in the briefs as 1,250 miner's inches. Soon after this water was appropriated the parties in interest erected water wheels in the river to lift the water to a sufficient height for distribution over the land. Nine of these wheels were erected opposite or near the tracts on the south side of the river, and two near the tract on the north side of the river. These wheels vary in height from 24 to 34 feet. The parties also constructed wing dams in the river adjoining or in front of the lands owned by them, for the purpose of confining the flow of the

water of the river and raising it at such points above the natural flow of the river, so that the current would drive the water wheels and cause them to revolve and carry the water in buckets attached to the wheels to a height where it would be emptied into flumes and distributed over the lands by ditches and used thereon to irrigate and cultivate the agricultural land and work the mining ground. It is not alleged in the complaint, but it is assumed that the river at this point runs between high banks and that the water is lifted by the wheels at least 20 feet before it is emptied into the flumes for distribution over plaintiff's lands. In the year 1903, while plaintiff was using the appropriated water of the river upon the described premises, the defendant commenced the construction of a dam across Snake river at a point about nine miles westerly from and below the lands of the plaintiff. The work was prosecuted on said dam until its completion in March, 1905. This dam is so constructed as to impound all the water of Snake river flowing at said point, and to raise the water about 40 feet in height. It is alleged that when defendant's dam was filled with water the water was turned into a canal known as the "Twin Falls canal," owned by the defendant, and located on the north side of the river; that this canal was constructed at a cost, as plaintiff is informed and believes, of \$1,500,000, for the purpose of supplying water for irrigation and domestic purposes to the settlers on about 300,000 acres of arable and arid lands situated below the dam; that for said lands and for a great number of people, being, as plaintiff is informed and believes, 5,000 in number, there is no other supply available for irrigation, stock, domestic, or manufacturing purposes except the water from said canal. It is alleged that by reason of this dam the waters of Snake river have been backed up from said dam and to and beyond plaintiff's premises and have destroyed the current in the river by means of which plaintiff's water wheels were driven and made to revolve and raise the water to the elevation required for distribution over plaintiff's lands. It is alleged that it is now impossible for plaintiff to so arrange or change his said dams or water wheels or flumes, or to build or construct other dams or water wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's lands, and by reason thereof plaintiff has not been able to irrigate said lands or any part thereof or to raise profitable crops thereon or to use the same as pasture lands, and will not in the future be able to irrigate said lands or to raise profitable crops or any crops thereon, as long as defendant's dam is maintained; that there is no other supply of water available for use upon said lands except the waters of Snake river; that by reason of the backing up of said water and stopping the plaintiff from using said water wheels to raise the waters of Snake river to and upon said lands and cutting off the water supply from plaintiff's lands he has been damaged in the aggregate sum of \$56,650. In the first count of the complaint a separate and distinct cause of action is alleged in an averment that about 12 acres of plaintiff's land has been covered by the waters of Snake river backed up by defendant's dam, but the land is not described or its boundaries given, or any particulars stated so that the land can be identified or ascertained. To this cause of action defendant interposed a special demurrer on the ground of uncertainty and the improper joinder of two separate causes of action. This special demurrer appears to be admitted. The defendant also interposed a general demurrer on the ground that the facts stated in the complaint do not constitute a cause of action against the defendant as to either or any of said counts. The demurrer was sustained by the Circuit Court, and the plaintiff has brought the cause to this court upon a writ of error.

Hawley, Puckett & Hawley and W. E. Borah, for plaintiff in error.
E. B. Critchlow (Henderson, Pierce, Critchlow & Barrette and Parley L. Williams, of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error present the single question whether the facts stat-

ed in the complaint constitute a cause of action against the defendant.

It is not denied that the plaintiff has the right by appropriation to divert 1,250 miner's inches of the waters of the Snake river, mainly for irrigation purposes, and it is not charged by plaintiff that this amount of water is not still in the river subject to his right of appropriation and diversion. His claim is that he cannot divert it by the means he first adopted for taking the waters from the river, and that the defendant by placing a dam across the river has deprived him of the right to the current of the river which prior to the erection of the dam rendered his means of diversion available. Is this current and the means adopted for the diversion of the appropriated water part of or attached to plaintiff's right of appropriation? It is contended on the part of the plaintiff that the current of the river is necessarily appurtenant to the water location and that the means of utilizing that current is attached as an appurtenance to the appropriation. We have not been referred to any case—and we know of none—where either of these propositions has been upheld.

The claim that the right to the current of the river is appurtenant to the water location is contrary to well-established principles of the common law governing such a relation. The water location was an appropriation and diversion of a certain quantity of the flowing water of the stream. The current of the river is part of the stream. There can be no right to the current of a stream as appurtenant to a diversion of the flowing waters of the stream. The two rights in such case would be equal and of the same character and quality, and one such right cannot be appurtenant to the other. Lord Coke says (*Co. Litt.* 121b): "A thing corporeal cannot properly be appurtenant to a thing corporeal nor a thing incorporeal to a thing incorporeal. According to this rule land cannot be appurtenant to land." *Harris v. Elliott*, 10 Pet. 25, 53, 9 L. Ed. 333; *Leonard v. White*, 7 Mass. 8, 5 Am. Dec. 19; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Jones v. Johnston*, 18 How. 150, 155, 15 L. Ed. 320. "It follows that things in their nature equal and of like character and grade can never be appurtenant to each other, for the common as well as the legal meaning of the word implies inferiority and dependence, so that a water ditch could never become appurtenant to another water ditch of like character and pass as an incident thereto, for the same reason that one farm will not pass as an appurtenance to another." *Donnell v. Humphreys*, 1 Mont. 518, 528. The reason for such a rule in the present case is as forcible as in any of the cases cited. If the plaintiff were permitted to own the current of the stream as appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he would control and own. There might be a great surplus of water in the stream at and above plaintiff's premises and an urgent demand for a portion of this surplus for beneficial uses, but if an appropriator above should divert a sufficient quantity to lower the current under plaintiff's water wheels so that they would not revolve, the plaintiff would have a cause of action to prevent such an appropriation. It is clear that in such a case the

policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated.

But aside from this rule of common law, which we think denies the right of the appropriator to claim the current of the stream as appurtenant to his water location, the law of appropriation is itself opposed to such a claim. It is provided in the Constitution of the state of Idaho, art. 3, § 15, that:

"The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."

In the Revised Statutes of Idaho of 1887, under the title "Water Rights and Irrigation," a method of procedure is provided for the appropriation and diversion of running water flowing in a river or stream for a useful or beneficial purpose. This procedure involves three distinct acts on the part of the appropriator: First, the person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein (1) that he claims the water there flowing to the extent of (giving the number) inches measured under a 4-inch pressure, and accurately describing the point of diversion; (2) the purpose for which he claims it and the place of intended use; (3) the means by which he intends to divert it and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it—a copy of the notice must, within 10 days after it is posted, be recorded in the office of the recorder of the county in which it is posted (section 3160). Second, a diversion of the water within a reasonable time (sections 3157, 3158, 3161, 3162, 3163). Third, the actual application of the water to a useful and beneficial purpose. In Colorado, which like Idaho has adopted the law of appropriation as distinguished from the common-law doctrine of riparian rights, it has been held that there must be not only an actual diversion made with the intent to apply the water to beneficial use, but the water must be actually applied to such use. In *Fort Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 Pac. 1032, 1033, 36 Am. St. Rep. 259, Chief Justice Hayt, in delivering the opinion of the court, said:

"From the first this court has recognized and emphasized the idea that a priority could only be legally acquired by the application of the water to some beneficial use. Hence there must be not only a diversion of the water from the natural stream, but an actual application of it to the soil, to constitute the constitutional appropriation recognized for irrigation."

It thus appears that the law of appropriation requires that the appropriator shall post a notice at the point of intended diversion, of the quantity of water claimed; he must make an actual diversion of the water and apply the water to a useful and beneficial purpose, which in the case of irrigation is an application of the water to the soil. In none of these requirements did plaintiff comply with the law in appropriating the current of the river. He did not notify the world that he made such a claim; he made no diversion of such water, and he did not apply it to the soil as required where the appropriation is for the purpose of irrigation. It is clear, therefore, that the current of the river was no part of plaintiff's water location, and that he has no cause of

action against the defendant for destroying this current. The claim of the plaintiff that the means of utilizing the current is attached as an appurtenance to the appropriation is likewise untenable. Section 3184 of the Revised Statutes of Idaho is referred to as supporting this claim. That section provides as follows:

"All persons, companies and corporations owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel of, or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the last two sections."

The permission here given is a mere license to the owner of lands adjacent to a stream to use any appropriate method for raising the water to a level above the banks for distribution upon such adjacent lands, but it is immaterial to the state what particular method is used. The landowner may use a ram, a pump, or a wheel, or he may raise the water by means of a ditch. And he may change from one method to another as the situation or circumstances may require. *Charnock v. Higuerra*, 111 Cal. 473, 476, 44 Pac. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195. The method adopted cannot be said to have attached as appurtenant to the appropriation as against other appropriators of water from the same stream. Perhaps in a conveyance of land having upon it or in the adjacent stream a ram or other machine for raising water from the river such a machine would pass to the grantee of the lands under a deed containing the term "appurtenances," but that would be a very different proposition from the one now under consideration. We are, therefore, of opinion that the means of utilizing the current is not attached as appurtenant to the appropriation.

There is, furthermore, the general principle that the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right. In *Basey v. Gallagher*, 20 Wall. 670, 683, 22 L. Ed. 452, the Supreme Court of the United States said:

"Water is diverted to propel machinery in flourmills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual."

In *Fitzpatrick v. Montgomery*, 20 Mont. 181, 187, 50 Pac. 416, 417, 63 Am. St. Rep. 622, the Supreme Court of the state of Montana, after referring to what has been just quoted from *Basey v. Gallagher*, said:

"While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. The use of water in this state is declared by the Constitution to be a public use. Constitution, art. 3, § 15. It is easy to see that, if persons by appropriating the waters of the streams of the state became the absolute owners of the waters without restriction in the use and disposition thereof, such appropria-

tion and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state. The tendency and spirit of legislation and adjudication of the northwestern states and territories have been to prevent such a monopoly of the waters of this large section of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free, use of water by appropriation."

It follows that, in our opinion, the complaint does not state facts sufficient to constitute a cause of action against the defendant. The judgment of the Circuit Court is therefore affirmed.

GRIFFIN v. INTERNATIONAL TRUST CO.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1908.)

No. 1,494.

1. CORPORATIONS—MORTGAGES—TAKING NEW MORTGAGE FOR SAME DEBT—RE-INSTATEMENT OF ORIGINAL MORTGAGE.

A corporation executed a mortgage to a trustee to secure a \$300,000 issue of bonds. After default in payment of such bonds, it executed a second mortgage to the same trustee to secure an issue of bonds of \$500,000, which recited that it was subject only to the prior mortgage, and was given to secure the payment of the bonds given thereunder, which were to be paid by exchanging the same for bonds issued under the new mortgage, and that the holders of such bonds were willing to make the exchange. The first mortgage was not released of record. *Held*, that the provisions of the second mortgage preserved the lien of the first for the benefit of the holders of the bonds so exchanged, but, even if not, that a court of equity would reinstate it for their protection as against an attachment creditor who obtained a lien on the property before the second mortgage was executed, and which was not known to such bondholders or their trustee.

2. MORTGAGES—PRIORITY—RENEWAL.

The failure of a mortgagee of property in Alaska to ascertain the fact of an attachment lien thereon before taking a renewal mortgage, or to make the attachment creditor a party to the suit to foreclose the same, was not such laches as to debar it from the right to relief by a reinstatement of the original mortgage as against such lien, where no prejudice resulted to the holder thereof.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

In Equity. Action to foreclose two certain mortgages on mining property in Alaska, the first mortgage executed December 15, 1891, and the second executed January 1, 1896; and to restrain a judgment creditor from proceeding with the sale of a part of the mortgaged property under the lien of an attachment levied after the first mortgage and prior to the second mortgage.

John G. Heid, William T. Love, R. F. Lewis, and Alfred Sutro, for appellant.

Shackleford & Lyons, John J. Boyce, and John A. Shackleford, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was an action brought by the International Trust Company, a corporation, against the American Gold Mining Company, a corporation, Frank W. Griffin, and James M. Shoup, United States marshal. The purpose of the action was: (1) To foreclose two certain mortgages, the first executed December 15, 1891, by the Nowell Gold Mining Company, the predecessor in interest of the American Gold Mining Company, to the International Trust Company, trustee, to secure the payment of 300 bonds of the par value of \$1,000 each; the second mortgage executed January 1, 1896, by the Nowell Gold Mining Company to the International Trust Company, trustee, to secure the payment of 500 bonds of the par value of \$1,000 each. (2) To enjoin and restrain the defendants James M. Shoup and Frank W. Griffin from proceeding with the sale of part of the mortgaged premises under a judgment entered in favor of Frank W. Griffin July 10, 1905, for \$25,000 and interest, secured by the lien of an attachment levied November 24, 1893. The two mortgages are set forth in the bill of complaint. The first executed December 15, 1891, by the Nowell Gold Mining Company, was to secure the payment of 300 bonds of that date for the sum of \$1,000 each, with interest at the rate of 7 per cent. per annum. It was provided that 60 of these bonds were to be paid on the 15th day of December of each year from the year 1893 to 1897, and, upon a default for one year on payment of either principal or interest on any of the same, then the whole principal should become due and payable at the option of a majority of the bonds then outstanding. It is alleged in the bill of complaint that none of the 300 bonds secured by the mortgage of December 15, 1891, were paid, and on the 1st day of January, 1896, the Nowell Gold Mining Company, for the purpose of providing for and retiring said \$300,000 of bonds and interest thereon, and for the purpose of providing means to aid in the purchase of additional mines and mining properties in the district of Alaska, and of acquiring and constructing milling plants and mining equipments and for other corporate purposes, issued its bonds to the amount of \$500,000, being 500 bonds of the par value of \$1,000 each, bearing interest at the rate of 7 per cent. per annum. Thirty-five of these bonds were to be paid on the 1st day of January of each year, from the year 1901 to 1913, and the remaining 45 bonds were to be paid on the 1st day of January, 1914. It is alleged in the bill of complaint that of the 500 bonds of \$1,000 each 298 were to be issued at the special instance and request of the Nowell Gold Mining Company and sold and delivered, and thereby the payment and retirement of 298 of the bonds of the issue of 300 bonds of the mortgage of December 15, 1891, accomplished and the bonds redeemed; that two of the bonds of the denomination of \$1,000 each of the issue of December 15, 1891, were not so redeemed, but remained actually outstanding under and by virtue of the provisions of said mortgage; that the remaining 200 bonds of the issue of January 1, 1896, were executed and delivered, sold on the market, and the proceeds thereon were received by the Nowell Gold Mining Company; that at the same time, and as a part of the same transaction, the Nowell Gold Mining

Company made, executed, and delivered to the International Trust Company its mortgage and deed of trust dated January 1, 1896. In this mortgage it was provided that for the purpose of retiring the \$300,000 of bonds of the Nowell Gold Mining Company dated December 15, 1891, with unpaid interest thereon, the holders of said bonds and interest being willing to exchange same for an equal amount of bonds of the issue of January 1, 1896, the Nowell Gold Mining Company should issue its bonds to the amount of \$500,000, in denominations of \$1,000 each, all dated January 1, 1896, and payable at the office of the International Trust Company of Boston, Mass., payment to be made of not less than 35 of said bonds on January 1st of each year from 1901 to 1913, both inclusive. It was also provided that said mortgage was subject only to the mortgage dated December 15, 1891, and given to secure the payment of said \$300,000 of bonds of even date therewith, which were to be paid by exchanging the same for the issue of bonds of January 1, 1896.

It is alleged in the bill of complaint that in the year 1898 the Nowell Gold Mining Company amended its charter and legally obtained a change of its name to the American Gold Mining Company; that on December 11, 1902, the plaintiff caused foreclosure proceedings to be instituted for the foreclosure of the mortgage of December 15, 1891, with respect to two of the bonds of the issue of that date, and for the foreclosure of the mortgage of January 1, 1896, with respect to the 498 bonds of the issue of that date; that such proceedings were had in the matter that a decree was entered in favor of the plaintiff in the sum of \$745,582, and the property covered by said mortgage was thereunder and thereby foreclosed and sold on the 31st day of March, 1903, and was at the sale bid in by the plaintiff for the sum of \$382,000, and plaintiff believed in bidding in said premises it would leave the same free and clear of all incumbrances. The bill of complaint recites the commencement of an action by one M. W. Murray against the Nowell Gold Mining Company on the 11th day of November, 1893, in the district court of Alaska to recover the sum of \$25,000, the issuance of a writ of attachment and its levy upon certain property of the defendant on the 24th day of November, 1893. It is alleged that such property was at that time and subsequently subject to the lien of the plaintiff's mortgage of December 15, 1891; that Frank W. Griffin, one of the defendants named in the bill of complaint, was substituted for the said M. W. Murray and as his successor in interest in the attachment suit, and thereafter, on the 10th day of July, 1905, judgment was entered in favor of the said Griffin and against the American Gold Mining Company for the sum of \$25,000 and interest; that an order of sale was thereupon issued out of the court upon the judgment, and the property attached was ordered sold by the court. Thereafter a notice of sale was given and published by the defendant Shoup as United States marshal. It is alleged in the complaint that, if the sale is allowed to proceed, the property will be in danger of being sold to parties who have no knowledge of the equities and lien of the plaintiff; that prior to November 3, 1905, plaintiff had no knowledge or notice of the facts pertain-

ing to the attachment suit, but had prior to that time been informed by the officers of the defendant corporation, and believed and relied upon said information and representation, that there were no liens or claims intervening between December 15, 1891, and January 1, 1896. It is further alleged that in plaintiff's foreclosure suit commenced December 11, 1902, neither Murray nor Griffin was a party to that action, and that the decree of foreclosure against the property of the defendant corporation was entered by the plaintiff in entire ignorance of the existence of the attachment suit by Murray and his successor, Griffin. It is alleged that plaintiff herein is without speedy or adequate remedy at law; that defendant Frank W. Griffin threatens to sell the property mentioned in the complaint and described as having been attached by the plaintiff in the attachment suit; that said property is a part of the property subject to the mortgage of December 15, 1891, by and through which Shoup, as United States marshal, will sell the same unless previously enjoined, to the irreparable loss and damage of the plaintiff.

The prayer of the bill of complaint is that the holders of the 298 bonds issued under the mortgage of January 1, 1896, be subrogated to the rights of the holders of the 298 bonds issued under the mortgage of December 15, 1891; that an account be taken of the moneys due of principal and interest owing on said bonds and mortgage, and that a decree be entered for the sale of the mortgaged premises for the payment to the plaintiff of the moneys found to be due the defendants and all persons claiming under them subsequent to the commencement of the suit; that the premises described in the mortgage of December 15, 1891, be sold to satisfy said sum of \$300,000 and interest thereon, and upon the sale of the premises the sum bid be credited upon the amount due under the mortgage, and that plaintiff have judgment for any deficiency there may be for the difference between the amount so bid and the amount found due under the mortgage; that the mortgage of January 1, 1906, be foreclosed in like manner for the sum of \$200,000 and interest thereon, and that the premises covered by that mortgage be condemned and sold to satisfy the said sum of \$200,000 and interest, and that defendants Shoup and Griffin be enjoined and restrained during the pendency of the suit from the sale of the premises as described in the writ of attachment and published notice of sale; and that further proceedings under said order and notice of sale be stayed and enjoined until final judgment, decree in the action. Upon the verified bill of complaint, the court issued an order restraining the defendants Griffin and Shoup from proceeding with the sale of the property described in the complaint. The temporary restraining order was subsequently continued in force as a temporary injunction. Thereafter a motion was made to the court to dissolve the temporary injunction, which was denied on the ground that the motion presented to the court all the issues practically involved in the merits of the case, and the court was unable to determine the merits of the case upon a motion to dissolve the temporary injunction.

The defendant Griffin appeals from the order denying the motion to dissolve the temporary injunction; and the only question to be

determined by the court is whether the bill of complaint states a cause of action for equitable relief.

We think the express terms of the second mortgage were such as to preserve the lien of the first mortgage for the benefit of the bondholders who should receive bonds under the second mortgage in exchange for bonds issued under the first mortgage. The parties to the two mortgages were the same. The first mortgage was not canceled or released of record, or the plaintiff, as trustee, relieved of its trust under the mortgage; but, on the contrary, the lien was kept alive and the trust continued. The mortgage recited that the holders of \$300,000 of bonds issued under the mortgage of December 15, 1891, were "willing to exchange the same for an equal amount of the bonds of the issue of January 1, 1896." Pursuant to this recital the second mortgage contained the express provision that it was "subject only to the mortgage of said last-named party (the Nowell Gold Mining Company) to said party of the second part (the International Trust Company) dated December 15, 1891, and given to secure the payment of said three hundred thousand dollars of bonds of even date therewith which are to be paid by exchanging the same for bonds of said issue of January 1, 1896." Neither the principal or interest of any of these bonds had been paid, and the whole principal had become due at the option of the majority of the bondholders, and the plaintiff, as trustee of these bondholders, was in a position to proceed with the foreclosure of the mortgage given to secure the debt. That it did not do so, and the bondholders did not so request, was because of the plain terms of the mortgage that it was subject to the mortgage of December 15, 1891. The appellant contends that the purchasers of the bonds issued under the mortgage of January 1, 1896, were mere volunteers without any agreement that the mortgage of December 15, 1891, was to be kept alive for their benefit or protection. This is undoubtedly correct with respect to the purchasers of the \$200,000 of bonds issued under the second mortgage and sold in the open market for the purpose of providing an additional capital for the use of the Nowell Gold Mining Company; but with respect to the \$300,000 of bonds issued for the purpose of exchanging the same for bonds issued under the mortgage of December 15, 1891, the relation of the parties to the transaction was different, and involved different considerations. The bondholders under the first mortgage had a prior lien, which presumably they would not voluntarily surrender until their debt was paid. To carry out the plan of reorganizing the debt of the corporation and enlarging its business, it became necessary to carry the lien of the bondholders under the first mortgage into the second mortgage, in the provision that the second mortgage was subject to the first mortgage, securing the payment of \$300,000 of bonds which were to be exchanged for bonds to be issued under the new mortgage. The case of *Union Trust Co. v. Illinois Midland*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963, cited by appellant, related to a very different transaction. In that case there was a consolidation of three Illinois railroad companies, and the agreement between the parties in interest was that the bonds of the Illinois Midland Railway Company (the consolidated com-

pany) were to be issued "subject and in subordination only to such bonds already issued by the Paris and Decatur Railroad Company as for the time being shall be existing and be preferentially charged on the portion of the undertaking which shall have been constituted with or represent the undertaking of the last mentioned railway company." Under this agreement the bonds of the consolidated company were subject only to the priority of the bonds of one of the companies entering into the consolidation with respect to the property of that company, while for the "time being" the bonds of the latter company "shall be existing." There was no reservation in the agreement in favor of the first bondholder if he exchanged his bonds for bonds of the consolidated company. The agreement was expressly otherwise. The court says:

"The Paris and Decatur bonds * * * were exchanged and surrendered specifically for cancellation. * * * Each person who surrendered gave up his lien under the Paris and Decatur mortgage, and took one under the Illinois Midland Mortgage, as it was, and took the risk of its value. * * * There was no contingency and no reservation on the part of those surrendering. The surrender was for cancellation and was cancellation. * * * All parties got what they contracted for."

The acceptance of bonds issued under the second mortgage in substitution for bonds issued under the first mortgage worked a cancellation of the lien of the first mortgage, because that was one of the terms of the agreement between the parties to the transaction under which the bonds were exchanged. There was no such agreement in the present case, and no cancellation of the first lien. On the contrary, the lien was preserved in the second mortgage, under the terms of which the exchange of bonds was made. The question in such a case is one of agreement or intention of the parties, and, as said by the Circuit Court of Appeals in the Seventh Circuit, in *Mowry v. Farmers' Loan & Trust Company*, 76 Fed. 38, 43, 22 C. C. A. 52, 56:

"The question must be resolved in each case upon the facts of the particular transaction. Where a novation is thus sought to be established, it must be shown that the substitution of the new obligation was with design and intent to extinguish the old obligation, and, as such an act would upon its face appear to be against the interest of the holder of the bond, such intent will not be presumed, but must be clearly established. A mere change in the form of the mortgaged debt such as the substitution of new bonds for those originally secured by it would not extinguish or affect the lien."

To same effect is *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Val. R. Co.*, 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858.

The equitable jurisdiction of a court of equity is not, however, limited to granting relief to a bondholder under a second mortgage against the claim of an intervening lien when there is some agreement or other evidence of an intention to continue the prior lien for the benefit of the holders of the second mortgage. The court may grant relief by way of subrogation when the prior lien has been surrendered and canceled in ignorance of the existence of the intervening lien, or where by reason of any other fact it would be manifestly inequitable to admit the claim of the intervening lien to a priority. In such case the holder of the second lien is deemed in

equity to have succeeded to the right of the prior lien by an equitable assignment.

In the case of the International Trust Company v. Davis & Farnum Mfg. Co., 70 N. H. 118, 46 Atl. 1054, the action was a bill in equity to restrain the levy of execution against an electric light company, except in subordination to the rights of bondholders. In 1895 the corporation issued bonds to the amount of \$50,000 secured by a mortgage running to the plaintiff as trustee. The mortgage was recorded August 14, 1895. In January, 1896, because the validity of the bonds was questioned they were canceled, the mortgage discharged and a new issue made for \$40,000 and secured by a like mortgage. The new bonds to the amount of \$30,000 were substituted for the former issue. In September and October, 1895, the light company's real estate was attached by creditors, and, having obtained judgment, they were about to levy upon it when they were enjoined. The question was whether the attachments levied in September and October, 1895, were prior liens to the mortgage executed in January, 1896, which secured bonds issued in exchange for bonds issued under the prior mortgage recorded in August, 1895. In this case the prior bonds had been canceled, and the prior mortgage discharged. The court held that:

"The discharge of the prior mortgage and the taking of the later one in its stead did not affect the rights of the parties. A discharge of a mortgage is always treated as an assignment, when justice requires such a course for the protection of equitable rights. *Holt v. Baker*, 58 N. H. 276, and cases cited. The attaching creditors have not done or omitted to do any act relying upon the recorded discharge (*Holt v. Baker*, *supra*), and cannot complain because the transaction is given the effect intended by the parties thereto. By their attachments these creditors became subsequent incumbrancers, against whom the rule of equitable assignment has frequently been applied. *Hammond v. Baker*, 61 N. H. 53, and cases cited."

In *Pearce v. Buell*, 22 Or. 29, 29 Pac. 78, the holder of a mortgage released his mortgage, and took a second mortgage in ignorance of an intervening judgment lien. It was held that the mortgagee was entitled to have his original mortgage restored as against the judgment lien. The court, in discussing the question, said:

"In such a case a court of equity will look through the form to the substance, and keep alive the original security, if it can be done without injury to third parties. No rule of law is better settled than if a holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter, in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity will, in the absence of the intervening rights of third parties, restore the lien of the first mortgage, and give it its original priority. *Jones, Mortg.* § 972; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Bruse v. Nelson*, 35 Iowa, 157; *Downer v. Miller*, 15 Wis. 677; *Vannice v. Bergen*, 16 Iowa, 555, 85 Am. Dec. 531; *Robinson v. Sampson*, 23 Me. 388; *Corey v. Alderman*, 46 Mich. 540, 9 N. W. 844; *Cansler v. Sallis*, 54 Miss. 446. The fact that the mortgage was released in ignorance of the existence of the intervening lien is, in equity, deemed such a mistake of fact as to entitle a party to relief, although such lien may have been of record. *Bruse v. Nelson*, *supra*; *Cobb v. Dyer*, 69 Me. 494; *Geib v. Reynolds*, *supra*."

In 27 Cyc. 1222, the law relating to the substitution or renewal of a mortgage, is stated as follows:

"Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage."

In Jones on Mortgages, § 971, the law applicable to this case is fully stated, as follows:

"When a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity and given its original priority as a lien. This was done in a case where the holder of a first mortgage, in ignorance of the existence of a subsequent one on the premises, released his mortgage and took a new one. There was no evidence of mistake except such as might be inferred from the mortgagee's ignorance of the existence of the intermediate mortgage, and there was no evidence that he would not have made this arrangement had he known this fact; but it was considered that, although the court was not at liberty to infer facts not proved, yet that it was at liberty to draw all the inferences which logically and naturally follow from the facts proved; that it is not an act of reasonable prudence and caution such as men commonly use in the conduct of business affairs for one having a first mortgage upon property, without consideration or other apparent motive, to release it, and take a new mortgage subject to a prior lien of a considerable amount; and therefore it may be inferred that the mortgagee would not have made the release had he known of the intervening mortgage. A court of equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction.

"Where a new mortgage is taken to secure the payment of the same debt, and the fact is so stated in the mortgage, and the old mortgage is released and the new one recorded on the same day, the new mortgage will have priority of any intervening incumbrance. Where a second mortgagee, in order to enable the mortgagor to renew a first mortgage and give it priority as a lien, canceled his mortgage and took a new one to secure the same notes, subject to the renewed first mortgage, he did not thereby release the lien created by his original mortgage, and the mortgagor's wife obtained no new rights as against the second mortgagee."

Authorities might be multiplied, showing the various considerations that will justify a court in protecting a bondholder who has surrendered the evidence of a lien to accept a new one when the claim of an intervening lien threatens to deprive him of the equitable right to the prior lien, but the cases already cited are sufficient, we think, to establish the equitable right of the bondholders in this case to their prior lien upon the facts stated in the complaint.

The appellant makes the further objection that the appellee has been guilty of such gross and inexcusable laches and negligence that the appellee and the bondholders are precluded from seeking relief in a court of equity. This objection is based upon the allegation of the complaint that prior to November 3, 1905, plaintiff and the bondholders under the first mortgage had no knowledge or notice of the attachment suit, "but had prior thereto been informed by the officers of the defendant corporation, and believed and relied on said information and representation, to wit, that there were no liens or claims intervening between December 15, 1891 and January 1, 1896." It is contended that the appellee should have examined the official rec-

ords at Juneau, and discovered the Griffin attachment and made him a party to the foreclosure proceedings; but Griffin has not been prejudiced in any of his rights by the foreclosure proceedings. Upon the facts stated in the complaint, we have determined that his attachment was subject to the mortgage lien under the mortgage of December 15, 1891, and that this lien was carried into the mortgage of January 1, 1896, either in express terms or was preserved by the doctrine of equitable assignment for the benefit of the bondholders under the mortgage of December 15, 1891, who exchanged their bonds for bonds under the mortgage of January 1, 1896. This being so, the Griffin attachment created a lien only on the mortgagor's equity of redemption, and the only effect of the failure of the mortgagee to make the attaching creditor a party to the foreclosure suit was to leave him with the right of redemption, in the event he obtained a judgment on his claim. *London & San Francisco Bank v. Dexter, Horton & Co*, 126 Fed. 593, 61 C. C. A. 515. Griffin obtained judgment on July 10, 1895. The appellee learned of his claim and judgment November 3, 1905, and brought this suit on December 19, 1905, to set aside the foreclosure suit and obtain a decree foreclosing both mortgages in accordance with the rights of the respective bondholders, and for the foreclosure of all rights of redemption. In this action Griffin's rights will be protected as fully as though he had been a party to the original foreclosure suit.

Under this aspect of the case, we cannot, under the facts stated in the complaint, hold that the appellee and bondholders are chargeable with such negligence that they cannot seek relief in a court of equity. We are of opinion that the complaint states a cause of action for equitable relief, and that the court was right in denying appellant's motion to dissolve the temporary injunction.

The order of the District Court is affirmed.

GREAT FALLS NAT. BANK v. McCLURE et al.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1908.)

No. 1,496.

1. FRAUDULENT CONVEYANCES—SUFFICIENCY—ATTACHMENT—LACHES IN ENFORCEMENT.

That no attempt was made to enforce a judgment in an action at law in which property was attached until five years after it was rendered is not ground for the annulling of such judgment by a court of equity at suit of a subsequent creditor of the same debtor, who brought an action on his claim and recovered judgment after execution had been issued on the prior judgment; no facts being alleged to show that such prior judgment was not based on a valid indebtedness.

2. SAME—SUIT FOR ANNULMENT—SUFFICIENCY OF BILL.

A bill by a judgment creditor of a mining company to annul a prior judgment obtained against such company by another creditor, on the ground that the latter made himself personally responsible for complainant's debt, that when his own debt was created he made certain promises to the company which he did not perform, and that the company, in which such prior judgment creditor was a large stockholder, shut down its

works and failed to redeem property sold under an execution against it, held not to allege facts which entitled complainant to the relief sought.

Appeal from the Circuit Court of the United States for the District of Montana.

A. C. Gormley, for appellant.

Ira T. Wight, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The sufficiency of the bill of complaint is the sole question for consideration on this appeal. It was filed February 25, 1907, and alleges, among other things, that on the 14th of December, 1901, the defendant Charles D. McClure commenced an action in the court below against the Diamond R Mining Company to recover certain money theretofore advanced by him to the company, in which action a writ of attachment was issued, directed and delivered to the defendant Merrifield as marshal, in pursuance of which writ the marshal levied upon certain real estate in Cascade county, Mont., belonging to the mining company, and also upon certain of its personal property there situated, placing in charge of the latter a keeper, a description of all of which property is contained in the bill, and constituting, according to the averments of the bill, all of the property owned by the company. The bill alleges that summons in that action was served upon the president of the mining company, L. S. McClure, a brother of Charles D. McClure, and that on the 16th day of January, 1902, a judgment by default was entered in the action against the company and in favor of the plaintiff therein for the sum of \$86,180 and \$53.30 costs. It is alleged that the plaintiff therein did not cause a writ of execution to be issued upon the judgment until January 10, 1907, and "that the said defendant has by his laches and unreasonable delay waived, abandoned, and lost whatever lien he may have had or claimed upon said property." The bill alleges that on the 17th day of December, 1907, the complainant commenced an action in the district court of the Eighth judicial district of the state of Montana, in and for the county of Cascade, against the same mining company, in which action it procured a writ of attachment to be issued, directed to the sheriff of the county of Cascade, which the sheriff undertook to levy upon the same property theretofore attached and held by the marshal in the suit of Charles D. McClure against the mining company; the personal property, however, remaining in the possession of the keeper appointed by the marshal. The bill alleges that, after due service of summons in the action so brought in the state court, judgment was duly entered therein against the defendant company, and in favor of the plaintiff in that action, for the sum of \$25,304.84 and \$27.70 costs, which judgment was thereupon duly docketed in the office of the clerk of the state court, no part of which has been paid. The bill shows that the action brought by the Great Falls National Bank in the state court was, aside from two claims assigned to it amounting in the aggregate to \$3,261.37, based upon certain promissory notes executed by the mining company in

consideration of money loaned to it by the bank, and it also shows that the preceding action brought by Charles D. McClure against the mining company in the court below was for money by him theretofore loaned to the company. The prayer of the bill is for a—

"decree that complainant has a first and prior lien upon all of said property, and that the attachment or pretended attachment made in said cause of Charles D. McClure, plaintiff, against Diamond R Mining Company, defendant, hereinbefore mentioned, is null and void and of no effect, or in any event has become lost and abandoned; that the judgment entered therein is void as to this complainant, or in any event has become satisfied; that the writ of execution therein be withheld; that the defendants herein, their officers, agents, and servants, be restrained and enjoined from selling or disposing of, in any manner whatsoever, under the said writ of execution issued in the above-mentioned action, any of the property herein described and set forth; and for such other and further relief as to the court may seem meet and equitable."

As the sole basis for such relief the bill alleges, in addition to the matters above stated, that Charles D. McClure and L. S. McClure are brothers, and during all of the times mentioned in the bill owned and controlled, and still own and control, a majority of the capital stock of the mining company; that L. S. McClure was a director and the general manager of the mining company, and since the 12th day of June, 1900, has also been its president, and was also during the times mentioned in the bill the agent and representative of his brother, Charles D. McClure, who was also a director of the company until October 9, 1900; that the moneys borrowed from the complainant were requested by the mining company for the purpose of meeting its urgent current expenses in building a concentrator at its mine in the town of Neihart, Cascade county, Mont., and that the complainant refused to loan the company any money except upon the understanding that Charles D. McClure—

"would immediately repay the same in preference to any other indebtedness of the said Diamond R Mining Company, and before any of said moneys were so advanced, and as a part of the consideration therefor, it was so understood and agreed that the said Charles D. McClure would repay the same to the complainant as aforesaid, and fully protect the complainant against any loss or damage as the result of said loans to the said defendant company; that some time subsequent to the advancement of said sums, aggregating \$20,000, the petitioner demanded payment thereof from the said Charles D. McClure, and he promised to pay the same, but notwithstanding the aforesaid facts and circumstances, whereby the complainant was led to believe and did believe that it would not be obliged to bring suit by attachment or otherwise to enforce the payment of said indebtedness, the complainant knowing at all times that the said Charles D. McClure was the only other large creditor of the defendant company, the said Charles D. McClure did nevertheless institute the aforesaid action, and, as hereinbefore set forth, levied upon and attached all the property of any kind and character belonging to the said defendant Diamond R Mining Company; that the said attachment by the defendant herein, Charles D. McClure, as plaintiff in said action, was not sought or made in good faith, as stated in his affidavit therefor, but was made, and the said action prosecuted and judgment therefor taken, for the express purpose of hindering, delaying, and defrauding this complainant and other creditors out of their claims and demands, and the said proceedings will have the effect so intended unless set aside by this court."

It is further alleged in the bill that in the year 1900 a concentrator with a daily capacity of 100 tons had been completed by the mining

company for the purpose of concentrating its ores, which was working successfully, when the McClures—

“controlling the affairs of the company as aforesaid, proceeded to enlarge said concentrator so as to make the same of a capacity of 300 tons of ore daily, and it was done at an additional cost and expense of about \$100,000 (most of which was advanced by said Charles D. McClure, one of the defendants herein, and embraces the moneys sued for in the aforementioned action); that the company voted to enlarge said concentrator and to borrow said money under the promise and agreement of said Charles D. McClure that he would consolidate the Broadwater group of mines, then owned by him, with the mines of said company, but which promise and agreement he has never kept, and there has thereby been a failure of consideration for the notes sued on by said Charles D. McClure, plaintiff in said action; that the said concentrator, after successfully treating the ores on the dump of said company as aforesaid, was thereafter used by said Charles D. McClure for his sole benefit in concentrating ores from his said Broadwater group of mines, under a contract of 75 cents per ton, which was a loss to said company, instead of being used to treat the ores from the company's mine as originally intended; that notwithstanding that the said concentrator was reasonably worth the sum of \$175,000, if the same were to be kept in operation in pursuance of the original plan, and notwithstanding, also, that the mining claims and property of the defendant company were, taken in connection with the concentrator, then and there reasonably worth the sum of \$500,000, and could have been worked and operated at a profit, all of which was well known to them, the said Charles D. McClure and L. S. McClure, acting in collusion for the purpose of cheating and defrauding the complainant and other creditors, as well as the minority stockholders of the defendant company, closed down the said concentrator, and failed and refused to open up the defendant company's mine, and at once instituted the aforesaid action, and levied upon and attached all of the defendant company's said property.”

The bill also alleges that in the year 1903 one Bartlett recovered a money judgment against the mining company in the district court of Montana for the county of Cascade, under which the ground upon which the first part of the mining company's concentrator was erected was sold, and “that the defendant herein, Charles D. McClure, and his brother, L. S. McClure, acting collusively and fraudulently as aforesaid, took no steps whatsoever to redeem said property of the company, or to protect the interests of the stockholders or creditors thereof,” but that on the 23d day of March, 1905, Charles D. McClure himself redeemed the property so sold, taking a deed therefor, and—

“that under and by virtue of the provisions of section 1236 of the Code of Civil Procedure of the state of Montana for 1895 the said Charles D. McClure, plaintiff in said action, would not have permitted this complainant or any other redemptioner to redeem from him, except by paying the amount so paid by the defendant herein as aforesaid, and also the amount of defendant's said judgment, to wit, \$86.180, with interest thereon from the date thereof; that this prejudice and damage to complainant has resulted because of said defendant's delay and laches in not having execution issued upon his judgment in the aforementioned action.”

The bill also contains the allegation that the McClures—

“were acting in collusion and in fraud of the rights of the complainant and other creditors of the defendant company when they created the indebtedness for enlarging the concentrator, when they closed down the defendant company's concentrator and failed and refused to open its mines, and when the aforesaid attachment suit of the defendant herein, Charles D. McClure, plaintiff in said action, was instituted and judgment by default taken after serv-

ice upon said L. S. McClure, and also when they delayed for five years to take any steps whatever to sell the property held under said attachment, leaving this property during all of said time in the custody of their said employé, John L. Tripp; that they also acted in collusion and for the same fraudulent purpose and design in making no reasonable effort to pay the said claim of George F. Bartlett, and in permitting the sale of said land and premises to satisfy his said judgment, and in effecting the redemption of said property in the manner aforesaid, to the great damage, loss, and injury of this complainant, and other creditors, as well as the minority stockholders of the defendant company; that by reason of all the acts aforesaid the said attachment lien and also the judgment in said cause should be held fraudulent and void as to this complainant."

We are unable to see that any of the alleged frauds constitute any valid reason for avoiding the judgment in favor of Charles D. McClure. There is nothing in the bill showing that the amount for which it was given was to any extent in excess of what was justly due McClure on the notes the company executed to him for the loan. Surely a court of equity will not undertake to annul a judgment rendered in an action at law, in the absence of facts showing that there was a meritorious defense to the action (*White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113), more especially when the attempt is not made until more than five years after the entry of the judgment at law, no excuse for the delay appearing. *Denton v. Baker*, 93 Fed. 46, 35 C. C. A. 187. If Charles D. McClure made himself personally responsible for the money the complainant subsequently loaned the mining company, complainant might have sued him therefor, and if it be true, as alleged, that he agreed with the mining company to consolidate with its mines the Broadwater group of mines owned by him, his alleged failure to keep that agreement might have given the mining company a cause of action against him, but is no ground for annulling a judgment in his favor based upon notes for money loaned at the instance of a subsequent creditor of the same debtor. Neither do we see how that result can be effected by the alleged closing down of the concentrator by the company, or the alleged failure of the latter to redeem that portion of the ground upon which the original concentrator was erected from the sale thereof made under the judgment given against the company in favor of Bartlett. We think the court below was right in holding that the facts alleged in the bill are insufficient to entitle the complainant to any of the relief sought.

The judgment is affirmed.

COLUMBIA CANNING CO. et al. v. HAMPTON et al.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1908.)

No. 1,422.

1. NAVIGABLE WATERS—SHORE LANDS—RIGHTS OF RIPARIAN OWNER IN ALASKA.

Under Act May 14, 1898, c. 299, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1412), extending the homestead laws to Alaska, which expressly provides that nothing therein contained shall be so construed as to authorize entries to be made, or title to be acquired to the shore of any navigable waters, a location of land on a shore under the soldiers' additional home-

stead scrip act does not give the proprietor any right in the land lying below the line of ordinary high tide.

2. INDIANS—LANDS—POSSESSORY RIGHTS IN ALASKA.

Act May 17, 1884, c. 53, 23 Stat. 24, extending the mining laws to Alaska, section 8 (p. 26) which provides that Indians or other persons shall not be disturbed in the possession of any lands "actually in use or occupation or now claimed by them," refers only to possession held at the time of its passage, and does not protect possession acquired since.

3. NAVIGABLE WATERS—RIGHTS OF RIPARIAN OWNER.

While the owner or locator of lands in Alaska which border on navigable or tidal waters has under the general law the right of access to such waters for the purpose of navigation, he has no right or title in the soil below high-water mark, and no right of possession which will support an action against an intruder for interfering with or obstructing him in the erection and use of a structure upon the shore below such high-water mark, unless it prevents or obstructs his access to the navigable waters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 246-249.]

4. FISH—PRIVATE RIGHT OF FISHERY IN PUBLIC WATERS—RIPARIAN OWNER IN ALASKA.

An owner or claimant of lands in Alaska which border on navigable waters, having no right to the shore lands, has no exclusive right of fishery in such waters nor to erect and maintain a fish trap either on the shore between high and low water mark, or in the adjacent deep waters to the exclusion of others.

Appeal from District Court of the United States for the First Division of the District of Alaska.

In Equity. This was an action in the court below brought by the appellee W. H. Hampton, as complainant, against appellants, as defendants, to restrain the latter from interfering with or obstructing the plaintiff in the use of the structure which he had commenced to erect for a fish trap at a point on St. Mary's Peninsula on the north shore of Lynn Canal, a navigable arm of the North Pacific Ocean in Alaska. Upon evidence taken before the court a final decree was entered in favor of the plaintiff. Defendants appeal.

R. W. Jennings, T. A. Marquam, and Lorenzo S. B. Sawyer, for appellants.

Jno. R. Winn and Newark L. Burton, for appellee W. H. Hampton.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The complainant alleges that on the 19th day of April, 1905, plaintiff entered upon and staked out and surveyed a piece or parcel of land on St. Mary's Peninsula, on the north shore of Lynn Canal, in Alaska. The land described in the complaint has for its southern boundary the meander line of the shore of Lynn Canal at high-water mark. The three other boundary lines, on the north, east, and south, are each 20 chains in length. It is alleged that at the time plaintiff entered upon said land the same was government land, unoccupied, unappropriated, and open to entry, bordering upon the navigable waters and extending down to the line of ordinary high tide of Lynn Canal, navigable water of the North Pacific Ocean; that said entry, staking out, and surveying were done by plaintiff with the intention of obtaining title to said piece of land from the Government

of the United States under what is known as "Soldiers' Additional Homestead Scrip Act," and it was then laid out and entered upon by plaintiff for, among other purposes, building and constructing out from the shore line of said claim into deep water in said Lynn Canal what is known as a fish trap for the purpose of catching salmon; that the location so selected by plaintiff for that purpose was an exceptional one, for the reason that the shore line above and below said location is precipitous and mountainous, and the plaintiff alleges that the waters of Lynn Canal up and down the shore in both directions from said location are so deep and the bottom so rocky that it is impossible to construct a fish trap and maintain or operate the same, and the waters at said point where plaintiff had commenced the construction of said trap abound in salmon, and the fish running in schools along the shore line can be caught in large quantities; that for the purpose of constructing a fish trap immediately in front of said claim so staked out plaintiff on May 9, 1905, engaged the services of a pile driver and obtained piles and piling, and commenced the driving of piles at or near the line of ordinary high tide abutting upon the property described, driving a row of piles the line of which would be at an angle of about 45 degrees with the shore line of said land so staked out, said piles being 11 in number, and placed at a distance of about 10 feet apart; that, after the driving of the 11 piles, work and operations were temporarily suspended, in order that the plaintiff might procure a raft of piles to complete the said trap; that plaintiff was then and at the time of the filing of the complaint ready to go ahead with the construction of said trap, and had all the necessary trap, web, hearts, pots, and spillers for the completion of said trap, and for the running and operation of the same; that favorable locations for fish traps of the kind and nature referred to are scarce and are of great value; and plaintiff alleged that he was entitled to the use of the shore line abutting upon the piece of property so entered by him for the purpose of landing his nets, operating seines, and removing fish from said trap, and for the landing of small boats, skiffs, and scows to be used in said fish business; that the waters in which said piles were driven are waters that had been theretofore unappropriated and unused by any one for fishing or any other purpose; that said waters constitute a common fishery in which prior rights are gained for the purpose of fishing by the first occupant on such ground, and that plaintiff was the first occupant on the same; that after plaintiff had staked out and surveyed the lands described, and procured the services of the pile driver and driven piles as alleged, while plaintiff was absent from the ground for the purpose of securing piles and piling for the completion of the trap, but was in possession of the premises by an agent and employé, defendants, through their agents, servants, and employés, entered upon the ground and tide lands and waters immediately in front of and abutting the land laid out and described as entered by plaintiff, and within a few feet of the southerly side of the line of piles so driven by plaintiff, and drove another line of piles, without the consent and against the will and express wishes of the plaintiff. It is alleged that, unless defendants are restrained by the court, they will proceed to complete their said piling, and will so finish and construct a trap that it

will cork the trap of the plaintiff, and prevent plaintiff from catching fish. The threatened injury to plaintiff is stated; and it is alleged that, unless the defendants are restrained from their threatened trespass, plaintiff will suffer irreparable damage. To this complaint the defendants interposed a demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action to entitle the plaintiff to the relief sought, or to any relief. The court overruled the demurrer. This action of the court is assigned as error.

Plaintiff's entry and location of the tract of land under the provisions of law relating to the acquisition of title through soldiers' additional homestead rights gave him no possessory right to the shore in front of or abutting upon such location. Act Cong. May 14, 1898, c. 299, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1412), "extending the homestead laws and providing for right of way of railroads in the District of Alaska, and for other purposes," provided specifically in section 1 that nothing therein contained should "be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said district." Plaintiff alleged in his complaint that his entry and location of the upland under the soldiers' additional homestead scrip act was for, "among other purposes, building and constructing out from the shore line of said claim into deep water in said Lynn Canal what is known as a fish trap," and in carrying out this purpose he "commenced the driving of piles at or near the line of ordinary high tide." This structure of piles which he designed for a fish trap was intended, therefore, to commence at the shore line of ordinary high tide, and to extend out into deep water. Plaintiff also alleged that he was entitled to the use of the shore line abutting upon the piece of property so entered by him for the purpose of landing his nets, operating seines, and removing fish from said trap, and for the landing of small boats, skiffs, and scows to be used in said fish business. The shore is that ground that is between ordinary high-water and low-water mark. *Shively v. Bowlby*, 152 U. S. 1, 12, 14 Sup. Ct. 548, 38 L. Ed. 331. Plaintiff's claim as alleged in his complaint, was therefore to occupy the shore between high tide and low tide abutting upon his upland location as a basis for the purpose of carrying on the fishing business, in connection with a fish trap extending out into the navigable waters of Lynn Canal. The plaintiff could acquire no possessory right, under the act of May 14, 1898, to occupy this shore for the purpose of carrying on the fishing business or for a fish trap, and he had no right of possession of such shore under the act upon which he could base an action against the defendants for interfering with or obstructing him in the use of such shore.

Act May 17, 1884, c. 53, 23 Stat. 24, 26, establishing a civil government in Alaska, provided, in section 8, for a land district in the territory, and extended the laws of the United States relating to mining claims to the district. It was further provided in section 8:

"That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in use or occupation or now claimed by them but the terms under which such persons may acquire title to said lands is reserved for future legislation by Congress."

The act clearly refers to the possession held at the time of the passage of that act by Indians and other persons in the District of Alaska, and it was such possession that was not to be disturbed. It did not provide for the protection of the possession of any lands by any person or persons who might acquire possession or make claim thereto after that date. *Heckman v. Sutter*, 128 Fed. 393, 395, 63 C. C. A. 135. The possession which the plaintiff alleges he acquired in April 1905, was therefore not a possession recognized or in any way protected by the act of May 17, 1884. The littoral right attached to plaintiff's homestead location entitled him to free access to the navigable waters of Lynn Canal, but not to build upon the shore or erect any structure reaching out into deep water so as to obstruct navigation. In *Gould on Waters* (3d Ed.) § 149, this right is stated as follows:

"But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. This right of access is his only, and exists by virtue and in respect of his riparian property. It exists in the case of tide waters, even where the shore is the sovereign's property, both when the tide is out and when it is in. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the Legislature."

In *Hardin v. Jordan*, 140 U. S. 371, 381, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, Mr. Justice Bradley said:

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States."

In *Shively v. Bowlby*, 152 U. S. 1, 58, 14 Sup. Ct. 548, 38 L. Ed. 331, Mr. Justice Gray, discussing this same question, said:

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force no title or right below high-water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

It follows from these authorities that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high-water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark. He may have, however, a right of action against an intruder who places ob-

stacles on the shore that prevent him from having access to the navigable waters; but that is not this case. The plaintiff does not charge that defendants' structure is a nuisance, or that the defendants are obstructing him in having access to the navigable waters of Lynn Canal. The charge is that defendants are erecting on the shore a structure of piles for a fish trap which will be an obstruction to a similar structure which the plaintiff had commenced to erect. This is not the statement of a cause of action under the general law relating to littoral rights, nor under any statute relating to the waters of Alaska to which our attention has been called.

There remains but one other question to be considered and that is plaintiff's right to take possession of the shore for the purpose of erecting a fish trap in the exercise of the public right of fishing. In support of this claim, portions of section 394 of 2 Farnham on Waters and Water Rights is cited as authority. The section refers to various circumstances and conditions under which fishing rights have been claimed in the waters of a number of states, and such claims sanctioned or denied by the courts, as shown by the cases cited. It would extend this opinion unnecessarily to discuss those cases cited by the author as supporting the text, which it is contended recognizes plaintiff's right as claimed in this case. It is sufficient to say that we do not find in the text of section 394 or any of the cases cited any authority for the right claimed by plaintiff to erect a structure on the shore or in the adjoining deep water for fishing purposes, with the right to exclude the defendants therefrom under the circumstances and conditions of this case. But, turning to section 375 of the same work, we find clearly stated the law applicable to this case. The author says:

"An exclusive right of fishery in the water adjacent to property is not one of the rights of the riparian owner. He can claim such right only when he owns the soil under the water, or the right has been expressly conferred upon him."

In support of this doctrine the author cites *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Arnold v. Mundy*, 6 N. J. Law, 4, 10 Am. Dec. 356; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. (Pa.) 71; *Skinner v. Hettrick*, 73 N. C. 53; *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722. The case of the *Pacific Steam Whaling Company v. Alaska Packers' Association*, 138 Cal. 632, 636, 72 Pac. 161, is also a case in point. It was there said by the Court:

"The right of fishery in the waters of the ocean, whether in the open sea or where the waters ebb and flow over tide lands, is a public right which may be exercised by any citizen. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, and cases there cited; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 338, 35 L. Ed. 428; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714. In its very nature the exercise of the right of fishing in the public waters of the ocean is not, and cannot be, exclusive. Its exercise, no matter by whom or for what length of time, is only the exercise of a public right. There can be no possession for the purpose of fishery of an area of land covered by the waters of the ocean that is at all analogous to an actual possession of a tract of upland which might give the possessor a right of action against a mere trespasser. One who exercises this public right of fishery in the sea does not by that act make himself a trespasser. We need not inquire to what extent the government—either federal or state—could give an

exclusive private right of fishery in such public waters. No such right is asserted here."

We are of opinion that the complaint did not state facts sufficient to constitute a cause of action, and that the demurrer should have been sustained. Decree reversed, with directions to the court below to sustain the demurrer and dismiss the complaint.

MISSOURI PAC. RY. CO. v. LARUSSI.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1908. Rehearing Denied May 6, 1908.)

No. 1,420.

1. DEATH—STATUTORY RIGHT OF ACTION FOR WRONGFUL DEATH—ENFORCEMENT IN FEDERAL COURTS.

A right of action for wrongful death, accrued under a statute of one state, may be enforced in a federal court in another having jurisdiction of the parties, at least where such statute is not contrary to the public policy of the state in which the action is brought, without regard to any special rule or statute of such state either authorizing or inhibiting actions in the local courts on causes arising elsewhere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 50.]

2. EXECUTORS AND ADMINISTRATORS—JURISDICTION TO APPOINT—DOMICILE OF DECEDENT.

A probate court, in appointing an administrator, is presumed to have been acting within its jurisdiction; and such presumption is not overcome by the fact that the decedent, shown to have resided in the state and county where the appointment was made for several years, was at the time of his death engaged on construction work on a railroad in another state, where he boarded and lodged during such work, or that an administrator was there appointed after his death.

3. MASTER AND SERVANT—INJURY TO SERVANT—PROOF OF NEGLIGENCE—EFFECT OF KANSAS EMPLOYER'S LIABILITY ACT.

Under the Kansas employer's liability act (Gen. St. Kan. 1889, § 1251), which as construed by the Supreme Court of the state relieves railroad employes, more or less exposed by their employment to the hazards of railroading, from the common-law rule of assumed risk from negligence of fellow servants, such an employe, injured or killed in a collision between trains while being carried by the company to or from his place of work as required under his contract of employment, stands in the same relation to the company as a passenger, and the happening of the collision is prima facie evidence of the company's negligence, and casts upon it the burden of proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 144-152, 894-906.]

4. DEATH—CONDITION PRECEDENT TO ACTION—NOTICE OF CLAIM.

The amendment of the Kansas employer's liability act, adopted in 1903, which provides that notice in writing of an injury sustained, "stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within 90 days after the occurrence of the accident," does not require that such notice should have been given by an administrator, suing for an injury which caused the death of his intestate, as a condition precedent to such action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 13.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For lower court opinions, see 155 Fed. 654.

The defendant in error, as administrator of the estate of Minanzio Arquilli, deceased, recovered judgment in suit against Missouri Pacific Railway Company, plaintiff in error, for damages for alleged negligence in causing the death of the intestate, and this writ of error is brought by the railway company to reverse such judgment. The injury and death occurred April 26, 1903, in Kansas, where the right of action, when death is so caused, was conferred by statute (paragraph 4518, Gen. St. Kan.; Taylor's 1889 Ed., c. 80, § 422), in conformity with the provisions of the so-called "Lord Campbell's Act"; and the suit was commenced in the United States Circuit Court for the Northern District of Illinois, upon averments of the citizenship therein of the defendant in error and his appointment by the probate court of Cook county, Ill., having jurisdiction thereof, as administrator of the estate of the deceased, and that the plaintiff in error was a Missouri corporation and citizen. The intestate, Arquilli, came to Chicago from Italy, about six years prior to his death, with his elder son, leaving his wife and four children in Italy, and making frequent remittances from Chicago, out of his earnings as a laborer, for support of his family. At the time of his death Arquilli was employed by the plaintiff in error as a laborer on trackwork in Kansas, and it is stipulated of record that he "was working, boarding, and lodging in Wilson county," where "some of his wearing apparel and ornaments of the person and earned and unpaid wages, not over \$50, were kept, all of which were taken possession of by W. H. Lake, administrator appointed by the county court of Wilson county, Kansas." The deceased, with about 40 other laborers, was in a caboose on a work train which was carrying them, as arranged by the railway company from their place of work, at the close of the day, to their lodging place, running with the cars in front of the engine and the caboose at the head of the train. An engine hauling a freight train, running upon the single track in the opposite direction, struck and wrecked this caboose and killed Arquilli. The testimony as to the circumstances of the collision is that furnished on behalf of the plaintiff below in meager statement of the fact as above mentioned, with various estimates of the speed of both approaching trains and mention of the further fact that the engine of the freight train passed over the wreckage of the caboose. No testimony was offered on the part of the defendant below, by way of explanation or traverse. On an issue raised by the defendant below, by special plea, that Arquilli was a resident of Kansas, and not of Illinois, at the time of his death, the court instructed the jury to find against such plea; and thereupon the issue of liability under the evidence was submitted, and the jury returned a verdict in favor of the plaintiff, with damages assessed at \$2,500.

Frank F. Reed, for plaintiff in error.

James Rosenthal, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The record in this case is comparatively brief, except in the assignment of errors, 51 in number. In the oral argument, however, all contentions for reversal were fairly embraced under four propositions, and reference to the various assignments in detail is not needful. We have considered all the questions raised, but confine the discussion to those advanced in the argument—with the third and fourth propositions grouped together—namely: (1) That the "action should have been dismissed because contrary to the public policy" of Illinois; (2) that it was error to instruct the jury to find in favor of the plaintiff upon the question (raised by

plea) of the intestate's residence; (3) that "no negligence of the defendant was established," either under the general rule applicable to such case of master and servant, or "within the terms of the Kansas fellow servant act."

1. The plaintiff recovered judgment for damages arising out of the injury and death of the intestate, in Kansas, caused by alleged negligence of the defendant in its operation of trains; and it is conceded, not only that the Kansas statute provided (in conformity with the Lord Campbell act) for recovery thereupon, but that like provision then existed in Illinois, as the law of the forum. Thus the alleged cause of action rests on the Kansas statute, and its creation thereunder is unquestionable, if the proof establishes actionable negligence. Objection is raised to its enforcement in the federal court, sitting in Illinois, upon the ground that the analogous statutory provision in Illinois above referred to (section 1, c. 70, 1 Starr & C. Ann. St. 1896; section 1, c. 70, Hurd's Rev. St. 1905) was qualified by an amendment of the succeeding section (section 2) in 1903—after the date of the injury and death in question—whereby the amount of damages recoverable was increased, and a proviso inserted "that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside the state." Hurd's Rev. St. 1905, c. 70, § 2. The contention is, in substance, that this proviso amounts to departure from the original statutory policy of the state, so that the provisions for the cause of action, in Kansas and Illinois, respectively, are inconsistent or nonconcurrent, and that such cause of action arising in the one state is not enforceable in the other, even in the federal court—citing *Texas & Pacific Railway Co. v. Cox*, 145 U. S. 593, 604, 605, 12 Sup. Ct. 905, 36 L. Ed. 829; *Northern Pacific R. v. Babcock*, 154 U. S. 190, 198, 14 Sup. Ct. 978, 38 L. Ed. 958; *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448, 18 Sup. Ct. 105, 42 L. Ed. 537.

The amendment referred to is without force in the case at bar, as we believe, irrespective of the question whether its terms authorize the interpretation sought, to bar suit upon a pre-existing cause of action. The general doctrine is established, as applicable as well to this statutory cause of action, that a liability is enforceable in the federal forum, having jurisdiction of subject-matter and parties, whenever "a right of action has become fixed and a legal liability incurred," either under the common law or under a state statute not penal in its nature. *Dennick v. Railroad Co.*, 103 U. S. 11, 18, 26 L. Ed. 439; 10 Notes U. S. Rep. 8; *Huntington v. Attrill*, 146 U. S. 657, 674, 13 Sup. Ct. 224, 36 L. Ed. 1123. As stated both in the *Cox* and the *Babcock* Cases, *supra*, cited by the plaintiff in error, this rule is one of general law and regarded as settled by the *Dennick* Case. Upon the death of the intestate, if caused as averred, the right of action accrued under the Kansas statute, and its enforcement in the trial court, in a suit there instituted, appears to be authorized under the above-mentioned doctrine, subject only to the jurisdictional requirements.

Whether such enforcement may be subjected to the further test mentioned in *Texas & Pacific Railway Co. v. Cox*, 145 U. S. 593,

605, 12 Sup. Ct. 905, 908, 36 L. Ed. 829—namely, that “the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced”—is a question not involved here for solution, as the terms of the statute in Illinois creating the cause of action are substantially identical with those of the Kansas statute. Both provide alike to remove the common-law bar and establish a cause of action for a tort (committed in the state) which causes death. The right of recovery in the case at bar rests alone on the statute of Kansas—is “governed by the *lex loci*, and not by the *lex fori*.” *Northern Pacific Railroad v. Babcock*, 154 U. S. 190, 199, 14 Sup. Ct. 978, 981, 38 L. Ed. 958. As the law of Illinois concurs in this policy in creating the cause of action, the test referred to is met, if applicable; and whether the remedial provisions in Kansas and Illinois are alike or unlike is immaterial under either view. *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448, 18 Sup. Ct. 105, 42 L. Ed. 537. Assuming, therefore, that jurisdiction of the parties was acquired, cognizance in the trial court of the subject-matter was governed by the federal law, with rights to be administered in conformity with the rule of general jurisprudence as above stated, unaffected by any special rule or statute of Illinois, either authorizing or inhibiting suit in the local courts upon such causes of action arising outside the state, except such statute of limitation as may be applicable thereto. So the proviso incorporated in section 2 of the Illinois statute, in reference to a foreign cause of action, which leaves unmodified the rule and policy of the Lord Campbell act adopted in section 1, is inapplicable to the case at bar, as we believe, whether this concurrence with the Kansas statute in creating like cause of action is needful or immaterial. Nor is it necessary to ascertain whether a like rule prevails in Kansas and Illinois as to enforcement of foreign rights of action.

2. The plaintiff below was both a citizen of Illinois and administrator of the estate of the deceased under adjudication and appointment in the probate court of Cook county, Ill.; and his authority to sue is challenged by pleas averring that the deceased was not “a resident of or domiciled in the state of Illinois” and had no property or effects therein, and that he was a resident of Kansas at the time of his death, and an administrator of his estate had been appointed and qualified in Kansas on May 25, 1903. Support for this plea rests alone on the stipulated facts that Arquilli (deceased) was employed in trackwork, “was working, boarding, and lodging in Wilson county,” where “some of his wearing apparel” and earnings were kept, and such belongings came into the possession of an administrator appointed in Kansas. It is undisputed, however, that he was theretofore living and working in Chicago for a considerable period, and made remittances from there to his wife in Italy; and his transfer to and presence in Kansas is fairly attributable to the engagement there as railroad laborer merely for the time being. The adjudication of the probate court of Cook county is presumptive of the existence of one or the other of the statutory grounds therefor, with either of which the Kansas facts relied upon are in no wise incon-

sistent, so that no evidence appears for impeachment of such proceedings in the probate court. We are of opinion that the trial court committed no error in its instruction to the jury accordingly.

3. The objection that actionable negligence was not established as the cause of death is urged under these contentions: (a) That the doctrine "*res ipsa loquitur*" is not applicable, because the intestate was not riding on the train in the relation of passenger, but as a servant of the company; (b) that the "Kansas fellow servant act" is not applicable to such case; and (c) that the plaintiff is not entitled to the benefits of such act, in any view, for want of notice of the injury, as required by an amendment in 1903.

The first-mentioned contention is untenable, as we believe, in the view in which it is pressed in the argument, namely, that the carrier is not liable for an injury to the servant thus riding to or from his work, without proof of negligence on the part of the carrier other than the mere fact of the collision of trains, although it be assumed that the statute of Kansas imposes liability for the negligence of fellow servants. Under the common-law rule of liability, the distinction is well settled by the authorities between the case of a passenger and that of a servant on the train, in the proof required to charge such liability for injury arising from collision or other accident, and that "the fact of an accident carries with it a presumption of negligence on the part of the carrier," in favor of the injured passenger, while no such presumption is raised in favor of the injured employé, who must prove affirmatively that the employer was negligent. This rule is distinctly recognized and stated as resting, in the one instance upon the breach of the contract to carry the passenger safely, and in the other upon the relation of master and servant, with its assumption by the latter of risk for negligence of fellow servants, the frequent cause of such happenings; hence the burden cast on the employé to prove negligence for which the master is chargeable in such case. *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361, and cases cited. Whether such rule of distinction is applicable to the case of an employé (as in the present instance), injured or killed by collision of trains, during his conveyance by the employer, pursuant to contract, from his place of work to a lodging place, in the absence of controlling statutory provisions, is a question not free from difficulty, in the light of the various authorities, but its solution is not deemed needful, in view of our conclusions upon the effect of the Kansas statutes referred to. If the employé thus in course of such conveyance under agreement with his employer, a common carrier, is relieved by the statute from the common-law rule of assumed risk for negligence of fellow servants in such service, no ground exists for the above-mentioned distinction, under that rule, between the obligation of the carrier to the employé thus carried and its obligation to the passenger under his contract for transportation. As stated in the early and leading case of *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 191, 10 L. Ed. 115, and frequently approved (3 Notes U. S. Rep. 810), the undertaking for carriage is "that so far as human care and foresight can go he will transport them safely." The *prima facie* breach arising from the accident is

alike in both cases, and thus "the happening of an injurious accident" (as in a passenger case, *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. Ed. 458), is "prima facie evidence of negligence on the part of the carrier," and casts the burden of proof upon the carrier "to show that its whole duty was performed."

We are satisfied, therefore, that proof of the collision unexplained authorizes recovery for the death of an employé so riding on the train, unless the Kansas statute is without force under the circumstances. The statute known as the "Employer's Liability Act," adopted in Kansas in 1874 (section 1, c. 93, p. 143, Laws 1874; paragraph 1251, Taylor's 1889 Compilation of General Statutes), reads as follows:

"Every railroad company organized or doing business in this state shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any person sustaining such damage."

This provision was upheld and construed, in *Missouri Pac. Ry. Co. v. Haley*, 25 Kan. 35, 53, to embrace "only those persons more or less exposed to the hazards of the business of railroading"; and it is plain that the employé in question was within such definition of service and exposure. The contention that he was not entitled to its benefits, because not engaged in the operation of the train, is without merit, under the denial of such distinction in *Union Pac. Ry. Co. v. Harris*, 33 Kan. 416, 418, 6 Pac. 571, and in subsequent decisions reviewed in *Missouri, K. & T. Ry. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875. While the last-mentioned decision is cited in support of the contention, it is applicable only for its recognition of the rule as above stated. Both facts and ruling are clearly distinguished in the opinion from the circumstances of the present case. In reference to the Iowa cases, cited as supporting the contention, it is sufficient to remark, as stated in *Union Pac. Ry. Co. v. Harris*, *supra*, that the statute construed in these recent decisions is materially changed from its original provision, adopted in Kansas, and the rulings thereunder furnish no aid for the construction sought here of the Kansas statute. We are impressed with no view which excludes the employé in question from the benefits of the act, either under its terms or in any interpretation by the Supreme Court of Kansas brought to our attention.

The remaining objection raised against such benefit is predicated on an amendment of this employer's liability act, adopted in 1903 (Laws 1903, p. 599, c. 393), in a proviso as follows:

"That notice in writing of the injury so sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within ninety days after the occurrence of the accident."

This proviso was adopted in March, to go into effect July 1, 1903, while the injury and death in question occurred April 26, 1903. Whether it would require notice to be given by a person injured prior to the date so fixed for the amendment to become operative needs no determination in the present case, under our view of its terms as inapplicable to recovery by representatives for an injury causing death. As notice cannot be given "by or on behalf" of the de-

ceased, and the representatives entitled to recover damages are not "the person injured," it is obvious that no provision is expressly made for notice in such cases. The purpose of the requirement in cases of alleged injury is well recognized—that timely notice be given to enable the party charged with negligence to investigate the facts, of which he may not otherwise be fairly advised—and the just inference is that notice of injuries causing death was not within the reasonable purpose and requirement of the proviso, and thus excluded from its terms. In any view of the requirement, however, the statute must be strictly construed, as no notice is needful at common law, and we are of opinion that the trial court rightly overruled the objections thereunder.

The judgment of the Circuit Court appears to be well supported and free from reversible error, and is affirmed.

GULF, C. & S. F. RY. CO. v. MOSELEY.

(Circuit Court of Appeals, Eighth Circuit. April 20, 1908.)

No. 2,541.

LIMITATION OF ACTIONS—TRESPASS—PERMANENT DIKES DEFLECTING CURRENT OF STREAM—ACTION FOR INJURY TO LAND—ACCRUAL.

Defendant railroad company built dikes along the bank of a river to prevent the current from washing away its roadbed. They were constructed by driving rows of large piles from five to seven feet into the earth, seven feet apart, planking between, and filling in with stone. The effect of such dikes was to deflect the current of the river against plaintiff's land on the opposite bank, portions of which were thereafter constantly being undermined and destroyed. *Held*, that the dikes were permanent structures, and that the damages for injury to plaintiff's land, both present and prospective, were recoverable in a single action, the right to bring which accrued at once when the dikes were completed and the injury commenced, and was barred in three years thereafter, under Mansf. Dig. Ark. § 4478 (Ind. T. Ann. St. 1899, § 2945), limiting the time for bringing actions for trespass upon lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 303-305.]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion of the court below, see 98 S. W. 129.

S. T. Bledsoe, for plaintiff in error.

A. Eddleman and J. F. Sharp, for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The defendant in error (hereinafter designated the "plaintiff") in the United States Court for the Southern District of the Indian Territory recovered judgment against the plaintiff in error (hereinafter designated the "defendant") for damages to her land in the sum of \$1,980, with interest at 6 per cent. from July 4, 1895, which judgment was affirmed by the Court of Ap-

peals of the Territory, to reverse which this writ of error is prosecuted.

In 1893 the plaintiff, under the homestead law, owned a tract of land of 137 acres, bordering on the east bank of the Canadian river, in Cleveland county, Oklahoma Territory. The defendant railroad company prior to 1893 had constructed its roadbed along the opposite west bank of said river on its right of way. The Canadian river, of varying width, at the point in question was perhaps one-half mile wide under high stage of water. The stream was somewhat treacherous in its flow, subject annually to high floods, which rendered its current, when veering to the bank, destructive to adjacent lands. The bank along the plaintiff's land, owing to the sandy soil formation, was quite susceptible to disintegration from the wash of the current; and owing to the low surface of the body of the land this condition existed throughout the tract, so that the caving in of large areas of the land was an apparent inevitable result when the current was sent against the east bank of the river. Prior to 1893 the normal flow of the current was toward and along the west shore line, opposite the plaintiff's land, with the result that it was constantly making inroads on the right of way of the defendant company, endangering its roadbed and tracks, until, as the defendant claims and the testimony tends to establish, it became necessary for the preservation of its roadbed to construct at the point in question a line of powerful dikes, with the view of throwing the current back to its wonted place as at the time of the construction of the road. The effect of these dikes, the plaintiff claims, was to so deflect the natural current of the river as to drive it forcibly against the opposite shore line, undermining and disintegrating the natural barrier of the bank protecting her land.

The petition avers that in September, 1893, about one month after the completion of the dikes, the current of the river so diverted washed away of the plaintiff's land about 5 acres, in 1894 about 10 acres, in 1895 about 75 acres, and in 1897 about 5 acres. This action was originally instituted on the 11th day of December, 1897, covering the damages sustained up to that time. On the 23d day of November, 1899, an amended petition was filed, claiming damages for the destruction of 5 acres of the land in 1898 and for damages to the remaining portion of the land. A demurrer to the petition having been overruled, the defendant answered, pleading, *inter alia*, the statute of limitations. The trial court denied the applicability of this defense. If in fact and law this plea was good, the discussion of other assignments of error is unnecessary. The statute of the state of Arkansas (section 4478, Mans. Dig. [Ind. T. Ann. St. 1899, § 2945]), applicable to the Indian Territory, declares that an action for trespass upon lands shall be brought within three years after cause of action accrues. As construed by the Supreme Court of Arkansas, the three-year period applies to an action for damages of this character. *St. Louis, I. M. & S. Ry. Co. v. Morris*, 35 Ark. 612.

The defendant's contention is that the dikes were permanent in construction, and under the allegations of the petition and the proofs *the injuries* to the plaintiff's freehold were obviously consequential,

and therefore the entire damages could have been recovered in one action, the cause for which arose as early as September, 1893, more than four years prior to the institution of suit, which was more than three years after the damage was done in 1894. The contention of the plaintiff is that the structure did not immediately involve the entire destruction of her estate, or its beneficial use, but the damages were apportionable from time to time, and therefore separate actions might be brought to recover damages for each successive injury as it occurred. That the structure of the dikes was permanent in character, and intended by the defendant to be so, hardly admits of debate. The evidence shows that the piles, at the large end, were from 14 inches to 2 feet in diameter, and were driven down into the earth from 5 to 7 feet, and were about 7 feet apart, with caps of heavy boards along the tops. These rows of dikes were boarded up with planks from 2 to 3 inches in thickness, and were filled in with smaller stones at the bottom, and on the top with stones so large that only three of them could be loaded onto a car, which was run out along the side of the dike, and the stones were lifted in place by derricks.

It may be true, in the abstract, that nothing constructed by the hand of man is indestructible. The razure of time and the process of erosion of the waters may wear away this structure. But in its relation to the practical affairs of human action, with which the law deals, this formidable, substantial work must be regarded as possessing in a high degree the quality of a permanent structure. The petition itself avers:

"That the natural and probable consequence of the erection of said dikes was to change the current and channel of said river, by turning the current over and against the east or left bank of said river and cutting and washing said bank away, and that they were built and maintained by the defendant for this purpose. * * * That the effect of said dikes was to, and they did, change the current of said river, and threw the same over and against the left or east bank of the same, and cut and washed the same away, and destroyed plaintiff's land, and changed the channel of said river, making the same much farther east than it ever was before the wrongful building of said dikes. That after and on account of the said building and maintaining of said dikes, at each successive rise in said river, the current was thrown over and upon plaintiff's land, and washed a portion of the same away, and destroyed it."

As if to aid this defense, the plaintiff's evidence was full and strong to the point that within the month succeeding the construction of the dikes the effect was to send the current of the river directly across to the east shore, where it began rapidly to eat away the bank, destroying 5 acres of the land, and in the following year 10 acres, and 1895 75 acres more. In the very nature of the situation, this deflection of the current to the east shore was constant—more destructive at intermittent periods of high water than at others. This characteristic of the river, its history shows, was as certain of manifestation as the coming of the seasons. The quality of the soil composing the ever-receding bank and the lay of the land rendered it so probable that this process of disintegration and work of destruction would proceed, unless arrested by human agency, as to have permitted a tangible estimation of the whole damage, within the admissibility of

the law, in a single action as early as September, 1893. Indeed, the plaintiff ought not to be heard to say that this ascertainment was too remote and speculative, for the reason that in this suit the trial court, under the evidence introduced by the plaintiff, permitted her to recover, not only damages for all the land hitherto destroyed by the alleged nuisance within the three years next preceding the institution of suit, but for the prospective damages to the remainder of her land yet left intact. Some of her witnesses testified that the residue of the land was rendered almost worthless, and that they would not pay the taxes thereon for its value.

It is to be conceded that there is much conflict in the decisions of courts touching the application of the statute of limitations to nuisances of this character. This conflict has arisen especially in reference to the erection of railroad embankments across creeks and swales, draining large areas of adjacent land without sufficient ditches or culverts to carry off the waters on occasions of freshets, whereby the land becomes flooded by overflows, damaging annual crops, and the like. In such case there is not infrequently present elements of uncertainty, such as the insufficiency of the openings in the embankments, which, the presumption may be indulged, the railroad might at any time in the future sufficiently enlarge, rather than submit in the first action to the recovery of all the consequential damages. In the second place, where the damage is to crops, it may depend entirely upon the possibility of the nonrecurrence of the overrunning flood in any given year, or the contingency of no crop being planted thereon, or being cultivated in a product subject to little damage from a temporary overflow. Such are not the conditions of the nuisance in question. The very purpose to be subserved by the defendant's permanent structure does not admit of any rearrangement to obviate sending the force of the current of the river against the plaintiff's shore line. Neither did the situation admit of the probability of the removal of the dikes in the future, as the burden of the defendant's proof was that they are indispensably necessary to prevent the destruction of its right of way, roadbed, and tracks. Moreover, the injury to the plaintiff did not consist in now and then flooding her land with water, damaging possible crops; but it was the destruction of the freehold by the constant eating away of the protecting bank—a process as certain to continue as the annual rainfalls and the flow of water in a large river, and a result reduced to a demonstration more than three years before this suit was instituted.

Gould, in his work on Waters (section 1416), speaking of permanent injury, says:

"In such cases the rule is altered for the sake of convenience, and but one action is allowed. The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant's act. Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, and bridges, permanent dams, and permanent pollutions of water, fall in this class."

Farnham, in his work on Waters and Water Courses (volume 2, § 586), discussing this question, says:

"The rule that every continuance of a nuisance is a fresh nuisance should have no application in case of permanent nuisances of this class, any more than it should be contended that a trespass upon the land and erection of a structure there should constitute a fresh trespass every moment it was continued, for the purpose of extending the time within which the action could be brought. And there are cases which have applied the true rule that, in case the dam is a permanent one, the limitation period will begin to run against the right of action to recover damages for the injuries from the time the dam was built. The rule that the statute of limitations is not available to defeat an action for damages for the flooding of land until the right to flood it has been acquired by prescription, since every continuance of the injury is a fresh nuisance, is a mere arbitrary rule, invented by the courts to meet the necessities of an apparently hard case. The difficulty seems to be that the courts have confounded two distinct rights of action. As was seen in a preceding section, it is held that ejectment will not lie to destroy an inchoate flowage easement. To avoid the effect of that ruling, the courts which apply the successive injury doctrine, in order to prevent the acquisition of an easement in real estate in less than the prescriptive period, hold that the nuisance is a continuing one, and that action may be brought at any time until the right to maintain it has been acquired by prescription. The latter holding seems illogical. If a permanent obstruction is erected, so that it casts water across the boundary line onto land of the upper owner, the injury is complete at the time the obstruction is erected and the injury done, and there is no ground for holding that a right of action for damages may be carried along for a period of 20 years, when the statute of limitations says that it shall be barred in 6 years."

This position is reinforced by Judge Brewer, in *Central Branch of Union Pacific Railroad Co. v. Twine*, 23 Kan. 586, 33 Am. Rep. 203.

As applied to the instance where the permanent structure is such as to injure the land itself of the adjacent proprietor, the Supreme Judicial Court of Massachusetts maintains that the whole injury, present and prospective, is recoverable in one action, maintainable immediately when the effect of the nuisance was first manifested. In *Fowle v. N. H. & N. Co.*, 107 Mass. 352, the plaintiff sued to recover damages for injury to the freehold resulting from the construction of the defendant's railroad along the bank of Mill river and across the bed thereof. The construction was of earth and stone, so as to obstruct and deflect the flow and current of the river, driving it against the embankment of the plaintiff's land, whereby it was undermined, and large portions thereof were destroyed, whereby the value of the residue of the land was diminished. The defendant pleaded a former recovery for the first damage resulting from the destruction of the land, which occurred beyond the statutory period of limitations. Gray, J., said:

"The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause. *Troy v. Cheshire Railroad Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Warner v. Bacon*, 8 Gray (Mass.) 397, 402, 403, 69 Am. Dec. 253. This case is not like one of illegally flowing land by means of a milldam, where the damage is not caused by the mere existence of the dam itself, but by the height at which the water is retained by it, according to the manner of its use from time to

time, as in *Staple v. Spring*, 10 Mass. 72, and *Hodges v. Hodges*, 5 Metc. (Mass.) 205. Nor is it the case of an action against a grantee who, after notice to remove it, maintains a nuisance erected by his grantor, as in *McDonough v. Gilman*, 3 Allen (Mass.) 264, 80 Am. Dec. 72, and *Nichols v. City of Boston*, 98 Mass. 39, 93 Am. Dec. 132."

When the case went back for retrial, the plaintiff again sought to recover by some additional evidence. After adverting to the fact that in the first action for damages there was probably included in the recovery prospective damages, Judge Colt said:

"The case at bar is not to be treated strictly in this respect as an action for abatable nuisance. More accurately, it is an action against the defendant for the construction of public work under its charter in such a manner as to cause unnecessary damage for the want of reasonable care and skill in its construction for such a remedy. The remedy is at common law; and if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and possible future injuries."

This doctrine is supported by the following cases: *Chicago & Alton Rd. Co. v. Maher*, 91 Ill. 312; *Van Schoick v. D. & R. Canal Co.*, 20 N. J. Law, 249; *Van Orsdol v. B., C. R. & N. R. Co.*, 56 Iowa, 470, 9 N. W. 379; *Henderson v. N. Y. Cen. Rd. Co.*, 78 N. Y. 423; *Rock Land Water Co. v. Tillson*, 69 Me. 255; *Powers v. Council Bluffs*, 45 Iowa, 654, 24 Am. Rep. 792; *Railway Co. v. Loeb*, 118 Ill. 214, 8 N. E. 460, 59 Am. Rep. 341.

The Supreme Court of Arkansas has applied the rule, under the statute of limitations, to the instance of permanent railroad embankments, whereby the natural waterflow is diverted so as to deluge, in times of freshets, adjacent lands. The pertinent decisions of that court are reviewed in *St. Louis, I. M. & S. Ry. Co. v. Anderson et al.*, 62 Ark. 360, 35 S. W. 791. The plaintiff had constructed a drainage ditch on his lands. The defendant railroad company built a permanent embankment across it, and obstructed the outflow of water, whereby in times of freshets the plaintiff's lands were flooded and the value diminished. The court affirmed the proposition that:

"Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance."

Further on the court said:

"In this case the obstruction of the ditch was permanent; that is, it will continue without change from any cause, except human labor. The effect of it was to restore the land drained to the condition in which it was before the ditch was dug. Its present and future effect upon the land could be ascertained with reasonable certainty. The damage was original, and susceptible of immediate estimation. No lapse of time was necessary to develop it. * * * As the law does not favor the multiplicity of suits, and all damages which will be sustained as a necessary result of the filling of the ditch in question and are recoverable could have been estimated at the time of such obstruction from the effect of it upon the value of the land, only one action should be brought therefor, and that within three years after the ditch was closed up."

The trial court, as in effect requested by the defendant, should have instructed the jury that the action is barred by the statute of limita-

tions. It results that the judgment of the Court of Appeals and of the United States Court for the Southern District of the Indian Territory must be reversed, and the cause remanded, with direction to grant a new trial, and for further proceeding in conformity with this opinion.

ARMOUR & CO. v. KOLLMEYER.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1908.)

No. 2,694.

1. CONTINUANCE—DISCRETION—ABUSE OF DISCRETION ONLY REVIEWABLE.

The granting or refusing of a motion for a continuance is intrusted to the judicial discretion of the trial court, and it is an abuse of that discretion only that is fatal error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 17, 18.]

2. SAME—CONTINUANCE OR ADMISSION OF STATEMENT OF TESTIMONY OF ABSENT WITNESS CONDITIONED BY DILIGENCE TO PROCURE IT—FACTS.

Proof of due diligence to procure the attendance or the testimony of an absent witness, and of facts which present reasonable grounds to believe that his attendance or evidence will be secured at the next term, is essential to the right of the moving party to a continuance or an admission of the statement of the witness' testimony as evidence.

Proof of reasonable, but futile, diligence to procure the attendance or testimony of a witness from March 20, 1906, until May 7, 1906, and from April 29, 1907, until May 3, 1907, without evidence of diligence between May 7, 1906, and April 29, 1907, is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 74-93.]

3. DAMAGES—PERSONAL INJURIES—PROXIMATE CAUSE—IMPOSSIBILITY OF ANTICIPATION OF EXTENT OF INJURY NO BAR TO RECOVERY OF COMPENSATION FOR PROBABLE INJURY.

There was substantial evidence that the collision of two one-horse teams, induced by the negligence of defendant's driver, caused a fright of the plaintiff that produced an impairment of nervous power, weakness and suffering.

Held, inasmuch as the natural and probable effect of such a collision, which a person of reasonable prudence would have anticipated, was some fright, shock, and injury, the fact that the extent of it was indeterminate and impossible of anticipation was no bar to a recovery of compensation for the actual pecuniary loss caused by the negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

4. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—CURING ERROR BY SUBSEQUENT INSTRUCTION—RULE—EXCEPTION.

The general rule is that, if inadmissible evidence has been received during a trial, the error of its admission is cured by its subsequent withdrawal before the trial closes and by an instruction to the jury to disregard it.

There is this exception to the rule: Where the evidence thus admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by an instruction of the court to disregard it, the judgment will be reversed on account of its admission, and a new trial will be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4178-4184.]

5. TRIAL—REFUSAL OF INSTRUCTION CONTAINING A SOUND AND AN UNSOUND PROPOSITION NO ERROR.

Where a request for an instruction contains two or more propositions of law, one of which is unsound, there is no error in a refusal to grant it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 660.]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

George B. Webster, for plaintiff in error.

W. R. Gentry (W. L. Bohnenkamp, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This writ challenges a judgment of \$4,000 against Armour & Co., a corporation, for damages on account of personal injuries inflicted on Kollmeyer, the plaintiff below, by the alleged negligence of one of its drivers. Kollmeyer alleged in his pleading that, as he was driving in a one-horse spring wagon slowly south along the west side of Fourteenth street in St. Louis, Mo., the defendant's driver drove its one-horse meat wagon rapidly into collision with his wagon, raised one side of it so that there was reason to believe, and the plaintiff did believe, that there was imminent danger that it would be overturned, and would throw him into the street and injure him; that he thereupon jumped to the street, where he struck with great force, and by reason of the force and shock of the collision and of striking upon the street he was greatly shocked and injured. The defendant answered that it was guilty of no negligence, and that, if the plaintiff sustained any injury, it was caused by his negligence. There was substantial evidence of these facts in support of the verdict, although some of them were not established by uncontradicted evidence. Fourteenth street extends from north to south, and Biddle street crosses it at right angles. The plaintiff was a contractor, and he was walking his horse, attached to a light spring wagon loaded with a dozen sticks of lumber, 2x4, 16 feet long, south along the west side of Fourteenth street, near its intersection with Biddle street, with the intention to go east on Biddle street. The defendant's driver was driving rapidly a horse attached to a wagon loaded with 1,200 pounds of meat east along Biddle street behind a stake wagon, with the intention to go north on Fourteenth street. There is a descending grade on Biddle street from the west to its intersection of Fourteenth street. There was a shed 12 feet high, which extended along the west side of Fourteenth street north from Biddle street, and obstructed the view of the former street from Biddle street west of Fourteenth street. As the stake wagon arrived at the intersection of the line of the west curb of Fourteenth street with Biddle street, the defendant's driver guided his horse along the north side of this wagon around the corner into Biddle street, so that one of the shafts of the wagon struck the west side of the plaintiff's spring wagon, raised it a foot or 18 inches, the plaintiff slid toward the east, was afraid his wagon would be overturned

and that the defendant's team would run over him, and he jumped to the ground, a distance of about 4 feet. Before this collision he had been a healthy man, and had earned \$6 per day. The shock of the collision and of his alighting upon the street produced traumatic neurasthenia, reduced his earning capacity about 50 per cent., caused him much suffering, considerable expense for medicines and medical service, and rendered it doubtful whether or not he would ever regain his former good health.

The case was called for trial on May 1, 1907, and the court denied a motion by the defendant to continue it upon the ground that its counsel was engaged in the trial of another case in another court. But that ruling will not be discussed, because the defendant was not prejudiced thereby, as its counsel was present throughout the trial, which was not commenced until May 3, 1907.

On the latter day the defendant made another motion to continue the case upon the ground that one Rombaugh, an important witness, was absent and could not be found. The defendant set forth in affidavits material testimony which the absent witness would give, if present, that a subpoena had been issued for him, and that diligent search and endeavor had been made to find him from April 29, 1907, until May 3, 1907. The fact also appeared, however, from evidence presented to the court, that the defendant had caused diligent search to be made for this witness from March 20, 1906, until May 7, 1906, had during that time caused subpoena to be issued for him and to be delivered to one Trimmer for service upon him, but that the witness had then moved from his former address and could not be found at that time. One of the errors specified is that the court below denied the motion for continuance based upon this showing, without requiring the plaintiff to admit that the witness would testify as stated in the moving affidavits. But the granting or refusing of a motion for continuance is intrusted to the judicial discretion of the trial court, and it is only when the record discloses an abuse of that discretion that an appellate court will reverse a judgment on account of its exercise. No such abuse appears from this record.

It is only when, in addition to the other requirements of section 685 of the Revised Statutes of Missouri of 1899, the moving party states facts in his affidavits which show the use of diligence to obtain the witness or his testimony, and facts which show reasonable grounds for belief that his attendance or his evidence will be procured at the next term, that a court is required by the statute and the practice to grant a motion for continuance, unless the opposing party will admit that the witness would testify as stated by the moving party, and that statement is received in evidence as his testimony. Rev. St. Mo. 1899, § 687. The defendant failed to comply with each of these requirements. The facts that it searched in vain for the absent witness from March 20, 1906, until May 7, 1906, and from April 29, 1907, until May 3, 1907, without any proof or statement that it made any effort either to find him or to serve him with a subpoena, or to take his deposition between May 7, 1906, and April 29, 1907, did not evidence due diligence to obtain him or his testimony, and did not fur-

nish reasonable grounds to believe that his attendance or his testimony would be procured at the next term of the court.

Counsel complain because the trial court refused to grant their request for a peremptory instruction in favor of the defendant. The evidence was conclusive that no break of any bone, no strain or tear of any muscle, no abrasion of the skin, and no external appearance upon the person of the plaintiff of any injury resulted from the collision or the jump. But there was substantial evidence that the collision and the jump caused fright and neurasthenia and a reduction of nervous power, which impaired the plaintiff's earning capacity and resulted in undue fatigue on slight exertion, in pain, in expense, and in a condition which rendered it doubtful whether or not he would ever recover his former health. There was substantial evidence that the fright was the real cause of the neurasthenia and its accompanying ills, and that it was impossible to separate the injury caused by the jump and by the alighting upon the street from the injury caused by the collision and the accident.

Counsel argue that the defendant was not liable for any damages in this case:

(1) Because the serious injury caused by the fright was not the natural or probable effect of the gentle collision which the defendant caused, and the defendant could not have anticipated such an injury. But the natural and probable result, the effect which a person of reasonable foresight would have anticipated from carelessly driving a horse and wagon loaded with 1,200 pounds of meat against the side of a light spring wagon loaded with pieces of 2x4's with such force as to raise one side of it a foot or 18 inches from the ground, was some fear of injury, some fright, some shock of the nervous system of the driver of the spring wagon, and its resulting injury, and the fact that the extent of the resulting injury was in its nature indeterminate and impossible of anticipation constituted no bar to a recovery of compensation for the actual pecuniary loss caused by the negligent act.

(2) Because the sole cause of the collision and the injury was fast driving, and the court below charged, and counsel insists, that fast driving is not of itself negligence; but, conceding the latter proposition, the conclusion does not follow that fast driving is never negligence under any circumstances. It may be the exercise of reasonable care to drive rapidly in the daytime along the public street, when the driver can see that the course he intends to pursue is unobstructed, and all other persons on the street can see where and in what way the driver intends to go; but it is not the exercise of reasonable care to drive rapidly along a public street in darkness, at a time when the driver knows that many other persons will probably be moving upon and across the street, or to drive so rapidly sharply around the corner of two public streets of a city that the driver cannot prevent collision with teams or pedestrians that are lawfully using the street upon which he enters. The defendant's driver was taking his team along Biddle street at a rapid gait. He knew that he intended to take it into Fourteenth street, and the plaintiff was ignorant of that purpose. He knew that his wagon was loaded, and that he could not stop his rapidly moving horse as quickly as he could have done if it had been with-

out a load. He knew that the shed on the corner obstructed his vision, so that he could not see from Biddle street what there was upon Fourteenth around the corner. In this state of the case the law imposed upon him the duty to exercise reasonable care to take his team into Fourteenth street at such a speed and at such a place that he could avoid a collision with and injury to all who were lawfully using the latter street. He might have exercised the requisite degree of care by driving along on Biddle street until he could see up Fourteenth street, and by then steering clear of plaintiff and others upon it. He might have exercised due care by sharply rounding the first corner with his team under such control that he could prevent it from colliding with unseen vehicles upon Fourteenth street. He pursued neither course. He blindly drove his horse so rapidly and sharply around the first corner that he could not avoid a collision with the plaintiff, who was driving slowly down Fourteenth street on the right side of the street, and he thereby failed to exercise reasonable care, although fast driving of itself may not be negligence.

(3) Because there was a fatal variance between the plaintiff's pleading and his proof, in that he counted upon physical injuries resulting from his jump and his alighting upon the street, and his only proof was of mental injuries caused by his fright. But the complaint contained averments that the collision was caused by the negligence of the defendant's driver; that it raised one side of the plaintiff's wagon, and caused him to believe, and would have caused a person of reasonable prudence in his situation to believe, that there was imminent danger that he would be thrown out and would be caused great bodily injury; that to escape such injury he jumped; that he struck the street "with great force and violence, and by reason of the force and shock of the collision of said wagons, and by reason of striking the street with such force and violence, plaintiff was greatly shocked and injured, and was injured in his back and spine, and his whole nervous system was permanently shocked, and he was made sick, sore, and weak, and caused to suffer great pain in his arms and limbs, and suffered great loss of sleep and severe spells of nervousness." The plaintiff sued for both the physical injuries caused by his jump and the mental injuries caused by the shock and consequent fright that the collision and the jump produced, and no more conclusive demonstration of that fact and no more complete answer to the defendant's claim of variance between the pleading and the proof could be made than the above quotation from the complaint and the statement of the evidence which has been made.

It is assigned as error that the court permitted the plaintiff and one of his witnesses to testify that the collision caused him to lose sexual power. In answer to a question by his counsel the plaintiff testified without objection that since the accident his sexual power was pretty nearly all gone. Defendant's counsel immediately moved to strike out the answer, because "not a matter of damages and not pleaded," and the court denied the motion. One of the plaintiff's witnesses, a physician, subsequently testified that the loss of sexual power is one of the symptoms of neurasthenia, and that upon a rational examination he discovered that was verified by the conditions in the

present case. At the close of the direct examination of the latter witness the plaintiff asked to amend his complaint by interlining an averment of the impairment of sexual power, and the court refused permission. The plaintiff then moved to strike out the evidence upon that subject, the court granted the motion, and the defendant excepted. At the close of the trial the court instructed the jury to disregard any evidence tending to show the loss by the plaintiff of sexual power. Conceding, but not deciding, that the evidence stricken out was inadmissible, how are the rulings which have been recited reversible error? The general rule is that, if inadmissible evidence has been received during a trial, the error of its admission is cured by its subsequent withdrawal before the trial closes, or by an instruction to the jury to disregard it. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Specht v. Howard*, 16 Wall. 564, 21 L. Ed. 348; *Union Pacific R. Co. v. Thomas*, 152 Fed. 365, 371, 81 C. C. A. 491.

There is this exception to the rule. Where the evidence thus admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by the instruction of the court to disregard it, the judgment will be reversed on account of its erroneous admission, and a new trial will be granted. *Waldron v. Waldron*, 156 U. S. 361, 381, 383, 15 Sup. Ct. 383, 39 L. Ed. 453; *Throckmorton v. Holt*, 180 U. S. 552, 567, 21 Sup. Ct. 474, 45 L. Ed. 663. There are two reasons why there was no reversible error in the rulings of the court under consideration:

In the first place, the fact of the plaintiff's impairment of power was proved, and was lodged in the minds of the jurors, in the absence of any error of the court. It was put in evidence in answer to a question which clearly disclosed the subject-matter, in the absence of any objection by the defendant. Thus the evil effect upon the minds of the jurors of the proof of the fact was wrought without any error of the court. It is true that immediately after the question was answered counsel for the defendant moved to strike the answer out, and the court denied the motion; but after another witness had testified to the fact, and before the case went to the jury, and before the plaintiff rested his case, the court struck out all evidence on this subject and instructed the jury to disregard it. The error of the court, if any, was not that it received the evidence, but that after the evidence had been received without objection it did not strike it out as soon as it should have done.

In the second place, the case falls under the rule, rather than under the exception. The objectionable evidence was withdrawn by the plaintiff himself, and the court told the jury to disregard it before the plaintiff rested. It was not before the jury when the case was argued to them, and at the close of the argument the court again instructed them to disregard it. The other evidence of injury in the case was sufficient to sustain the verdict for the amount of damages which the jury found. The jury could not have misunderstood the repeated instruction of the court to disregard the testimony here challenged, and the presumption is that they faithfully discharged their duty. Inasmuch as the fact challenged was lodged in the minds of the jurors in the absence of error, and the counsel who introduced it and the court

respectively requested and instructed the jury to disregard it, their erroneous delay of a few hours during the trial in the discharge of this duty was cured, and the case fell under the general rule, and not under the exception.

It is specified as error that the court refused to give to the jury the following instruction, which was requested by the defendant:

"The court further instructs the jury that the fact that the driver of defendant's wagon may have been on the left side of the street when the collision is alleged to have occurred is no evidence in itself of negligence on the part of such driver. The 'law of the road,' so called, that a driver must keep to the right, does not apply when one is crossing or turning into the street, or where the parties are driving in opposite directions and about to meet at the intersection of two streets. A disregard of this rule will not render the defendant liable in case of collision, if the plaintiff himself could have avoided the collision by the exercise of ordinary care on his part; and the mere fact that he was driving slowly at the time when the collision is said to have occurred (if such fact of slow driving has been proven) is no proof in itself that the plaintiff was in the exercise of due care upon his part."

Conceding, but not deciding, that this instruction correctly states the law of the road, its last clause was unsound, inapplicable to the facts of this case, and misleading. The plaintiff was approaching the intersection of two streets. He intended to take his team, which he was driving slowly along on the right side of Fourteenth street, east on Biddle street. He knew or anticipated that there were, or would be, other teams on the latter street. The requested instruction was that the fact that he was driving slowly at the time when the collision occurred was no proof in itself that he was exercising due care. His slow driving may not have been conclusive proof of due care; but was it not some proof, some evidence, of it? Even if the fact were conceded that slow driving is in itself no proof of reasonable care, are there not times when, places where, and circumstances under which, it is some proof, some evidence, of due care? The instruction is limited to the time, and hence to the place and the circumstances, of the collision. Was not the fact that, as the plaintiff was approaching on the right side of his street, and was close to the crossing of Fourteenth street by Biddle street, into which he intended to turn, he was driving his horse so slowly that he could control his speed and prevent his team from running against or upon another, some proof, some evidence, of the exercise of due care on his part? These questions must be answered in the affirmative, and for that reason, and because the last clause of the requested instruction suggests that proof of the plaintiff's reasonable care was essential to his case, when it was not, and the burden was on the defendant to prove his causal negligence, if any, this part of the instruction did not state the rule of law applicable to this case, and there was no error in the refusal of the court to give the entire instruction.

Where a request for an instruction contains two or more propositions of law, one of which is unsound, there is no error in a refusal to grant it. *United States v. Hough*, 103 U. S. 71, 72, 73, 26 L. Ed. 305; *Chicago Great Western Ry. Co. v. Roddy*, 65 C. C. A. 470, 476, 131 Fed. 712, 718; *Monarch Cycle Mfg. Co. v. Royer Wheel Co.*, 44 C. C. A. 523, 526, 105 Fed. 324, 328.

There were other specifications of error; but they were leveled at refusals to grant requests for instructions which, so far as they were warranted by the law, were given in legal effect in the charge of the court, or at rulings which were not erroneous for reasons which have been given in the discussion of the specific objections which have been reviewed.

There was no error of law in the trial of this case, and the judgment below must be affirmed.

It is so ordered.

UNITED STATES v. CLEAGE.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1908.)

No. 2,560.

1. COURTS—TRIAL TO DISTRICT COURT WITHOUT A JURY—REVIEW.

Where a cause in a District Court, which is triable by jury under Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), is by consent of the parties tried to the court without a jury, no question of fact or law decided upon or in connection with the trial is subject to re-examination in an appellate court.

2. SAME—REV. ST. §§ 649, 700, HAVE NO APPLICATION TO THE DISTRICT COURTS.

Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), which provide for waiving a jury and for the review of judgments rendered in causes where there is such a waiver, relate exclusively to trials in the Circuit Courts, and there are no similar provisions in respect of trials in the District Courts.

3. WRIT OF ERROR—CASE SUBMITTED UPON AGREED STATEMENT—REVIEW.

Where, in a cause otherwise triable by jury, the parties agree upon a statement of the ultimate facts, and not the evidence of them, and the case is then submitted to the court without a jury for its decision of the questions of law arising upon the facts so stated, the judgment may be reviewed upon a writ of error; and this, because there the facts are not determined upon a trial by the court, but by the agreed statement, which is spread at large upon the record, as a part of it, as would be a special verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3365.]

4. TRIAL—TRIAL TO COURT—CHARACTER OF FINDING—CANNOT BE BOTH GENERAL AND SPECIAL.

When the trial is to the court, under Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), the finding may be either general or special, but not both, and, where a general finding is made and judgment is rendered thereon, it cannot be regarded as superseded by a supposed special finding, which was not entered of record, is only found in the bill of exceptions, and does not purport to qualify or take the place of the general finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 929.]

(Syllabus by the Court.)

In Error to the District Court of the United States for the Eastern District of Missouri.

Edward P. Johnson, Asst. U. S. Atty. (Henry W. Blodgett, U. S. Atty., on the brief).

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. By an action begun in the District Court the United States sought to recover from Thomas Cleage certain taxes alleged to have accrued under Schedule A of the war revenue acts of June 13, 1898 (30 Stat. 448, 458; c. 448) and March 2, 1901 (31 Stat. 938, 942, c. 806 [U. S. Comp. St. 1901, pp. 2286, 2300]). The petition was in two counts, and its allegations were all put in issue by the answer. By consent of the parties the trial was to the court without a jury. It resulted in a general finding for the defendant on the first count, and for the plaintiff on the second, and judgment was entered accordingly. Afterwards a bill of exceptions was allowed and signed, setting forth all the testimony and other evidence, and also what is termed a special finding of the facts. No order was made vacating the general finding or substituting the special one in its place. The case is here upon a writ of error sued out by the plaintiff with the purpose of securing a re-examination of the questions of fact relating to the first count and of certain questions of law said to arise upon so much of the special finding as relates to that count. None of these questions, however, is open to consideration by us.

Save in certain excepted causes, of which this is not one, section 566 of the Revised Statutes (U. S. Comp. St. 1901, p. 461) prescribes that the trial of issues of fact in the district courts shall be by jury; and, when this mode of trial is waived in those courts, in a cause not of the excepted class, there is no provision of law for the re-examination in an appellate court of any question of fact or law decided upon or in connection with the trial. In these respects the law applicable to the district courts and to the review of their judgments is to-day precisely the same as was the law applicable to the Circuit Courts and to the review of their judgments before the enactment of the statute now embodied in sections 649 and 700 of the Revised Statutes (U. S. Comp. St. 1901, pp. 525, 570). Prior to that statute, the Supreme Court held in *Campbell v. Boyreau*, 21 How. 223, 16 L. Ed. 96, a case tried in a Circuit Court and otherwise much like this, that none of the questions sought to be presented, whether of fact or law, could be re-examined upon a writ of error, and, to show the grounds upon which the decision proceeded, it was said:

"Indeed, under the acts of Congress establishing and organizing the courts of the United States, it is clear that the decision could not be otherwise; for, so far as questions of law are concerned, they are regulated in their modes of proceeding according to the rules and principles of the common law, with the single exception of the courts in the state of Louisiana, of which we shall presently speak. And by the established and familiar rules and principles which govern common-law proceedings no question of the law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment, in the cause), unless the facts are found by a jury by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court.

"The finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court,

therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And, as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."

That decision was uniformly followed and applied by the Circuit Courts in the exercise of their appellate jurisdiction under section 633 of the Revised Statutes now repealed, over the judgments of District Courts (*Blair v. Allen*, 3 Dill. 101, Fed. Cas. No. 1,483; *Wear v. Mayer* [C. C.] 2 McCrary, 172, 6 Fed. 658; *Town of Lyons v. Lyons National Bank* [C. C.] 8 Fed. 369; *Doty v. Jewett* [C. C.] 19 Fed. 337; *Jackson v. United States* [C. C.] 21 Fed. 35); and it was reaffirmed and applied by the Supreme Court in *Rogers v. United States*, 141 U. S. 548, 554, 12 Sup. Ct. 91, 35 L. Ed. 853, a case tried in a District Court, wherein it was also held that sections 649 and 700, *supra*, relate exclusively to trials in the circuit courts, when a jury is waived, and that there are no similar provisions in respect of like trials in the District Courts.

It should be observed, however, that these cases do not impinge upon, but expressly recognize, another rule, equally well established, which is that where, in a cause otherwise triable by jury, the parties agree upon a statement of the ultimate facts, and not the evidence of them, and the cause is then submitted to the court, without a jury, for its decision of the questions of law arising upon the facts so stated, the judgment may be reviewed upon a writ of error; and this, because there the facts are not determined upon a trial by the court, but by the agreed statement, which is spread at large upon the record, as part of it, as would be a special verdict. *United States v. Eliason*, 16 Pet. 291, 301, 10 L. Ed. 968; *Stimpson v. Railroad Co.*, 10 How. 329, 346, 13 L. Ed. 441; *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265; *Suydam v. Williamson*, 20 How. 427, 434, 15 L. Ed. 978; *Burr v. Des Moines Railroad Co.*, 1 Wall. 99, 102, 17 L. Ed. 561; *Pomeroy v. State Bank of Indiana*, 1 Wall. 592, 602, 17 L. Ed. 638.

What has been said requires that the judgment be affirmed, but the result would be the same, even if, as seems to have been supposed, sections 649 and 700, *supra*, did not relate exclusively to trials in the circuit courts. Those sections do not provide for the re-examination of questions of fact, but only of questions of law; and the only questions of the latter class sought to be presented here relate to the sufficiency of the supposed special finding to support the judgment. That finding must be disregarded. Section 649 provides that the finding "may be either general or special," but it does not authorize both. *British Queen Mining Co. v. Baker Silver Mining Co.*, 139 U. S. 222,

11 Sup. Ct. 523, 35 L. Ed. 147; *State National Bank v. Smith*, 36 C. C. A. 412, 94 Fed. 605; *Corliss v. County of Pulaski*, 53 C. C. A. 567, 116 Fed. 289; *Streeter v. Sanitary District of Chicago*, 66 C. C. A. 190, 133 Fed. 124. Here there was a general finding, and the judgment was rendered on it. The supposed special finding was not entered on the record, is only found in the bill of exceptions, and even then does not purport to qualify or take the place of the general finding. The latter is therefore controlling. *Corliss v. County of Pulaski*; *Streeter v. Sanitary District of Chicago*, *supra*.

The judgment is affirmed.

KRAKOWSKI v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 140.

COUNTERFEITING—HAVING IN POSSESSION PAPER ADAPTED TO THE MAKING OF GOVERNMENT SECURITIES—STATUTE CONSTRUED.

The provision of Rev. St. § 5430 (U. S. Comp. St. 1901, p. 3671), making it a criminal offense for any person to have or retain in his control or possession "after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States," includes the having in possession without authority of the distinctive paper itself and of similar paper adapted to the making of government obligations and securities; and it is not sufficient to warrant a conviction thereunder to prove that defendant has in possession paper which might be used to make counterfeit obligations or securities.

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error to review a judgment of the Circuit Court, entered upon a verdict finding the plaintiff in error (defendant below) guilty of a violation of section 5430 of the Revised Statutes (U. S. Comp. St. 1901, p. 3671) of the United States.

Thomas & Oppenheimer (Leo Oppenheimer, of counsel), for plaintiff in error.

Henry L. Stimson, U. S. Atty., G. H. Dorr and Francis W. Bird, Asst. U. S. Attys.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The statute under which the indictment in this cause is framed provides that:

"Every person * * * who has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury, or some other proper officer of the United States, shall be punished," etc.

The indictment follows the language of the statute in stating the offense charged. It alleges that the Secretary of the Treasury had

adopted a distinctive paper for the obligations and other securities of the United States, and that the paper which the defendant had in his possession was "adapted to the making of such obligations and other securities aforesaid." Upon the trial the defendant requested the court to charge that it was necessary to show that the paper in question was adapted to the making of the obligations of the United States. The court refused to so charge, and charged as follows:

"When the statute says any similar paper adapted to the making of such obligations or other securities, contemplating the unauthorized making, the words 'adapted to the making of such obligations' would refer to being adapted to the purpose of making an unlawful or counterfeit obligation."

The charge was erroneous. It stated an offense not charged against the defendant. He was indicted for having in his possession paper adapted to the making of the obligations "aforesaid," which were the obligations of the United States. He was not indicted for having paper adapted to the making of unlawful securities. Counterfeit money is not an obligation of the United States.

The charge also involved a wrong construction of the statute. The statute contemplates the adoption by the Secretary of the Treasury of a distinctive paper for government obligations, and provides that it shall be unlawful, without authority from the Secretary or other proper official, to possess any paper similar to the distinctive paper and likewise adapted to the making of government securities. A paper which resembles the distinctive paper and also is of such character as to be suitable for the imprint of government obligations comes precisely within the terms of the statute.

We think, moreover, that the statute is broad enough to include the "distinctive paper" itself. In fact, it would seem that the primary object of the statute was to prevent persons from having in their possession, without authority, the distinctive government paper. It is of the same general nature and for the same purposes as the English statute (St. 24 & 25 Vict. c. 98, § 11), which provides that:

"Whosoever, without lawful authority or excuse * * * shall purchase or receive, or knowingly have in his custody or possession, any paper manufactured and provided by or under the direction of the * * * Commissioners of Her Majesty's Treasury, for the purpose of being used," etc., "shall be guilty," etc.

The designated paper is manifestly adapted to the making of the obligations and securities of the United States. It is "similar" to itself within the primary meaning of that term given by Webster: "exactly alike." And, even if the word were not given its ordinary meaning, we should prefer that result to the one which would leave out of the operation of the statute the very paper which apparently it was primarily designated to protect. Any uncertainty in the language of the statute undoubtedly arises from the desire of Congress to prohibit in one provision both the unauthorized possession of government paper and of a similar paper which could be used for printing government securities. The words "adapted to the making of such obligations" clearly refer to the obligations of the United States just before mentioned in the statute. There is no room for reading anything else into the statute and no basis for doing so. Nothing

indicates that Congress had in mind the possession of the many kinds of paper adapted to the making of counterfeit money, especially poor counterfeits. Moreover, the provision of the statute making the possession of the paper unlawful "except under the authority of the Secretary of the Treasury or some other proper officer" necessarily implies that some persons may be authorized to have it in their possession. And, while the Secretary might properly authorize certain manufacturers to have in their possession the government paper or paper similar and adapted to making government obligations, an official authorization of the possession of paper suitable for counterfeiting would be unique in character.

Judgment reversed, and cause remanded for a new trial.

McCOACH, Internal Revenue Collector, v. BAMBERGER et al.

(Circuit Court of Appeals, Third Circuit. March 9, 1908.)

No. 9.

INTERNAL REVENUE—LEGACY TAXES—EFFECT OF REPEAL OF STATUTE.

Legacy taxes under War Revenue Act June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465, as amended by Act March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946, 948 (U. S. Comp. St. 1901, pp. 2307, 2308), which were made due and payable one year after the death of the testator, are not collectible on the estates of persons who died within one year prior to July 1, 1902, at which time the repeal of said section 29 took effect (Act April 12, 1902, c. 500, § 7, 32 Stat. 97 [U. S. Comp. St. Supp. 1907, p. 649]).

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Jasper Yeates Brinton and J. Whitaker Thompson, for plaintiff in error.

Wm. Jay Turner, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

PER CURIAM. Counsel for both parties agreeing that the only question sought to be raised in this case is that which was presented in the cases of *McCoach v. Trust Co.* and *McCoach v. Norris*, 142 Fed. 120, 73 C. C. A. 610, we need only say that, as there has not in the meantime been any contrary decision of that question by the Supreme Court, we adhere to the position taken by us in the cases referred to, and accordingly the judgment in the present case is affirmed.

DEVELOPMENT CO. OF AMERICA v. KING.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 196.

1. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—IMPLIED CONDITIONS.

There is an implied, if not an expressed, condition in a contract of employment that it was made with some regard to the known capabilities of the employé, and such condition is to be taken into consideration in determining whether or not a service required of him is reasonable.

2. SAME—GROUNDS FOR DISCHARGE OF SERVANT—REFUSAL TO OBEY ORDER OF MASTER.

The refusal of a servant to obey an order of the master does not afford legal ground for his discharge unless such order was reasonable, and that question is one of fact for the jury, although the contract is in writing and requires him to perform such services as the master may direct, and the order is also in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 30-38.]

3. SAME.

A servant is bound to obey all lawful and reasonable orders of the master, and the motive of the master in giving such orders is immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 30-38.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error to review a judgment of the Circuit Court, entered upon the verdict of a jury in favor of the defendant in error, who was the plaintiff below. In the opinion following the parties are designated as in the court below.

Lester, Graves & Miles (H. S. Graves and Charles S. Yawger, of counsel), for plaintiff in error.

Putney, Twombly & Putney (Henry B. Twombly and Louis H. Hall, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This was an action to recover damages for an alleged breach of a contract of employment between the defendant and one Brainerd Rorison, who assigned his claim to the plaintiff.

These facts were not disputed upon the trial: Prior to June, 1901, Rorison had been the president of the defendant company. At that time he resigned his office and entered its employment under a written contract providing that he should "devote his entire time, service, and energy, in good faith and to the exclusion of all other employment, to the service of this company and to the performance of such labors as the board of directors, its officers or executive committee, may direct," for the term of three years at the salary of \$6,000 per year. For about two months Rorison rendered services under the contract at New York—where the defendant's offices were located—and then received a leave of absence without pay which continued until July, 1902, when he reported for duty. In response to his re-

quest that work should be assigned to him the defendant sent him an extended communication—the letter of July 22, 1902—directing him to proceed to a remote part of Mexico and to make an investigation of, and reports concerning lands which had been recently purchased by the defendant there. Rorison refused to obey this order upon the ground that it was unreasonable. He was thereupon discharged from his employment by the defendant, and brought this action upon the theory of a breach of contract by wrongful discharge.

Upon the trial the question of primary importance was whether the order was a reasonable one. Only in case it were reasonable did refusal to obey constitute good ground for dismissal. The trial court submitted the question whether the order was a reasonable one to the jury. The defendant assigns this action as error, and urges that the question of the reasonableness of the order was for the court to determine as a matter of law upon undisputed facts. This contention is evidently based upon the theory that, because the contract provided that Rorison should perform such labor as the defendant's officers might direct, he was bound to do whatever they chose to require, and consequently, the order being in writing and refusal to obey admitted, that there was no question of fact in the case. The defendant's contention is not well founded. While the contract contains no limitations with respect to the services to be required under it, conditions are implied with reference to which the law presumes that the parties contracted. Wood's Master and Servant (2d Ed.) § 83. Thus it must be presumed that the defendant employed Rorison with some regard to his known capabilities. A master has no right to require, and a servant is not bound to attempt, the impossible. A person known, when employed, to possess no technical skill, cannot be required, under pain of dismissal, to attempt a difficult engineering undertaking, even though he has agreed to do such work as his employer may direct. Upon similar principles the defendant has no right to require Rorison to make investigations involving the expenditure of money without making reasonable provisions therefor, in view of the conditions under which the investigations were to be made. The question, then, whether the order was reasonable, did not rest wholly upon undisputed facts. The capabilities of Rorison and the defendant's knowledge thereof were matters of fact to be found from the evidence. The nature of the work required could only be shown by testimony concerning the character of the country. The character of the country also indicated whether the provisions in the order for meeting Rorison's expenses were reasonable.

The facts being disputed, it was for the jury to determine whether the order was reasonable. The rule stated in Wood's Master and Servant (2d Ed.) p. 227, § 119, based upon early decisions, is not changed in any of the cases cited by the defendant:

"But, if the command of the master involves the doing of an unlawful act or is unreasonable, * * * the servant may refuse to obey without subjecting himself to dismissal upon legal grounds. But in all such cases the question of reasonableness is one of fact. * * *

"But a refusal or neglect on the part of the servant to obey a lawful and reasonable command of the master, which, in view of all the circumstances, amounts to insubordination, and is inconsistent with his duties to his mas-

ter, is a good ground for his discharge. But in determining this question reference must always be had to the contract, the nature and character of the business for which the servant was employed, and the command itself. What might be regarded as insubordination in a servant employed in one capacity might not be so regarded of a servant of another. Therefore the question is one of fact for the jury."

There was no error in the action of the trial court in submitting the question of reasonableness of the order to the jury.

The court, however, went further than this and, at the request of the plaintiff, instructed the jury as follows:

"If the jury find from the evidence that the officers of the company in giving Brainerd Rorison the orders contained in the letter of July 22, 1902, acted in bad faith, and for the purpose of getting rid of Brainerd Rorison, then his discharge, because of his refusal to carry out the said orders, was unjustifiable."

This charge was erroneous. A master has the right to give reasonable orders to a servant, even though he knows the work required is distasteful. He may give them with the expectation that the servant will leave his employment rather than obey. He may even give them for the express purpose, as stated in the charge, of "getting rid" of the servant. The motive of the master in giving the order is not important. Whether the order is reasonable is all important. A servant is bound to obey reasonable orders given in bad faith. He is not bound to obey unreasonable orders given in good faith.

As a new trial must be had by reason of this misdirection, we think it unnecessary to consider the other specifications of error.

The judgment is reversed.

WARD, Circuit Judge (concurring). I agree with the opinion of the court in this case, but go further, and think that a verdict should have been directed for the defendant. There was no dispute about the facts connected with the order given to the plaintiff to go to Mexico, his refusal to go, and his discharge by the defendant. These facts were all evidenced in written communications. It seems to me that the order to the plaintiff to go to Mexico and report on the company's property there was clearly within the contract of employment and reasonable. Most of the things which he was required to do after arrival involved reports as to the condition of its property which it was very natural for the defendant to want and which any intelligent person could make. If the plaintiff was not qualified to do some of these things or was not sufficiently equipped by the defendant to do them, he could not have been lawfully discharged for not doing them. The question of the reasonableness of the order in respect to these particulars would arise only if the defendant had discharged the plaintiff for not performing them, but he was discharged for refusing to go to Mexico at all, and I think there was no justification for his refusal.

ROWLEY v. J. F. ROWLEY CO.

(Circuit Court of Appeals, Third Circuit. May 1, 1908.)

No. 44.

1. TRADE-NAMES—USE OF NAME—FRAUD.

While every man is entitled to use his own name in connection with his business, equity will not permit its use in such a manner as to perpetrate a fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 84.]

2. SAME—INJUNCTION—SCOPE OF RELIEF—EXPLANATORY DESCRIPTION.

Complainant's president, having built up a business in the manufacture of artificial legs under his own name, which were widely known as "Rowley" legs, transferred his business and good will to complainant, after which defendant, whose name was also Rowley, embarked in the same business, and advertised himself as manufacturing "Rowley" artificial legs. *Held*, that an injunction restraining defendant from any use of the name "Rowley" in the manufacture of artificial limbs was too broad, and should have been limited to the use of the name without some explanation which would prevent deception.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 84.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 154 Fed. 744.

John H. Roney, for appellant.

Frank Ewing, for appellee.

Before MOODY, Associate Justice of the Supreme Court, and DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The appellee was complainant and the appellant was respondent in a suit in equity to restrain unfair competition in the manufacture and sale of artificial legs. The case was heard upon pleadings and proofs, and thereupon the decree now appealed from was entered, as follows:

"And now, November 13, 1907, this cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that a perpetual injunction be granted in this cause against the said defendant, his agent, employes, servants, or by any one acting in his behalf, restraining him and them from making and selling any artificial limbs in imitation of the goods made and sold by the plaintiff in which the dress, covering, or appearance is such that it would likely deceive the public or prospective purchasers, from using as samples in selling goods any of the plaintiff's make of goods or any goods so made in imitation of plaintiff's goods as would deceive the public or prospective purchasers; from mailing letters or circulars such as would deceive the ordinary purchasers into believing that the defendant's goods were the plaintiff's goods; from the use of the name 'Rowley' with or without initials in any manner whatsoever in the manufacture or sale of artificial limbs, or doing any other thing whatsoever that would tend to confuse the general public or prospective purchasers into believing that the goods made or sold by the defendant were the goods of the plaintiff. * * *"

When the cause came on for argument here, the appellant's counsel withdrew all objections to this decree other than that (as averred) there

was error in its award of an injunction restraining the defendant "from the use of the name 'Rowley,' with or without initials, in any manner whatsoever, in the manufacture or sale of artificial limbs"; and the validity of this single objection is the only matter now for determination.

The right of every man to his name is indisputable, though equity will not permit its use in such manner as to compass a fraud. No one, it is true, should be allowed so to employ it as to convey to the public the notion that his goods are the goods of another; but in completely depriving this appellant of the use of his own name we think the court below went too far. The rights of the two parties ought to have been reconciled by allowing the use but requiring it to be accompanied by an explanation which would avoid deception, "so as to give the antidote with the bane." *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. et al.*, 28 Sup. Ct. 350, 52 L. Ed. —. The defendant below has a right to carry on the business of manufacturing artificial limbs in his own name, and, though the abuse of that right must be prevented, its exercise should not be absolutely prohibited. *Croft v. Day*, 7 Beav. 84. We are not unconscious of the difficulty there may be in prescribing the precise terms of the explanation which, in view of all the circumstances, should be attached to the appellant's use of the name "Rowley," but it is a difficulty that, in the first instance at least, can best be dealt with (after a further hearing, if desired) by the court below; and the solution of which may be aided, we think, by consideration of the cases of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, *Hygienic Fleeced Underwear Co. v. Way*, 137 Fed. 592, 70 C. C. A. 553, and especially *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, supra.

Solely upon the ground that there was error in restraining the appellant from using his own name "in any manner whatsoever," instead of "allowing the use, provided that an explanation is attached," the decree of the Circuit Court is reversed, and the cause will be remanded to that court for further proceedings to be there taken in accordance with this opinion.

THE MONTEREY.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 194.

1. COLLISION—STEAMER AND PILOT BOAT—RULES GOVERNING NAVIGATION.

A steamer and a pilot boat which have agreed to come to a standstill, so that the pilot boat's yawl may bring a pilot to the steamer, are not navigating on independent courses, and the statute creates no presumption that one is the privileged and one is the burdened vessel, and defines no course of navigation to be followed by either. It is a case of special circumstances in which the vessels are co-operating in an agreed maneuver, and each is bound to act prudently toward the agreed end.

2. SAME—NEGLIGENT NAVIGATION—MUTUAL FAULT.

The sinking of a schooner pilot boat at sea in the night by being run down by a steamer on board which she had agreed by signal to put a

pilot held due to the fault of both vessels, neither of which was properly attentive to the movements of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 52.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 153 Fed. 935.

Carter, Ledyard & Milburn, Edmund L. Baylies, and W. J. Taylor, for appellant.

Wing, Putnam & Burlingham and Harrington Putnam, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. A collision occurred about 4 a. m. December 15, 1906, between the schooner-rigged pilot boat Hermit and the steamer Monterey, after an agreement had been reached between the vessels that a pilot should be received on the steamer's port side. The steamer struck the starboard side of the pilot boat about amidships nearly head-on, causing her to sink in about five minutes, all on board being saved by the yawl.

The Hermit while cruising on her station, with a fresh breeze from the southeast, was hove to on her starboard tack heading E. by S., with her masthead light showing all around the horizon and her side lights burning, but screened. About 3:30 a. m. she discovered the masthead light of a steamer to the southward and eastward, and immediately began to show her torch. The steamer answered with a blue light, and the Hermit wore around to the northward until she got on a course S. by W. $\frac{1}{2}$ W., when she uncovered and showed red light to the steamer. In the meantime the steamer's red light and a ladder light on her port side had become visible. After holding this course for about seven minutes, the Hermit again wore around to the northward on a hard aport wheel, which shut out her red light from the steamer, and, as the booms jibed over, she uncovered her green light, and maintained a course approaching the course of the steamer for four or five minutes, showing her masthead and green lights, during which time almost all her crew were engaged in launching the yawl on her port side with her sails between them and the steamer. The Monterey, coming up the coast on a N. by E. course, saw the pilot boat's torch about 3:30 a. m., answered with a blue light, and gradually hauled in to a N. NW. course, which she held steadily for about 10 minutes before the collision. She saw the red light of the pilot boat and no other light until suddenly her green light appeared close aboard on the port bow. Seven minutes before the collision she was proceeding at full speed of 10 knots and at 4:05 on seeing the green light slowed, and at 4:06 went full speed astern, and put her helm hard aport, the collision occurring between that time and 4:08, when her engines were stopped. The pilot boat attributes the collision to a rapid change of course by the steamer under a starboard helm, while the steamer attributes the collision to the attempt of the pilot boat to cross her bows, and to her failure to show proper lights. No signals of alarm were given by either vessel to the other, and it is evident that neither discovered the prox-

imity of the other until the collision was inevitable. The district judge found the pilot boat solely at fault, and dismissed her libel.

It is difficult to imagine how such a collision could have occurred without the fault of both vessels; for vessels sailing on courses the steering and sailing rules seek to prevent collisions by defining one as the privileged vessel and requiring her to keep her course and speed and one as the burdened vessel and requiring her to keep out of the way. In a collision between such vessels, the burdened vessel must be held at fault, unless the privileged vessel has violated her statutory duty. But a steamer and a pilot boat which have agreed to come to a standstill so that the pilot boat's yawl, may bring a pilot to the steamer are not navigating on independent courses at all. The statute creates no presumption that one is the privileged and one is the burdened vessel, and defines no course of navigation to be followed by either. It is a case of special circumstances. The vessels are co-operating in an agreed maneuver, and each is bound to act prudently toward the agreed end. In this case, as the pilot boat intended to come to a stop about a mile ahead and on the port bow of the steamer, it is evident she could not have been watching the steamer's movements. On the other hand, if the steamer had observed the pilot boat, she would have come (as it was her duty to do) to a stop or to a very slow speed at a safe distance from her.

The pilots testify that their masthead light was burning, and continued to burn until it was submerged. As they are compelled by law to carry this light, and it is their distinctive sign, on the display of which their living depends, and as it shows all around the horizon and can be seen from any part of the deck, we find that it was set and burning. There is no dispute that the green light was burning, and the pilots testify that it was uncovered as soon as in wearing around the booms jibed over so that it would be visible to the steamer. This was a natural thing to do, and we find it was done. The diagram submitted by the claimant of the movements of each vessel for seven minutes before the collision shows that the green light would have been visible to the steamer for more than three minutes before the collision. Both these lights should have been seen by those on the steamer, and would, if seen, have advised them of what the pilot boat was doing. We are confirmed in this conclusion about the pilot boat's lights by the very unsatisfactory testimony on the subject from the steamer. In the first place, no one of the witnesses examined from the steamer saw the pilot boat's masthead light at all, nor the green light until the collision was inevitable. Nor did anyone see her torch light, except the second officer, who says he saw it twice, and the master, who saw it half a dozen times. Giacche, the lookout on duty from midnight to 4 a. m., saw the red light 10 to 15 minutes before he left the watch on the port side, and no other light at all. Ranier, who relieved him at 4 a. m., saw the red light and no other light. Stuart, the quartermaster on duty at the wheel, says the pilot boat was reported at a quarter of 4, and the only light he saw was the green light a little on the port bow, not over a ship's length away. Van Sicklen, who relieved him at 4 a. m., says he saw the red light on the port side about two minutes to 4, and then the green light. Korn, third officer, on watch on the bridge

from midnight to 4 a. m., saw the pilot boat's torchlight about 3:35, afterwards saw the red light, and at eight bells lost the red light. Banvard, second officer, who relieved him at 4, saw the green light, and no other. Smith, the master, who had been on duty for nine hours, saw the torchlight about 3:30, and half a dozen torches in all; saw the red light and then lost it; next saw the green light about the same bearing as the red light, on the port bow, just before collision. Mackie, second assistant engineer, in charge until 4 a. m., got a full speed bell 3:52, slow 4:05, when he went up on the main deck, and saw the green light about a ship's length away on the port bow. Mehlman, first assistant engineer, relieved Mackie at 4:05, got full speed astern 4:06 and stop 4:08. The entries in the ship's logs give confirmation of the negligence of those on the steamer.

The scrap log states:

- "3:50. Full ahead; pilot boat on port bow showing red light.
- "4:00. Slow.
- "4:05. Pilot boat No. 7 showed a green light; put both engines full speed astern."

The ship's log states:

- "3:50. Full speed ahead.
- "4:00. Slow; pilot boat on port bow showing red light.
- "4:05. Pilot boat 7 showed a green light; wheel hard aport and both engines full speed astern."

The engineer's log states:

- "3:52. Full speed. 4:05, a. m. slow bell; full astern 4:06; stop 4:08."

It will thus be seen that nothing whatever was said either in the scrap or the ship's log about any failure of the pilot boat to show her masthead light or about any time during which all lights disappeared, upon which circumstances the steamer's witnesses laid great stress. The ship's log reads as if the red light had not been seen before 4, whereas the scrap log shows that it had been seen at 3:50, and as if the engines had been slowed immediately on seeing the red light (as they should have been), whereas the scrap log shows they were not slowed for 10 minutes after. The engine room log shows that, instead of going from slow ahead at 4 to full speed astern at 4:05, the engines were first put at slow 4:05, and full speed astern 4:06, the loss of a minute when collision must have been inevitable.

This collision took place just about the change of the watch, and the conclusion is irresistible that those on board the steamer who ought to have been diligently observing the pilot boat were not doing so.

The decree is reversed, with costs, and, both vessels being held at fault, the District Court is directed to enter a decree in favor of the libelants for half damages, with an order of reference.

MORSE DRY DOCK & REPAIR CO. v. SEABOARD TRANSP. CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 200.

1. CONTRACTS—DEFAULT IN COMPLETION OF WORK—PROVISION FOR LIQUIDATED DAMAGES.

A provision in a contract for making alterations in a ship for liquidated damages for failure of the contractor to complete the work by the time fixed is not waived nor modified by a further agreement for changes in the specifications or extra work not necessarily requiring additional time, and when none was at the time asked or provided for.

2. SAME—CONTRACT FOR ALTERATION OF VESSEL—EFFECT OF OWNER'S DELAY IN FURNISHING MACHINERY.

Under a contract for making alterations in a vessel containing a provision for the payment by the contractor of liquidated damages for each day's delay in completion of the work beyond the time fixed, and which required the owner to furnish certain machinery to be installed, where it was furnished so late that the contractor could not have completed the work in time, the owner cannot insist on a strict enforcement of the contract by claiming that its own default made no difference, but the contract time for completion must be treated as extended for a sufficient length of time to permit the installment of the machinery after it was furnished, even though the contractor could not have installed it before if it had been delivered in time, and damages can be recovered only for delay beyond such extended time.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 154 Fed. 90.

Armstrong, Brown & Boland and P. M. Brown, for appellant.

Rumsey, Sheppard & Ingalls, Melville E. Ingalls, Jr., and John S. Sheppard, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The respondent desired certain alterations made in its ship, the John A. Briggs. It accordingly prepared specifications of the work required and sent them to the libelant. The libelant responded with the following proposal dated September 5, 1906:

"We hereby agree to faithfully carry out and complete all the alterations and repairs to ship John A. Briggs, as set forth in specifications dated New York, August 30th, 1906, and to abide by all the conditions expressed or implied therein for the sum of eight thousand five hundred and ninety-six (\$8,596) dollars, and to complete the work in thirty-five (35) running days from the time of delivery of the ship at our yard, or pay to her owners, the Seaboard Transportation Company, as liquidated damages and not as penalty, the sum of fifty dollars (\$50) per day for each and every day during which completion shall be delayed."

The respondent accepted this proposition, and the ship was delivered on September 7, 1906. On September 16, 1906, the parties agreed to modify the contract by installing hawse pipes in place of the hoisting gear and anchor tables required by the specifications at an additional cost of \$128. The respondent also ordered certain extra work amounting in the aggregate to \$661.98. According to

the terms of the contract the work should have been completed on October 12, 1906. It was not in fact completed until November 15, 1906—34 days thereafter. The respondent deducted from the libellant's bill \$1,700—being the liquidated damages stipulated in the contract—\$50 per day—for the 34 days' delay. And the only matter in controversy here is whether the respondent is entitled to these liquidated damages.

While admitting the delay, the libellant urges two reasons why the liquidated damage clause should not apply: (1) The contract was changed. (2) The respondent failed to fulfill its part of the contract. The only change made in the contract was in substituting the hawse pipes for the hoisting gear. This change was unimportant, and it is manifest that the parties in making it did not intend to modify the time provision in the contract. The libellant, having agreed to make the change without requiring additional time, cannot now urge it as an excuse for the delay. The extra work ordered might have been done at the same time as the contract work and involved no delay in the latter. And the fact that this extra work was done in no way relieved the libellant from its obligation to complete the vessel within the stipulated time. But the question whether the respondent fulfilled its part of the contract and is in a position to claim damages for the delay is a more serious one. It was the duty of the respondent to furnish the windlass to be installed in the vessel. The installation of the windlass required about eight days' time. And yet the respondent only furnished it on October 11, 1906—the day before the time limited for the completion of the work. Whatever may then have been the state of the work it was obviously impossible to complete it in time.

The respondent urges, however, that its delay was immaterial—that a strike at the libellant's yards, and not the nondelivery of the windlass, was the real cause of the delay. The respondent also points out that the boiler to be connected with the windlass was not obtained by the libellant until some 10 days after the delivery of the windlass. And so the respondent urges that the delayed delivery of the windlass made no difference—that the same delay would have taken place had it been delivered earlier. The respondent's contention is based upon an assumption which it had no right to make. The respondent, seeking to enforce the damage clause in the contract, must show that it lived up to the contract itself. It cannot assume that its failure to perform its obligations made no difference. It is impossible to say what might have happened had the conditions been different. It cannot be said that, if the libellant had received the windlass earlier, it would not have made greater efforts to hasten the work. The respondent seeking to enforce the contract cannot recover damages for delay which may have been occasioned by its own default.

Had the failure of the respondent to deliver the windlass been the cause of all the delay—had the work been waiting for the installation of the windlass when it was delivered—the default of the respondent would undoubtedly have constituted a complete waiver of the time provision in the contract. As clearly stated by the New York Court of Appeals in *Daunat v. Fuller*, 120 N. Y. 558, 24 N. E. 816:

"It is a well-settled rule that, where one party demands strict performance as to time by another party, he must perform his part, and a failure on his part of the conditions which are required in order to enable the other party to perform on his part, and a failure on the part of the party demanding performance to do the preliminary work required to enable the other party to complete the work within the time limit, operates as a waiver of the time provision in the contract."

This case, however, does not come strictly within the rule. The delay of the respondent in delivering the windlass did not prevent performance by the libellant of those things required by the contract not connected with its installation. Had the libellant done its part, the work should have been completed within about eight days after the windlass was delivered. But the libellant took some 26 days more. For this additional delay the respondent can in no way be said to be responsible. It was undoubtedly caused by the strike. Consequently, while the circumstances are not such that the delay of the respondent operated as a waiver of the time provision in the contract, it did operate as an implied agreement extending the time sufficiently to permit the installation of the windlass. The case should follow the decision of the Supreme Court in *McGowan v. American Tan Bark Co.*, 121 U. S. 600, 7 Sup. Ct. 1329, 30 L. Ed. 1027:

"The contract bound the defendants to supply the machinery, and set it up on the boat within 60 days. It is too plain for argument that the failure of the plaintiff to have the boat ready would excuse the defendants from strict compliance with this part of the contract. If the defendants proceed thereon under the contract, they were bound to complete the work within the time contemplated by the original agreement, and such additional time as was lost by the delay in the construction of the boat. There is nothing to show that the machinery could not have been erected within 60 days after the boat was ready to receive it. The parties treated the contract with full force except as to time within which it was to be performed, and the work was done, and payments made under the contract as thus extended in time."

Of the delay of 34 days in the completion of the work, only 27 days are attributable to the default of the libellant. Consequently of the \$1,700 retained by the respondent it has no right to more than \$1,350.

The decree of the District Court is reversed, with costs, and the cause is remanded, with instructions to enter a decree in favor of the libellant for \$350 damages and costs.

THE WINNIE.

THE EDITH BEARD.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 228.

COLLISION—TUGS WITH TOWS MEETING—MUTUAL FAULTS.

The tug Beard, passing eastward through the channel between Shooter's Island and Staten Island with a dredge in tow on a hawser, and the tug Winnie, passing westward with two canal boats on her port and one on her starboard side, both held in fault for a collision between their tows; the Beard for failing to keep near the right-hand side of the channel,

which is 600 feet wide, and the Winnie for inattention to a meeting schooner and for failure to give the bend signal required by rule 5 of the inland navigation rules (30 Stat. 96, c. 5 [U. S. Comp. St. 1901, p. 2882]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 40, 200–202.

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the Southern District of New York.

Mr. Hyland and Nelson Zabriskie, for libellant.

Sutherland D. Smith, for the Edith Beard.

Robinson, Biddle & Benedict (William S. Montgomery, and Roderick Terry, Jr., of counsel), for the Winnie.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This is an appeal from a decree of the District Court for the Southern District of New York, entered August 20, 1907, awarding damages to the libellant for injury to his canal boat, Joseph Crandall, against the tugs Winnie and Edith Beard. The injury was occasioned by a collision which occurred in Shooter's Island Channel, which is about 600 feet wide and divides Shooter's Island from Staten Island. Previous to the collision, which occurred April 7, 1906, at about 5 o'clock in the afternoon, the Edith Beard was bound east having in tow a steam dredge on two hawsers 150 feet long, and back of the dredge a water boat also on two hawsers. Before entering the channel the Beard sounded one long blast on her steam whistle and on sighting the Winnie, bound west, she gave one blast indicating her intention to pass port to port. The Winnie, bound west through the channel, had two light canal boats on her port side and one on her starboard side, the Crandall being the inside boat on the port side. No bend signal was blown by the Winnie. The tide was the last of the flood and what there was of it was with the Beard and against the Winnie, but as it set towards the northeast the tendency was to sag the dredge toward the Shooter's Island shore. The wind was about west, the weather was clear. The Beard was followed by a schooner sailing free, or on the port tack. The Beard passed the Winnie, clearing the outside canal boat by about 50 feet. Soon after the schooner was sighted it became evident that she was endeavoring to pass between the Winnie and the Shooter's Island docks. As there was insufficient room for her to do this unless the Winnie moved out nearer the center of the channel, the latter reversed her engines and backed, enabling the schooner to pass in safety, but by a very narrow margin. In executing this maneuver the Winnie's stern was thrown to port and into the course of the dredge in tow of the Beard. As soon as the schooner had passed, the Winnie put her helm hard astarboard and endeavored to clear the dredge but failed to do so, the port corner of the dredge striking the stern of the outside canal boat with such force that she crowded the Crandall against the fenders of the tug and broke in six of her starboard planks.

The testimony was taken in open court. The schooner was not made a party to the action. We think the Beard was negligent in not keeping on the southerly side of the channel, especially in view of the fact that her large unwieldy tow was sagging towards the northerly side, where the Winnie's flotilla, approximately 100 feet in width, was to pass. In addition to this the Beard knew that the overtaking schooner, which had the right of way, was evidently intending to pass both tugs on the northerly side. The conduct of the Beard so limited the theater of operations that a collision was the natural result. The schooner by taking in her booms barely scraped through between the Winnie's starboard tow and the docks and dredge struck the port tow before the Winnie could swing her free. The great weight of testimony is to the effect that the dredge, at least, was well over on the wrong side of the channel. If the Beard had been on the southerly side where the law required her to be, the collision could not have occurred. The district judge held the Winnie in fault for not noticing the schooner until the vessels were almost in collision. We also think she was culpable in not giving the bend signal as required by inland rule 5 (30 Stat. 96, c. 5 [U. S. Comp. St. 1901, p. 2882]), directing a steam vessel, when approaching a short bend where the view is obstructed, to give one long blast of her whistle and, also, in failing to answer the long blast of the Beard.

Counsel for the Winnie suggests that as the tugs exchanged passing signals when they were between 600 and 800 feet apart the omission of the bend signal could not have affected the result one way or the other. We are unable to accede to this view. The rule requiring a bend signal is most wise and salutary, it was absolutely ignored by the Winnie who not only failed to initiate the signal but also failed to answer the signal of the Beard. We cannot say that this violation of the law did not contribute to the collision. As this court said in *The Transfer* No. 8, 96 Fed. 253, 37 C. C. A. 462:

"This rule, literally construed, is imperative upon every steamer nearing such short bend or curve, whatever may be her own intention as to future navigation after she shall have reached it."

We cannot say that the Winnie's tow was improperly made up, but, as she was navigating an aggregation of boats practically 100 feet square in a narrow channel, she should have taken every precaution not only to inform approaching vessels of her own position but also to learn of their positions at the earliest practicable moment. In both respects she failed. We find no error in the record.

The decree is affirmed with interest and costs.

WATT v. CARGO OF LUMBER.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 158.

1. SHIPPING—BILL OF LADING—RIGHT OF SHIPPER TO DEMAND.

A shipper of goods on a vessel is entitled to a bill of lading therefor as a matter of right; but, where the master claims demurrage for delay in loading, he has the right to give notice of the claim in, or by indorsement upon, such bill, so as to charge a transferee with such notice.

2. SAME—DEMURRAGE—DETENTION OF VESSEL BY LEGAL PROCESS.

A vessel is not entitled to demurrage for the time she is detained by a shipper by virtue of a legal seizure, although on a claim which was unfounded and subsequently dismissed, unless the proceeding was in bad faith or malicious.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Eastern District of New York.

H. W. Goodrich, for appellant.

Conway & Williams (J. Parker Kirlen, Eustace Conway, and John M. Woolsey, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. August 24, 1905, the schooner *Helen M. Atwood*, under charter to deliver her cargo at New York, being about to sail from Mobile, the shipper demanded a bill of lading. Section 4 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445, [U. S. Comp. St. 1901, p. 2947]) makes the giving of a bill of lading stating certain particulars obligatory in the case of vessels trading between ports of the United States and foreign ports; but by virtue of long-established usage and without any statute a shipper is entitled to a bill of lading. It is a document of title, represents the goods, and is used commercially as security for advances.

The master, claiming seven days' demurrage during loading, refused to sign a clean bill of lading, but was willing to sign one which incorporated, or by indorsement or otherwise gave notice, of his claim. He was quite within his rights in taking this position, because any transferee of the bill of lading without notice could insist upon delivery of the cargo free of any claim for demurrage.

August 25th the shipper libeled the vessel upon the ground that the master was about to sail away without delivering a bill of lading and so to convert the cargo to his own use. If the shipper had any right in the premises, it would have been for damages arising from the failure of the master to deliver a bill of lading; e. g., loss of interest on the advances that in the ordinary course of business could have been obtained on it. We do not think that carrying the cargo to destination in compliance with the charter, of which the shipper was fully advised, could be regarded as a conversion. It also appears that the shipper admitted that some demurrage was incurred in load-

ing, but denied liability for it on the ground that it was caused by the charterer's inspector, as the court below subsequently found.

The master made no effort to release his vessel, but laid at Mobile until September 12th, when, all parties having come to some arrangement, the vessel was released, proceeded on her voyage, and on arrival in New York the master libeled the cargo for demurrage, but did not allege that the vessel was arrested in bad faith or out of malice. The court below decreed demurrage for $4\frac{2}{9}$ days, but refused to allow any demurrage for the time the vessel was in custody, and the libellant appeals.

The question is whether the shipper's conduct in libeling the vessel was in bad faith or malicious, so as to take the case out of the general rule that detention by virtue of a legal seizure on a claim subsequently dismissed creates no cause of action for damages. The Adolph (D. C.) 5 Fed. 114; Gow v. William W. Brauer Steamship Co. (D. C.) 113 Fed. 672. It will be noticed that the dispute between the master and the shipper was about demurrage, and that they were both wrong; the shipper denying that he was liable for any, and the master claiming 7 days, while the court below found $4\frac{2}{9}$ days. The shipper arrested the vessel, claiming a clean bill of lading, to which he was not entitled; but we do not think that he did so in bad faith or maliciously. The impasse was produced by the obstinacy of both parties.

The decree is affirmed, with costs.

CHANLER v. TOWN TOPICS PUB. CO. et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 202.

LIBEL AND SLANDER—ACTION FOR LIBEL—SUFFICIENCY OF COMPLAINT.

A complaint in an action for libel, which sets out the alleged libelous publication, is not demurrable, although it does not allege special damages, unless the words used are incapable of any reasonable construction which will make them defamatory.

In Error to the Circuit Court of the United States for the Southern District of New York.

W. D. Reed, for plaintiff in error.

Wray & Callaghan (Albert A. Wray, of counsel), for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an action of libel against the owner and the editor of a paper called Town Topics, because of the following publication:

"The sensation of the country 'round about where Amelie Rives-Chanler-Troubetskoi lives in her singularly independent way reached a climax when the interchange of two dispatches was made between Prince Pierre, her present husband, who is somewhere else than at home, and her former husband, John Armstrong Chanler, who is hanging around Charlottesville, Va. The first telegram read: 'Our Amelie is ill—needs money—will you supply it?'"

Troubetskoi.' The answer came: 'It will be my pleasure—how much?—Chanler.' Gossips say that Mr. Chanler is constantly riding or driving with 'Our Amelie,' and is to be seen sitting on the porches of the Rives mansion; that he makes 'Our Amelie' presents of silver and what-nots, and is continually carrying or sending flowers and cardies to her. Moreover, it is said that, when Prince Pierre is at the house he and Chanler are bon camarades, hunting, fishing, golfing and hobnobbing like two brothers."

No special damages were alleged in the complaint, and the defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the plaintiff appeals.

Unless the words are incapable of any reasonable construction which will make them defamatory, the demurrer should have been overruled. *Press Pub. Co. v. McDonald*, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53; *Culmer v. Canby*, 101 Fed. 195, 41 C. C. A. 302. We think that the article could reasonably be construed as holding the plaintiff up to ridicule and contempt.

For this reason the case should be submitted to a jury to determine the meaning of the words used, and the judgment is reversed.

THE RYGJA.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 208.

1. SHIPPING—TIME CHARTER PARTY—USE OF WORD "ABOUT."

The word "about," used in a time charter in designating the length of the term, is applicable to the term whether it be over or under the exact term stated, and, if the voyage terminates so near the end of the fixed time as to make another voyage unreasonable, the charterer may deliver or the owner may withdraw the vessel, or, if another voyage is reasonable, the charterer may require it at the charter rate of freight.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, pp. 21-28.]

2. SAME—TERMINATION OF CHARTER.

A charter was for "about six calendar months," with a privilege of renewal to the charterer on notice for about six months more, which notice was given. The vessel completed the voyage she was then on 50 days after the expiration of the first six months, and entered upon another. *Held*, that the first term ended and the second began at that time, and not at the end of six months from the time the first began, and, that on the termination of the second voyage in New York some 30 days before the expiration of six months from the time it commenced, the charterer was entitled to exercise an option given him by the charter party to redeliver the vessel in a European port.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 149 Fed. 896.

Ralph James M. Bullowa, R. J. Bullowa, and Sutherland D. Smith, for appellant.

Convers & Kirlin and J. Parker Kirlin, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The Tweedie Trading Company chartered the steamship Rygja for a period of about six calendar months to be employed between, among others, ports in the United States and/or West Indies and/or South America and/or Europe.

The charter party contained the following clauses:

"(4) That the charterers shall pay for the use and hire of the said vessel, one thousand and twenty-five pounds sterling per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of month hire to continue until her delivery, with clean holds to the owners (unless lost) at a United States, Gulf or Atlantic port, or a port in Europe at charterers' option."

"(25) That the charterers shall have the option of continuing this charter for a further period of about six calendar months more on giving notice thereof to the owners or their agents one month previous to the expiration of the first named term."

July 13, 1905, the steamship was delivered at a port in Italy. She proceeded to New York, loaded for South America, thence to the West Indies, thence to New York, where she completed her discharge March 4, 1906. The steamship then loaded for South America, thence to Cuba, thence to New York, where she completed her discharge August 4, 1906. December 12, 1905, the charterer declared its option for a second term under clause 25. June 12, 1906, the charterer declared its option to redeliver the steamship in Europe, a privilege which the testimony shows was valuable. The master refused to load for a European port under charterer's orders, and the charterer brought this action for damages for the withdrawal of the steamship from its use.

The question is did the second term begin at the end of the first six calendar months, viz., January 13th, or at the termination of the voyage, March 4th. No commercial understanding or practice is proved, and the construction of the clause is a pure question of law for the court to decide. Charters for a fixed period involve from the nature of things considerable difficulties because of the uncertainty as to the time voyages are likely to occupy. At the expiration of a fixed term the charterer is no longer entitled to possession. If in the employment of the ship he overruns the term, he is certainly liable at the charter rate of freight for the overlap, and, if freights have risen, to the difference between the market rate and the charter rate in addition. If the last voyage of the vessel terminate so near the expiration of the fixed term that another voyage cannot be made, the charterer either loses that time entirely, or if he employs the vessel on another voyage, he does so at the risk of being liable for the increase of the market rate of freight for the overlap. A clause was inserted to cover overlaps like No. 4 in this charter, providing that the charterer should pay at the charter rate until delivery of the vessel at the return port. Judge Brown in a case of overlap construed such a provision to entitle the charterer to at least one round voyage of the character contemplated in the charter at the charter rate of freight, unless the delay was due to his own fault. *The Straits of Dover Steamship Co. v. Munson* (D. C.) 95 Fed. 690. In the case of an underlap he held, collecting the intention of the parties from the whole document, that the charterer might employ the vessel on the shortest voyage contemplated by the

charter at the chartered rate of freight even if it was certain to overlap the term. *Anderson v. Munson* (D. C.) 104 Fed. 913.

In this charter the term is not an absolutely fixed period, but is "about six calendar months." The district judge restricted the effect of the word "about" to the underlap. Doubtless in a charter containing a clause like No. 4 the word is not necessary because that clause accomplishes the same thing. Still we think the word "about" applicable to the term whether it be over or under six calendar months, and that, if the last voyage terminate so near the end of the fixed time as to make another voyage unreasonable, the charterer may deliver and the owner may withdraw the vessel, or, if another voyage is reasonable, the charterer may require it at the charter rate of freight. This leaves room for dispute in the case of an underlap as to what voyage is reasonable, but that is a difficulty which cannot be avoided where a fixed term is not agreed upon. In this case, if there were no question of a second term, it could not be denied that the charter terminated March 4th. The charterer having declared its option for a second term, we think the further period began to run from March 4th.

The claimant relies much upon the fact that the charterer declared its option to the second term December 12, 1905, just one month and one day before the expiration of the first six months. We do not think this proves an understanding that the term should necessarily end then. It is natural under such charters to give notice with reference to the fixed period because it is certain, while no one can tell exactly when voyages will terminate, whether they underlap or overlap the fixed period. Mr. Tweedie testifies that he acted in a spirit of caution, and the claimant certainly cannot complain of getting a longer notice than the charter required.

The English cases cited are consistent with each other and with the foregoing views. In *Bucknall Bros. v. Murray*, 5 Com. Cas. 312, there was but a single term of about six calendar months which expired with an overlap for the last voyage ending at New York. The charterers contended that they had an option to redeliver the vessel in the United Kingdom. The court held that if they had such an option it could only be declared before the charter party came to an end. In *Dene Steamshipping Co., Ltd., v. Bucknall Bros.*, reported in the same volume at page 372, the charterer was held to have the right to send the vessel on another voyage before the six calendar months under the charter had expired, although the voyage was certain to overlap. Upon the same principle a contrary result was reached in the *Istok*, 7 Com. Cas. 190, where it was held that under a charter for 12 months the charterer could not send the vessel on a return voyage after the fixed period has expired.

In the case before the court the voyage taken was a usual one and as it terminated March 4th, about one month and nine days was left of the second term when the steamship discharged August 24th, and the charterer was entitled to the benefit of its option to redeliver her at a port of Europe.

The decree is reversed, and the court below is directed to enter a decree for the libellant with a reference to ascertain the damages with interest and costs.

WILCOX et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1908.)

No. 2,693.

1. JURY—TRIAL—NUMBER OF PEREMPTORY CHALLENGES.

Under sections 2240 and 2247, Mansf. Dig. (Ind. T. Ann. St. 1899, §§ 1583, 1590), defendants tried together for a misdemeanor are entitled to but three challenges, and the challenge of any one of them must be counted against all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 612.]

2. CRIMINAL LAW—FORMER JEOPARDY—ESTOPPEL BY VERDICT—BURDEN ON HIM WHO ASSERTS TO PROVE—TEST—IDENTITY OF EVIDENCE.

Where there are two actions between the same parties upon different causes of action, and there is, or may be, a material issue that may not have been raised, litigated, and decided in the action which has gone to verdict, the burden is on him who asserts to prove by pleading or evidence that the issue, right, or matter in question was actually and necessarily litigated and determined in the earlier trial.

The test of identity of issues is the identity of the evidence requisite to sustain them.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

R. A. Smith and Yancey Lewis, for plaintiffs in error.

James E. Gresham, for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. The plaintiffs in error, Wilcox and Ungles, were jointly indicted, tried, and convicted in the Indian Territory of maliciously disturbing the peace of the family of J. W. McCreary by threatening to fight and fighting in the vicinity of his residence. They complain that the trial court allowed them but three peremptory challenges. The controlling statutes read:

"The defendant is entitled to twenty peremptory challenges in prosecutions for felony and to three in prosecutions for misdemeanor." Mansf. Dig. Ark. § 2240 (Ind. T. Ann. St. 1899, § 1583).

"When several defendants are tried together, the challenge of any one of the defendants shall be the challenge of all." Section 2247 (section 1590).

Act May 2, 1890, c. 182, § 33, 26 Stat. 96.

The plain meaning of these provisions of the law is that, if any one of the defendants challenges a juror, all the defendants challenge him, and the challenge must be counted against all. When three challenges have been made, whether by one or several joint defendants, and whether jointly or severally, each defendant has had three challenges, because the challenge of any one is the challenge of all. *Glass v. Commonwealth* (Ky.) 26 S. W. 811; 1 Thompson on Trials, 40.

The disturbance of the peace of which the defendants were convicted consisted of the assault and battery upon Charles O. Shepard, townsite commissioner of the Choctaw Nation, in front of McCreary's residence. Before the trial of this action the defendants had been

indicted, tried, and Wilcox had been acquitted of the offense of conspiring to injure Shepard, an officer of the United States, on account of his lawful discharge of the duties of his office, under section 5518, Rev. St. (U. S. Comp. St. 1901, p. 3714). It is assigned as error that the Court of Appeals of the Indian Territory sustained the admission of evidence by the trial court tending to show that Wilcox conspired with Ungles to commit the assault and battery upon Shepard, and its rejection of the indictment and verdict in the case for injuring him on account of his lawful discharge of the duties of his office. But the two offenses differed in character, in their essential facts, and in the evidence necessary to establish them. In actions between the same parties upon different causes of action the burden is upon him who asserts it to prove that any issue involved in the later was litigated and determined by the earlier trial. The test of identity of issues is that the same evidence was indispensable to sustain each. *Ætna Life Ins. Co. v. Board of Com'rs*, 54 C. C. A. 468, 474, 117 Fed. 82, 88; *Board of Com'rs v. Sutliff*, 38 C. C. A. 167, 171, 97 Fed. 270, 274; *Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co.*, 5 C. C. A. 249, 255, 55 Fed. 690, 696. The plaintiff in error, Wilcox, failed to bear this burden successfully. The fact that the jury acquitted him of the charge of conspiring to injure Shepard on account of his lawful discharge of the duties of his office did not establish the fact that they found that he did not conspire to assault and to injure him, and there was no other evidence of that averment. The verdict may have been founded on a finding that Wilcox conspired to commit the assault, but that he did not do so on account of Shepard's discharge of the duties of his office. There was, therefore, no error in the rejection of the former indictment and verdict, nor in the admission of the evidence that Wilcox conspired to commit an assault and battery upon Shepard.

It is assigned as error that after one or two witnesses had testified, and Shepard had denied, that just before the assault he had said, "You are a liar," the court refused to permit another witness to testify that Shepard's general manner of speech was loud and threatening, for the purpose of proving that it was more probable that in this instance he used, than that he did not use, the words charged. But the attempt was not to show that it was Shepard's custom or habit to use such words, but that it was his habit to speak loudly and threateningly, and evidence to that effect was too remote and inconsequential for admission.

There was no error in the trial, and the judgments of the courts of the Indian Territory are affirmed.

DEY TIME REGISTER CO. v. SYRACUSE TIME-RECORDER CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 126.

1. PATENTS—INFRINGEMENT—WORKMAN'S TIME RECORDER.

The Dey patent, No. 524,102, for a workman's time recorder, is for an improvement only, and entitled only to a narrow construction; as so construed *held* not infringed.

2. SAME—CONSTRUCTION OF CLAIMS.

When a claim of a patent is explicit, the courts cannot alter or enlarge it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 241.]

Appeal from the Circuit Court of the United States for the Northern District of New York.

On appeal from a decree dismissing the bill of complaint which is founded upon letters patent No. 524,102, granted August 7, 1894, to John Dey for a workman's time recorder. The opinion of the Circuit Court is reported in 152 Fed. 440.

Thomas W. Bakewell, Clarence P. Byrnes, and Clarence D. Kerr, for appellant.

Howard P. Denison and William W. Dodge, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The facts are so fully set out in the opinion of the Circuit Court that it is unnecessary to repeat them here. It will therefore be sufficient for us to state, as briefly as may be, the reasons which lead us to the conclusion that the cause was properly decided. The patent is in no sense a pioneer. It is unnecessary to explore the prior art to establish this proposition. The specification offers sufficient proof. The patentee there states that the invention pertains to the style of workman's time recorder shown in a patent granted to him September 24, 1889. He says:

"The invention consists in an improved reorganization of the recording mechanism and means for operating the same, all as hereinafter fully described and summed up in the claims."

In other words the patent is for improvements upon existing machines. It embodies no new idea, introduces no new principle of operation and accomplishes no fundamentally new result. All that it purports to do is to produce the old result with greater speed, accuracy and economy, by reorganizing the old machinery.

That a claim covering such an improvement is not entitled to a broad construction is too obvious to require the citation of authorities. Suffice it to say that the doctrine has recently been reaffirmed by the Supreme Court in *Cimiotti Co. v. Fur Refining Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100, and *Kokomo Fence Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689.

That the patent in controversy did not even take "the last and successful step" is demonstrated by the fact that two months after the application for the patent in suit Dey applied for another patent for the

single roller improvement, similar to the machine used by the defendant. This was No. 522,784, issued July 10, 1894.

Although there are fourteen claims in the patent the first claim only is involved. It is as follows:

"A workman's time recorder comprising time-printing wheels, a band movable longitudinally in either direction in proximity to said printing wheels and having a longitudinal row of consecutive numbers marked upon it, a manually operated lever controlling the movement of said band, and an index traversed by said lever and numbered to correspond to the band, and a platen actuated by said lever and pressing the band into contact with the time-printing wheels, as set forth."

It will be observed that the second element of the claim is "a band movable longitudinally in either direction in proximity to said printing wheels, and having a longitudinal row of consecutive numbers marked upon it."

The fifth element is "a platen actuated by said lever and pressing the band into contact with the time-printing wheels."

Neither of these elements is found in the defendant's machine. Instead of a band moving longitudinally by the action of two rollers, the defendant's band is mounted on one roller and moves in a circle. Instead of a platen which lifts the suspended impression band up against the type wheels, the defendant, by proper mechanism, forces the type wheels down upon the paper band which is clamped upon the single roller or drum.

In short, the defendant has dispensed entirely with one of the rollers, the longitudinally moving band and the platen. In place of all this complicated mechanism it used a single roller and the substitution has compelled a reconstruction of the entire machine. The defendant's roller could not be substituted for the platen or one of the rollers of the patent, and accomplish any result whatever.

The two rollers are not mentioned, in totidem verbis, in the claim, but they are there by implication. Without them the claim would be meaningless for no other way is described for securing the longitudinal movement of the band. Assuming, for the moment, that a valid claim could have been drawn, based upon the present description and drawings, broad enough to cover the defendant's machine, it is enough for the present litigation that the claim in controversy is not such a claim. No canon of interpretation can construe a combination claim in an improvement patent to cover a structure which omits two of the elements of the combination.

"When a claim is explicit, the courts cannot alter or enlarge it." *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344.

The decree is affirmed, with costs.

STAFFORD et al. v. MORRIS et al.

(Circuit Court, N. D. New York. April 11, 1908.)

No. 7,059.

1. PATENTS—INFRINGEMENT—CIRCULAR-KNITTING MACHINE.

The Stafford and Holt patent, No. 759,928, for improvements in circular-knitting machines by which each swinging throat cam is independently moved while the machine is at work by its separate pattern chain for the purpose of producing fabrics of a large variety of patterns and stitches, was not anticipated, and, while covering a combination of old elements, discloses patentable invention; the combination being new with a new mode of operation and producing a new and useful result. Also, *held* infringed.

2. SAME—INVENTION—EVIDENCE OF INVENTION.

The fact that the product of a machine made by a new combination of old elements goes into general use and displaces others is some evidence, of greater or less weight, that the new combination involved invention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 39.]

In Equity. Suit to restrain alleged infringement of United States letters patent No. 759,928, dated May 17, 1904, application filed February 27, 1903, for circular-knitting machines, and for an accounting.

Risley & Love, for complainants.

Alfred Wilkinson, for defendants.

RAY, District Judge. The defendants above named are users of the knitting machines alleged to infringe, which are made and sold by the H. P. Snyder Manufacturing Company, which company is defending this action. Hence I shall speak of that company as defendant. This will be understood.

The alleged invention relates to improvements in circular-knitting machines, and in the patent it is illustrated as applied to multiple-fed machines; that is, that several threads are shown as being fed at the same time to the needles. The patentees, Walter Stafford and Robert C. Holt, declare that the particular purpose of the invention is to produce a circular rib-knitting machine in which certain of the needles of one set—preferably, for instance, the dial-needles—can be made, some of them, to knit plain, others to cause a tuck-stitch to be made, and some to skip the thread delivered from the same feed to such needles successively and at the same revolution of the machine and by which any number of such stitches may be produced at the same point and by which the stitch may be changed from one to another kind or form at any point of the operation. They also say:

"Where we speak of a needle making a 'tuck stitch' or 'welt stitch,' we wish to be understood as meaning that the needle is operated at that point in the operation to tuck the thread or to skip the thread, though properly the stitch is not completed until combined with the succeeding plain stitch formed by that needle, i. e., the needle is operated to take a thread without casting its old loop or to miss the thread without casting its loop instead of casting an old loop over a new loop to form a plain stitch."

The operation of the machine is described with great particularity. The patent has nine claims, six of which are in issue, viz., the second, fifth, sixth, seventh, eighth, and ninth. These read as follows:

"2. In a circular-knitting machine, a dial, long and short needles disposed therein, a cam-plate, cams seated thereon providing an inner and an outer heel-path for the needles, said cam-plate being constructed in a series of duplicate sectors, a throat-cam provided in each sector and in each path, the said throat-cams being pivoted at one end and provided with a path for needle-heels therethrough, means for adjusting each throat-cam to operate in the making of a plain, a tuck, or a welt stitch and to adjust adjacent needles of different form to either of such positions, said adjusting means comprising pattern-chains and operative connections between the pattern-chains and the throat-cams and means for operating the pattern-chains, in combination, substantially as described."

"5. In a circular-knitting machine, provided with a dial, pattern-chains, means for operating the same, needles of different length and a cam-plate provided with an annular groove for the heels of each set of needles, a plurality of throat-cams, each provided with a needle-heel groove therethrough, disposed in equal sectors of the cam-plate, one of such throat-cams being in the heel-path of each length needle and radially adjacent, the said throat-cams being adjustable to dispose adjacent needles to different operative positions to cause a plain, a tuck or a welt stitch to be made by one or more needles in the operation of the machine, means for adjusting the throat-cams comprising operative connections between each and its proper pattern-chain, substantially as described.

"6. In a circular-knitting machine, provided with a cylinder, a dial, pattern devices, means for operating the same and a cam-plate provided with annular grooves for the heels of different length needles, cams constructed with heel-controlling grooves therethrough, pivotally mounted on the cam-plate in pairs adjacent to the radial line between the center of the cam-plate and the yarn-feed, there being a yarn-feed for each such pair of throat-cams, said yarn-feeds, operative connections between each throat-cam and its proper pattern device to shift each throat-cam separately to dispose the through-passing needles to skip or to take the yarn of the adjacent feed, in combination, substantially as described.

"7. In a circular-rib-knitting machine provided with a cylinder, a dial, a cam-plate provided with inner and outer needle-heel grooves, pattern-chains and means for operating the same, a plurality of throat-cams constructed with grooves therethrough for the passage of needle-heels, the said throat-cams being seated one in the path of each needle and at different radial distances from the center of the cam-plate, needles arranged with their heels in the inner and outer heel-grooves, operative connections between each throat-cam and its pattern-chain to shift each throat-cam to cause one interpassing needle to ship the yarn from the adjacent feed and a succeeding needle to knit such yarn from the same feed, such needles being of a length to travel some in each of such needle-heel paths, substantially as described.

"8. In a continuous rotary knitting-machine provided with a cylinder and cylinder-needles, pattern wheels and chains and means for operating the same, a dial with different length needles interposed therein, and a cam-plate, the combination of pivotally-mounted throat-cams arranged in pairs on the cam-plate there being one pair for each duplicate sector of the cam-plate, duplicate sectors of the cam-plate, means for adjusting the throat-cams independently of each other to either of their operative positions at any instant in the revolution of the dial to shift the needles passing therethrough to their proper position in the making of a plain, a tuck, or a welt stitch, said means comprising operative connections between the pattern-chains and the throat-cams, in combination, substantially as described.

"9. In a knitting-machine, a plurality of yarn-feeds, a dial, needles of a plurality of forms therein, cams engaging the heels of each form of needle, a plurality of throat-cams for each yarn-feed pivotally mounted to project or retract each needle independently to co-operate in making a plain, a tuck, or welt stitch, operative means to project or retract the throat-cams, said means

comprising a pattern device and connections therefrom to each throat-cam, in combination, substantially as shown."

The patentees also expressly state that they do not limit themselves to the illustrations which they have made of their device, nor to the style of machine or number of cams and feeds exhibited as the improvement is capable of various applications and in different forms and positions without departure from the scope and spirit of the invention.

The following from the specifications summarizes quite well the salient features of the invention:

"Each throat-cam can be moved while the machine is at work by its own separate connection with its own pattern-chain and independently of each other throat-cam. As each needle comes to each throat-cam it may be projected so that it will cast off and make a plain stitch, or it may be projected a lesser distance and a tuck stitch be made, or it may be withdrawn and not take thread and permit the making of a welt stitch. These cams may be moved in unison, and the needles against one set of cams all make the same kind of stitch, or the cams may be moved oppositely, and thus make different stitches, or some can be moved one way and some another, any one or more of the twelve throat-cams in any one of the three positions for any number of revolutions or part of a revolution of the machine. Each cam may be changed at any time in the operation to any one of its three possible positions. So, too, the needles operated by these cams may be arranged in any desired way or with any desired space between them, governed only by the radial spaces of the dial-plate. It will thus be seen that we have produced an improved machine in which the stitches formed by the needles may be changed in any desired manner by the disposition of the throat-cams during the operation of the machine, and it will be obvious that we have thus made it possible to produce fabrics of a very large variety, grouping the possible kinds of stitches according to any desired pattern."

It is claimed, and is conceded, that this knitting-machine produces a fabric known as the "pineapple pattern," which had not been made before, and which it is impossible to make on any other machine of the circular-knitting variety. It is conceded that the various elements of the complainants' device or machine are old, but it is insisted that this is a new combination with novel features producing both a new result and some old results in a new and far better way. Of course, this is not a new art. It may be said that it is "an old and a crowded art." This fact does not detract, however, from the merit of the patent in suit, for to produce a new and useful result from a new combination of old elements demands, oftentimes, a high degree of skill and mental conception. The prominent new feature in the complainants' patent and invention consists in the independent operation of the various swinging throat-cams at the right instant and at the right point for producing the pineapple stitch, an entirely new stitch in a rotary-knitting machine.

In this art we have the stationary head machines and the rotary head machines. In both of these machines each swinging throat-cam has three distinct movements, according to the design of the pattern-chain. The throat-cams may be moved in the same direction, in directions opposite from each other, and towards each other. Each cam can be independently moved in the same direction or in opposite directions. The cams are automatically swung into position to make either one of the three stitches, plain stitch, tuck stitch, and welt stitch,

or any desired combination of these three stitches. This is a new operation and a new and improved result. We have swinging throat-cams located on the under face of the dial in radial lines from the center of the dial with suitable mechanism for operating sets of cams, swinging throat-cams, and there is included in this construction the necessary elements to produce the combination of the three stitches mentioned in a tubular knitted fabric, in the same course by the independent movement of each throat-cam. This was new. We have the raised or "pineapple" stitch fabric, so called because of its resemblance to the outer surface of that fruit. The utility, marketability, and commercial success of the product is not denied. As already stated, we have a new combination of old elements with a different or new mode of operation producing a new and useful result.

This constitutes strong and persuasive evidence of invention. Mere mechanical skill was not adequate for the undertaking. There was a mental conception with which was combined and utilized mechanical skill to provide means for carrying out and making useful this conception. Walter Stafford, a witness for the complainant, said:

"Q. 57. Please state in your own language the novelty which you claim exists in the patent in suit.

"A. According to my understanding it consists in pairs of throated cams located in the cam circles on radial lines; each cam being independently operated by the pattern devices, and their connection for independently controlling the needles in each set by means of which the threads can be accumulated and carried over and united to make the pineapple stitch. In this operation some of the needles accumulate the threads, and some of them are held from taking thread, and by this means pineapple-stitch fabric is constructed.

"Q. 58. Do you understand that the throated cam was broadly new at the time you perfected your invention?

"A. I do not.

"Q. 59. State what functions the throated cams performed in rotary-knitting machines prior to your invention?

"A. They were used for making a welt or hem on knitted fabric; that is when they came to the end of the garment, they were used to throw all the needles of the dial out of action, and hold them out until a hem of sufficient length had been made by the cylinder needles, which when thrown in they united the stitches to complete the hem which then would not ravel. In this class of machines there was but one row of cams and one length of dial needles. These cams were operated by the pattern mechanism and its connection, as shown in the McMichael patent, and, perhaps, some others."

On cross-examination the witness said that the throat-cam itself was old before the invention of the patent in suit, and that these throat-cams were in use in a machine having a single cam way or cam race both to project and retract the needles, and were there used to project the needles to tuck and to cast off and to retract them to welt. Also:

"Q. Then if you took those old throat-cams and substituted them for all the movable or pivoted cams shown in this blue print, would you have substantially the cam-plate of your patent in suit?

"A. It might require some modifications of the cams, but, substantially, I should say, 'Yes.'"

This is not to be understood as a statement that all the patentees did was to transfer the throat-cams from one machine to another, or to substitute throat-cams in place of pivoted cams, or plain swinging cams. There may be invention in transferring an old element from

one place to another if done to meet a new or novel exigency and serve a new purpose in its new sphere of action, but more than that was done here, something very different. We have a new arrangement, a new operation, and a new and useful result. The witness Stafford subsequently explained that the cams would have to be changed in shape and means provided to separately connect each cam, and that the pattern mechanism would have to be changed; in short, that means for independently operating the cams would have to be provided. All this Stafford and Holt did. The first and main defense is that in 1895 and 1896 there was designed, completed, and operated for Snyder and Fisher a machine practically identical with the machine of the patent in suit; that it was set up and operated for a short time, and its capabilities publicly exhibited and commented on. One George W. Belinger says that he talked about it with several persons, and he testified, among other things:

"I think I said a number of times that Fisher had a great head on him to get a circular machine that would make that fabric and one that would make so many different styles."

Also, that others "brought up the subject of this machine and spoke about the remarkableness of it, and I acquiesced to it." There is no pretense that other machines were made like it, or that it was utilized or put to work, except for a short time to show what it would do, or that any goods were made with it and put on the market. The claim is that when it was completed, at an expense of hundreds of dollars, when it had shown its wonderful capabilities, had demonstrated its "remarkableness," had set all who saw it to talking of its accomplishments, that it was packed away with the thought that at some time it might be brought out and utilized. In point of fact, it never was brought out or utilized until used in evidence in this case long after complainants' patented machine had been put in operation and had produced an article which met with great demand and commercial success and, to an extent, drove other fabrics out of the market. While some five or six witnesses give evidence tending to support the contention, I cannot credit it. It is too improbable. That an intelligent man would pack away, hide such a machine, one which, to an extent at least, would have revolutionized the trade in such fabrics, without making and putting on the market any of the great variety of novel and attractive articles it was capable of producing, is simply incredible. And why was it that it was not brought out and put in operation when the complainants' machine first made its appearance? Why was this left to sleep in idleness?

When complainants' machine came out, and the H. P. Snyder Company, now defending this action, undertook to make a machine that would do the same work, instead of bringing forward this old machine, which it says it had already made, Snyder & Co. worked for weeks, if not months, and produced a machine which would not work, would not do the work of complainants' machine; but finally there was produced to the defendants' workmen, engaged on these machines in trying to make them work, a hand print, one made by pressing a paper down on the cams of one of those cylinders like complainants' cylinders, and then there was no further trouble. It is claimed that

Snyder & Co. obtained this hand print of the cam arrangement from one of complainants' machines in some way, opportunity being shown, and thus was able to copy complainants' machine. There is evidence tending to show that the cap or cylinder carrying the cams alleged to have been made in 1895 or 1896 is new and could not have been made at the time claimed. But, however that may be, it was admitted on the final hearing that this old machine produced by defendant will not do the work of complainants' machine, and this is evidence of a material and substantial difference.

This first defense is not established to my satisfaction and beyond a reasonable doubt, as it must be. *Barbed Wire Patent Cases*, 143 U. S. 275, 285, 12 Sup. Ct. 443, 36 L. Ed. 154; *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Cantrell v. Wallick*, 117 U. S. 689, 695, 696, 6 Sup. Ct. 970, 29 L. Ed. 1017. In this last case it is said (pages 695, 696 of 117 U. S., pages 973, 974 of 6 Sup. Ct. [29 L. Ed. 1017]):

"The burden of proof is upon the defendants to establish this defense, for the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939. Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that 'every reasonable doubt should be resolved against him.' *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Washburn v. Gould*, 3 Story, 122, 142, Fed. Cas. No. 17,214."

I am satisfied that Stafford and Holt were the original and first inventors of the patented device, or knitting-machine in question, that it was not made by H. P. Snyder Manufacturing Company, and that the combination discloses patentable invention. There is a long line of unbroken authority that patentable invention is frequently shown in a new combination of old elements when a new and useful result is obtained. *Seymour v. Osborne*, 11 Wall. 541, 20 L. Ed. 33, per Clifford, J.; *Webster Loom Co. v. Higgins*, 105 U. S. 580, 599, 26 L. Ed. 1177; *The Barbed Wire Cases*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103.

In *Seymour v. Osborne*, *supra*, Mr. Justice Clifford said:

"Improvements in machines protected by letters patent may also be mentioned, of a much more numerous class, where all the ingredients of the invention are old, and where the invention consists entirely in a new combination of the old ingredients, whereby a new and useful result is obtained, and many of them are of great utility and value and are just as much entitled to protection as those of any other class. Such a combination is sufficiently described if the ingredients of which it is composed are named, their mode of operation given, and the new and useful result to be accomplished pointed out, so that those skilled in the art and the public may know the extent and nature of the claim, and what the parts are which co-operate to produce the described new and useful result."

Scores of cases might be cited where this is declared. However, a mere aggregation of old elements, even with an improved final result, is not invention. When old elements, each having a function of its own, are assembled into one device, and each there performs its old function in the old way, no one being qualified by the other, and the

final result is simply the combined result, several results added together, there is no invention. But that is not this case.

So all improvements in devices, or processes, or means for producing a given result, are not invention. In a new combination of old elements there must be not merely an improved result or a new result, but a new mode of operation as well, and this should disclose more than the application of mere mechanical skill. The new combination of old elements, the new arrangement of parts, and the new and beneficial result are not *per se* invention. They are evidence of invention. These facts are evidence from which the court may find the necessary mental conception, beyond the province of the skilled mechanic, which constitutes invention. *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177, where it is said:

"It may be laid down as a general rule, though not perhaps an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result, never attained before, it is evidence of invention."

So the fact that the product of such a new combination of old elements goes into quite general use and displaces others previously used for the same or analogous purposes is some evidence of invention in the making of the new combination. It does not establish invention. It is merely evidence which may have very little weight, or it may be quite persuasive. *Barbed Wire Patent Cases*, 143 U. S. 275, 284, 12 Sup. Ct. 443, 36 L. Ed. 154; *Smith v. Goodyear D. V. Co.*, 93 U. S. 486, 495, 23 L. Ed. 952; *Magowan v. N. Y. Belting Co.*, 141 U. S. 332, 343, 12 Sup. Ct. 71, 35 L. Ed. 781. The court should look to the state of the art at the time the patentees made their alleged invention, its progress and development, as well as at what the patentees actually did in selecting and assembling the elements of the new combination, and then at the results accomplished. If it is established that mechanical skill in that art and department of mechanics was not competent to do all that was done, and there is a new mechanical operation and new and useful results, then the court is likely to be convinced that there was a mental conception accompanied by application and execution that amounts to patentable invention. And a presumption that there was patentable invention, as well as that the patentee was the first inventor, goes with every patent issued, and must be overcome by substantial evidence of some kind. *American Sulphite Pulp Co. v. De Grasse Paper Co. (C. C. A.)* 157 Fed. 660, 663. In that case the court said:

"It seems to be thought that it was incumbent upon the complainant to establish by extrinsic testimony that it involved invention to take a lining from an open vessel where it was subjected only to boiling heat and comparatively slight pressure and subject it to steam heat, tremendous pressure, and the action of various gases engendered by the process; but we do not so understand the law. The grant of a patent is presumptive evidence that the patentee is entitled to the monopoly fairly covered by his claims. He who asserts to the contrary must prove his assertions. It is only when the court, by bringing to its aid matters of common knowledge, is convinced that the patent is void on its face, that such proof can be dispensed with."

It sometimes happens that this evidence appears on the face of the patent itself, but such cases are rare. Here, to sustain defendants' second defense, want of patentable invention in view of the prior art, we

have some prior patents, but very little evidence in explanation of them. It has been held that prior patents will not be considered at all in the absence of evidence explaining the operation of such patented devices. However, this rule ought not to be applied in cases where intelligent minds ought to be able to comprehend them; that is, where they are self-explanatory. Here some of the devices are, and some are not. The court cannot take judicial notice of the prior art on the question of the validity of the patent in suit, unless that prior art be in evidence, except as to matters of general knowledge, not even where that prior art appears and is fully disclosed and explained in the opinions of the court in prior litigations by the same plaintiffs as to the validity of the same patent. *American Sulphite Pulp Co. v. De Grasse Paper Co.* (C. C. A.) 157 Fed. 660; *N. Y. Belting Co. v. N. J. Rubber Co.*, 137 U. S. 445, 11 Sup. Ct. 193, 34 L. Ed. 741.

I have examined the patents in evidence here and the machines and their actual practical operation and the file wrapper of the patent in suit, and have arrived at the conclusion that the patent in suit discloses patentable invention. It is true that a considerable number of changes were made in claims and specifications in the Patent Office. But the file wrapper discloses that the most of these changes related to matters of description, the use of words to express ideas, and not to a change or substantial limitation and restriction of the true invention claimed in the first instance and finally allowed. It is also true that the patentees claimed some things that were not allowed, but it is incumbent upon a claimant in the Patent Office to include everything he conceives himself entitled to. That office is quite free, as a rule, to restrict and limit the claims as made in the first instance, but it is a very rare occurrence for it to suggest that they be broadened. What is not claimed, even if the omission includes patentable matter, is deemed to have been surrendered to the public. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344; *Universal Brush Co. v. Sonn*, 154 Fed. 665, 668, 669, 83 C. C. A. 414.

This patent in suit is more than a mere extension, a carrying forward, of the ideas of the patent to Nye & Tredick, assignees of Frank A. Nye, No. 556,514 of March 17, 1896, for circular-knitting machine. That was directed more particularly to an arrangement of the cams and to a peculiar manner of adjusting the same, having in view the production of a fabric bearing on its surface a polka-dot design, a stripe, or a combination of the two. This invention comprised a series of successively operating cams adapted to be set in different positions relatively to each other to cause certain of said cams to knit off and the remainder to tuck and to be reversed as to their relative positions to knit off and tuck alternately; the object being to lay yarn of different colors to the needles in such manner as to cause certain stitches of one color to appear on the surface of the fabric of the prevailing color, and the result being a fabric of one color having on its surface a dot or point made of the stitch of the other color. This necessarily included the details of construction and combination of parts there described and claimed. I have also examined the patent to Williams, No. 688,275, the patents to McMichael and Wildman, No. 508,965, and No. 556,514, patent to Townsend, No. 539,837, but fail to find such

combinations and modes of operation in the prior art that it can be said the patent in suit was not a distinct advance in the art disclosing patentable invention. The Patent Office clearly had the whole prior art before it and gave these claims careful attention and consideration. To my mind the file wrapper of a patent, which shows that careful examination was made and due deliberation had, is more persuasive on the question of patentable invention than one which shows nothing at all. Of course, it is presumed that the Patent Office does its whole duty, but an ex parte examination of the prior art is not apt to be as thorough and exhaustive as one accompanied by an animated correspondence and discussion between the examiner and applicant.

The third defense is that, conceding patentable invention, there is no infringement by the defendant. As already shown by quotation from the specifications of the patent in suit:

"Each throat-cam can be moved while the machine is at work by its own separate connection with its own pattern-chain and independently of each other throat-cam. * * * Each cam may be changed at any time in the operation to any one of its three possible positions. * * * It will be thus seen that we have produced an improved machine in which the stitches formed by the needles may be changed in any desired manner by the disposition of the throat-cams during the operation of the machine," etc.

The defendant, referring to this, says:

"This operation cannot be performed by 'Defts.' Cam-Plate.' That machine does not have independent connections for each cam, and does not have a separate pattern chain for each. The cams are connected up in pairs (not independently) by means of studs (upwardly extending through slots in the cam-plate) to the little irregular plates of thin metal, called the 'cam-shifting plates,' pivoted on top of the machine and connected each by a strap to a compound lever. When each cam-shifting plate is moved, both of its cams are moved simultaneously. The operation of the cams cannot be changed while the machine is in operation. In fact, after the machine is set up to make one kind of fancy-stitch fabric, the operation of the machine cannot be changed at all. To make a different fabric, all these cam-shifting plates would have to be changed, and the cams connected up differently. Each machine as sent out of the shop is adapted to make one fabric only, and to change to another would require the services of an expert machine builder or adjuster and a reorganization of the aforesaid connections and operating mechanism. Defendants' machine has only one pattern chain, which, by raising the spindle and small disc more or less, gives a similar movement to each cam-shifting plate and therefore to each pair of cams. Of course, the machine may be stopped, and a new chain substituted (even then the new chain would move all cams alike in pairs); but, unless the cams were properly rearranged and reconnected to correspond with the new chain, perfect confusion might be introduced and a crazy-quilt sort of fabric produced. (See what Mr. Snyder said on this point, D. R. pp. 107, 108, A31; and Mr. Thrall, D. R. p. 81.) Defendants' machine may be better or worse than the machine of complainants' patent, but is entirely different so far as this operating mechanism is concerned."

As to the defendants' machine actually made and sold by H. P. Snyder & Co. defending this action, and used by the defendants above named, I think they have substantially all the elements of the patent in suit arranged in the same way to produce the same result. Infringement cannot be avoided by mere changes in form, by making nonessential additions or substitutions, by adding another element or substituting an equivalent for one or more of the elements of the patent, or by changes in mechanical appliances. Nor is infringement

avoided by putting out a machine constructed in accordance with the patent and made to do its work by leaving off some part of the mechanism easily added when it is evident the intention is to have it do the work of the patent, and it is actually used to do that work.

The pattern chains of these machines, whether there be a multiple of chains or one single continuous chain, as I understand, must be provided with links of different heights. I cannot see that it makes any difference, so far as infringement is concerned, or any substantial difference in the operation of the machines, whether the three links of different heights are suitably and properly placed in a single chain, or several chains are used; each having the appropriate or necessary links. This is matter of choice, perhaps of convenience, and it may be of expense in construction; but, so long as the same substantial elements are used, the combination and modes of operation are the same, and the same result is sought and obtained, there is infringement. High links produce a plain stitch, low links produce the welt stitch, and the intermediate links produce the tuck stitch. These chains or a chain are not the subject-matter of this patent. The "soul," as it is expressed many times, of the patent, the "meat in the cocoanut," is found elsewhere. While there must be operative means to project or retract the throat-cams which comprise a pattern device and connections therefrom to each throat-cam, these may be varied, as the patent is not limited in this respect to any particular form. An examination of the machines and devices in actual operation and in parts, so far as material, leads me to the conclusion that infringement is made out.

There will be a decree for the complainant, accordingly, and for an accounting, with costs.

LAAS et al. v. SCOTT et al.

(Circuit Court, E. D. Wisconsin. April 2, 1908.)

1. PATENTS—SUIT IN EQUITY TO OBTAIN PATENT—PRESUMPTION FROM REFUSAL.

In a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent denied by the Patent Office and the Court of Appeals of the District of Columbia after a hearing in interference between the same parties, the decisions of such tribunals adjudging priority of invention to the defendant, are presumptively correct only, and that presumption is destroyed by proof that they were based on false and perjured evidence.

2. SAME—PERSONS ENTITLED TO PATENT—PRIORITY OF INVENTION.

Under our patent system, he who first arrives at a complete conception of an invention is entitled to a patent therefor, unless the interest of the public is compromised by his lack of diligence in demonstrating that his invention is capable of useful operation. As between two inventors of the same thing, the one who first reduces the discovery to practical operation is deemed *prima facie* the true inventor without regard to the date of his conception, but the earlier inventor may overcome such presumption by satisfactory evidence that he used due diligence to perfect and utilize the invention, and actual reduction to practice is preferable to that which is constructive merely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 113-123.

Priority and continuance of public use of invention as affecting patentability. See note to *Eastman v. Mayor*, etc., of City of New York, 69 C. C. A. 646.]

3. SAME—REDUCTION TO PRACTICE.

When the inventor who is first to conceive is also the first to reduce to practice within the statutory period, he is entitled to priority, although a junior inventor may anticipate him by an earlier application for a patent, and may have secured such patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 113-123.]

4. SAME.

In reducing an invention to practice, it is not necessary to prolong the test until its commercial value has been established, but, if it accomplishes the end desired, it is a perfected invention, although it may prove of little or no commercial value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 113-123.]

5. SAME—PERSON ENTITLED TO PATENT—RAIL ANCHOR.

Priority of invention of the device covered by the Laas and Sponenberg patent, No. 757,754, for a rail anchor or anti-creeper, designed to prevent the longitudinal movement of the rails of a railroad track, adjudged in favor of defendant John M. Scott, on evidence showing that he was not only the first to conceive the invention, but also the first to reduce it to practice.

In Equity. On final hearing.
See 145 Fed. 195.

This is a bill in equity in the usual form for the infringement of letters patent 757,754, issued to complainants April 19, 1904. Prayer for an injunction and accounting. The device covered by this patent is known as a rail anchor or anti-creeper, designed to prevent the creeping or longitudinal movement of the rails of a railroad track. To this bill an answer was interposed denying infringement, setting up the claim that defendant John M. Scott was the original and true inventor and entitled to a patent therefor. Defendants also filed a cross-bill, under section 4915, Rev. St. (U. S. Comp. St. 1901, p. 3392), alleging priority of invention, and averring that on the 10th day of March, 1904, Scott filed an application for a patent in the Patent Office, and duly complied with all the requirements of the law and rules of the Patent Office; that such application was adjudged to interfere with letters patent 757,754 theretofore granted to complainants; that after declaration of interference evidence was taken by the respective parties, and the case was heard successively by the several tribunals of the Patent Office, and finally by the Circuit Court of Appeals of the District of Columbia. The issues in the interference are then set out, together with the opinions of such several tribunals. The prayer is that Scott be adjudged entitled to letters patent to the full extent of the claim of his application, as far as the issues of interference are concerned; and a decree is asked authorizing the Commissioner of Patents to issue such letters patent to the defendant Scott, upon compliance by him with the requirements of law and the rules of the Patent Office. The cross-bill also asks for a perpetual injunction restraining complainants from asserting any claim of title or monopoly against Scott or those claiming under him, based upon any claims awarded as the result of such interference. There is also a prayer for general relief and discovery. Issue was joined on the cross-bill by answer and replication. Much additional testimony has been taken in this court, which materially changes the case presented by the record in the Patent Office. Witnesses who gave material evidence in the interference case bearing on the date of complainants' conception have admitted on the witness stand that their former evidence was willfully and corruptly false, and that the shop book chiefly relied upon to fix dates was fraudulently manipulated and falsified by them; so that on this final hearing we are dealing with a case that differs essentially from that passed upon by the several tribunals of the Patent Office.

Otto R. Barnett, for complainants.

Walter S. Holden, E. H. Bottum, and C. C. Lithicum, for defendants.

QUARLES, District Judge. The attention of the court has been called to an agreement entered into by the several parties *pendente lite*, calculated to bring about a *modus vivendi* for the purpose of facilitating sales of rail stays under the several patents. At first blush, it seemed doubtful whether jurisdiction of the court would survive this adjustment; but a careful inspection of the stipulation convinces me that the issues under the cross-bill have not been compromised, but such controversy remains unaffected, except that all parties agree that the decision of this court shall be accepted as final, and no appeal therefrom shall be taken. The present controversy involves the question, which of two rival inventors was the first and true inventor of the device embodied in letters patent 757,754?

At the outset we are met by the contention of complainants that under the doctrine of *Morgan v. Daniels*, 153 U. S. 125, 14 Sup. Ct. 772, 38 L. Ed. 657, the final decision rendered in the Patent Office can be overcome only by evidence so clear and convincing as to exclude every reasonable doubt. I am persuaded that the Supreme Court never intended to emasculate the statute or to trammel the court of equity in its administration, but sought to emphasize the fact that in every doubtful case the decision of the Patent Office was entitled to deference at the hands of the court. Every judicial opinion must be read with reference to the facts upon which it is predicated. In *Morgan v. Daniels* the court was passing upon the same record made in the Patent Office, and, finding it a doubtful case, the doubt was resolved in favor of the tribunal specially intrusted with the administration of the patent system. In the instant case the proofs present issues which were not before the tribunals of the Patent Office. In the interference case the main question was one of diligence on the part of Scott, who, as agreed on all hands, conceived the invention in 1902, and, as the examiner found, offered no sufficient proof of reduction to practice prior to the time when Laas and Sponenberg came into the field. In the present hearing Scott has introduced new and convincing evidence of the reduction to practice in September, 1903. If this contention be sustained, the question of diligence is eliminated. In the Patent Office the date of the junior conception was established as June 27, 1903, largely by the testimony of Bryan and Fischer, who swore to the entry made in the shop book of the foundry in the usual course of business, upon which entry practically all the oral testimony as to the date of conception was based. Upon the hearing in equity Bryan and Fischer repudiated their former testimony as false, and impeached the entry in the shop book as fictitious and spurious because fraudulently manipulated by them. According to the present testimony of Bryan and Fischer and by another genuine entry in the shop book, the date of conception by Laas and Sponenberg was October 27, 1903, and subsequent to Scott's alleged reduction to practice. Thus a mass of testimony has been offered here tending to show that fraud and perjury have intervened to impeach the very foundation upon which the rulings of the Patent Office were based. These circumstances take the

case out of the doctrine of *Morgan v. Daniels*. In two cases the Supreme Court had held that the jurisdiction conferred by section 4915 upon a court of equity is original, and not appellate, in its nature, and that the case is to be heard according to the methods and procedure of a court of equity. *Butterworth v. Hoe*, 112 U. S. 50, 61, 5 Sup. Ct. 25, 28 L. Ed. 656; *Gandy v. Marble*, 122 U. S. 432, 439, 7 Sup. Ct. 1290, 30 L. Ed. 1223. It was not intended to reverse these cases. The same rule has been asserted in a later case. *In re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. Ed. 1066.

The wholesome admonition of the court in *Morgan v. Daniels* is entitled to be kept in mind in every such case. The final determination of another department of the government is not lightly to be set aside by the courts. But when new issues arise in the equity case, or it satisfactorily appears that the Patent Office has been imposed upon by fraud or perjury, the rule contended for cannot apply. The inventor who was unsuccessful in the Patent Office is still entitled to his day in court where the trial is in the strictest sense a judicial hearing by original bill with all the powers of a court of equity at the service of the parties to the suit. *Bernardin v. Northall* (C. C.) 77 Fed. 849, 852; *Appert v. Brownsville Co.* (C. C.) 144 Fed. 115, 117; *Dover v. Greenwood* (C. C.) 154 Fed. 854. The Court of Appeals of this circuit in the same case ruled that the decision of the Patent Office is not *res judicata* nor conclusive, and that its influence is persuasive merely. *Scott v. Laas*, 150 Fed. 764, 766, 80 C. C. A. 500. It appears that Laas & Sponenberg (hereinafter referred to as L. & S.) filed their application for a patent December 16, 1903; that letters patent No. 757,754 were issued to them April 19, 1904. Scott filed his application March 10, 1904. The interference was declared June 28, 1904, between claims 8 and 9 of Scott's application and claims 1 and 2 of L. & S. patent 757,754. A comparison of dates claimed in the respective preliminary statements may be set forth as follows:

	Scott.	Laas & Sponenberg.
Conception	April 5, 1902.....	June 27, 1903.
Disclosure	April 5, 1902.....	June 27, 1903.
Drawings	April 5, 1902, and August 15, 1903	June 27, 1903.
Patterns	Between April 5, and May 12, 1902.....	June 29, 1903.
Reduction to practice.....	May 12, 1902, and September 15, 1903.....	July 1, 1903.

While L. & S. in their preliminary statement claimed reduction to practice under date of July 1, 1903, it is undisputed that there was no actual reduction to practice by them, unless the embodiment of the inventive thought in a full-sized casting answered the purpose of a reduction. The examiner of interferences found that Scott was the first inventor, and that his conception dated back to April, 1902. This finding is affirmed by each of the appellate tribunals of the Patent Office, and is not controverted here. There is, therefore, no dispute that Scott, not only conceived the invention

in 1902, but that in May, 1902, he made drawings and a wood pattern, and had full-sized castings made therefrom in the Brown foundry, in Racine, Wis. These facts may therefore be treated as established.

Thus the controversy is brought within narrow limits. The question first in order and paramount in importance is whether Scott, who was first to conceive, was also the first to reduce to practice. As to the law applicable to this case, I have carefully examined the numerous authorities cited in the briefs of counsel. A careful examination of the peculiar facts in each case will show a consistent line with less conflict than appears on the surface. To review them in detail would unnecessarily prolong this opinion. From all the cases I deduce the following principles applicable to this controversy: Under our patent system, he who first arrives at a complete conception of the inventive thought is entitled to recognition and reward, unless and until the interest of the public is compromised by his lack of diligence in demonstrating that his invention is capable of useful operation. The public may justly demand of the inventor who seeks a legal monopoly that within a reasonable time the invention be brought to such a state of perfection as to be adapted to actual use. To that extent the public interest is paramount. Actual reduction to practice is preferable to that which is constructive merely, as more to the interest of the public and reasonable indulgence ought to be extended to one pursuing that course in good faith. Therefore the inventor who first reduces the discovery to practical operation is held to be *prima facie* the true inventor, without regard to the date of his conception. But the earlier inventor may overcome this presumption and prevail, if he can show by satisfactory evidence continuous diligence to perfect and utilize the invention. Thus with nicety and fairness has the law adjusted the respective rights of rival inventors consistently with the general welfare. When the inventor who is first to conceive is also the first to reduce to practice within the statutory period, he is clearly entitled to priority, although a junior inventor may anticipate him by earlier application at the Patent Office, and may have secured letters patent. *Agawam Woolen Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Christie v. Seybold*, 55 Fed. 69, 5 C. C. A. 33; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *National Cash Register v. Lamson Co.* (C. C.) 60 Fed. 603. We are dealing with a simple device. It was strenuously contended at the bar that, when embodied in a full-sized casting, it was obvious to the average man that the device was mechanically correct, and would accomplish the purpose for which it was designed, and that, on account of its simplicity, no formal test was necessary. While this doctrine has been often sustained by the courts, I do not think it can be properly applied in the present case. The doubt which calls for experiment is well expressed in the testimony of Mr. Laas, one of the complainants, who is a railroad man of large experience:

"I remember of telling them if we can make this thing stick to the rail we will have something good. If we cannot, it is not worth anything."

I agree with the examiner that some actual test was necessary to demonstrate the efficiency of the device. I am also fully in accord with the decision of the Patent Office that Scott's shop test in 1902 was not sufficient to meet the requirements of the law, for the reason that power was applied directly to the anchor, instead of longitudinally through the rail, as would be the case in actual practice. In September, 1903, Scott made another test by placing five pairs of his rail anchors upon the rails of a side track at Racine, which, in view of certain new testimony here elicited, is entitled to serious consideration. The insufficiency of the proof in the Patent Office on this subject is unaccountable. The examiner says of this test:

"The testimony, however, does not show that the bumper at the end of the side track was subjected to the shock of moving cars while the rail anchor was in position, or even that any cars were ever placed on the side track at that time. An award of priority cannot be based upon the conjecture that Scott's experiment was successful, and, if not successful, it was such a test as would sufficiently establish the operativeness of the device under service conditions. These are matters which should be established by evidence. As there is no such evidence in the record, it must be held that the operation testified to by Scott and Walker did not constitute a reduction to practice of the invention at issue."

The exceptional conditions attending this side track and this test were not disclosed in the interference proceedings. It was not an ordinary siding where cars are occasionally stored, and where they are moved at a slow rate of speed, imposing no particular strain upon the track. It was a piece of track accommodating 12 cars, which was in constant use. Owing to a downgrade, freight cars were shunted in frequently at such a high rate of speed that a powerful bumping post was required to arrest them. This bumping post was specially designed and calculated to withstand a great shock. A blueprint showing its construction is in evidence. The post was so constructed and braced that the shock of the impact was communicated to the rails longitudinally. The strain upon the rails was so severe that they broke at the joints and the rivets in the splice bar were sheared off. It further appears that just beyond this siding there was a sharp curve in the main track, which prevented the engineer from catching the signal of trainmen, so that strings of freight cars were often "kicked" in on to this siding at excessive speed, which fact aggravated the difficulty. It was by reason of these facts that Scott chose this place to test the tenacity with which his anchor would adhere to the rails that were exposed to the greatest shock. The testimony shows that these anchors remained in place through September and October and until the rails were finally taken up, and that they held firmly in every instance, although the rails were bent by the violent impulse. Scott and Walker made almost daily visits to the side track, and testify that the anchors stood the test to their satisfaction. They were not the only ones who watched the experiment. Mr. Crowley, who was then the roadmaster of the Chicago & Northwestern Railway, observed these anchors when they were fitted to the rails, and watched the experiment with great interest. He was a railroad man of 40 years' experience in track maintenance. His attention had been directed to the increasing difficulty

known as the creeping of rails, and he was studying the problem with a view to overcome such difficulty. Mr. Crowley entirely corroborates the testimony of Scott and Walker as to the physical conditions and manner of use of the side track in question, and also as to the destructive influence of the shock and strain imparted to the rails through the bumping post. According to his testimony, this longitudinal shock and strain were greater than would be experienced on the main track under any ordinary service conditions, and that the test to which Scott subjected his rail anchors on this side track was more severe, and therefore more satisfactory than could have been had elsewhere. He also corroborates Scott and Walker in their statement that, notwithstanding the great shock and strain to which said rails were subjected, the anchors did not permit the rails to slip through, but held with great tenacity, and demonstrated to him as a practical railroad man that they were an operative success. This opinion was rendered more persuasive by the fact that he ordered a large number of these anchors for actual use upon his main line. Mr. Crowley is a disinterested witness, whose testimony was not shaken under a vigorous cross-examination. Keeping in mind the fact that the only question to be settled by the test is whether the anchor would hold the rail and not allow it to slip through the jaws, I cannot see why the side-track test did not amount to a satisfactory reduction to practice.

Mr. Robinson, in his work on Patents (section 129), speaking of reduction to practice, says:

"Nor is it necessary that the invention as a means should be incapable of further improvement by the exercise of additional inventive skill. If it accomplishes the end desired, it is a perfected invention, although some newly generated idea, or some better mode of application may reach the same end in a more perfect manner."

This is only another way of saying that it is not necessary to prolong the test until the commercial value of the invention has been established. It may be a completed invention, although it may prove of little or no commercial value. When embodied in letters patent, it must compete in the market with other devices of its kind. I think Scott made a practical demonstration that the jaws of his anchor would hold the rail base so as to withstand the shock and strain to which it would be subjected in actual practice.

In passing upon the sufficiency of this test, I have been somewhat influenced by another consideration. Scott was not the first to devise anti-creepers. L. & S. had preceded him by some years, and had demonstrated by actual experience that their device, known as "No. 4 anti-creeper," would hold to the rail with such tenacity as to make it a workable device. They seem to have satisfied the railroad people on this score, for we find that in October, 1903, they were buying car load lots of the No. 4 anti-creeper for actual use on various lines. Scott's device was from a mechanical standpoint much better calculated to meet the supreme test. The L. & S. anti-creeper was constructed of one piece, the jaws grasping only one side of the rail base. Scott's device consisted of two jaws adhering on both sides of the rail, drawn together by a bolt and nut underneath the rail. The jaws were furnished with teeth that embedded themselves into the texture of the

rail base. There can be no dispute that mechanically and practically, as the event has proven, Scott's device presented superior advantages for securing firm adherence to the rails. When, therefore, in October, 1903, it had been demonstrated by actual practice that the L. & S. No. 4 anti-creeper had passed the experimental stage and had proven a commercial success, Scott was justified in resting upon the tests already made, supplemented as they were by the success of the earlier device.

In *Juengst v. Boyer*, 63 O. G. 152, the commissioner said:

"In the case of a mechanism, reduction to practice consists in the construction of a mechanism of a size capable of practical use, and a knowledge, preferably by actual trial, that it will work practically for the intended purpose."

In other words, knowledge may also be predicated upon the actual trials of others with a similar device.

In *Shaffer v. Dolan*, 107 O. G. 539, the commissioner says:

"Where it appeared that a gas burner forming the subject-matter of an interference had never been put to an actual test, but that a tip differing therefrom only in a slight variance in the inclination of the air inlets had operated successfully, held that the operation of the device in issue was evident from the operation of the prior device, and that no test of the burner in issue was necessary to constitute reduction to practice."

For these reasons I am constrained to hold that Scott, who was the first inventor, was also the first and only one to reduce the invention to practice, and that, therefore, without regard to the date of the junior conception, Scott is entitled to priority, notwithstanding the presumption arising from the letters patent granted to complainants.

Counsel will prepare the necessary decree in accordance with this opinion.

DULL v. REYNOLDS ELECTRIC FLASHER MFG. CO. et al.

(Circuit Court, N. D. Illinois, E. D. April 22, 1908.)

No. 27,614.

1. PATENTS—SUIT FOR INFRINGEMENT—ESTOPPEL.

The sale by a partner to his copartner of his interest in the firm, without warranty, does not estop him, on subsequently acquiring a patent covering articles of the kind manufactured by the firm, to maintain a suit against his former partner for infringement not committed during the partnership term.

2. SAME—INFRINGEMENT—ELECTRIC FLASH SIGNS.

The Sinclair & Goltz patent, No. 566,874, for an electric distribution machine for operating electric flash signs, discloses invention and is valid, although narrow in scope; also *held* infringed.

3. SAME.

The Dull patent, No. 780,641, for an automatic electric switch, *held* not infringed.

In Equity. On final hearing.

Geo. T. May, Jr., for complainant.

Charles Turner Brown, for defendants.

KOHLSAAT, Circuit Judge. This suit is brought to restrain infringement of patent No. 566,874, issued to W. E. Sinclair and Wm. Goltz, September 1, 1896, for an electric distribution machine, and claims 1 and 4 of patent No. 780,641, issued to complainant January 24, 1905, for an automatic electric switch, both patents pertaining to electric sign flashing machines.

Preliminarily to the consideration of the case upon the merits, there is raised in the record a question of estoppel. Complainant acquired title to the Sinclair patent on December 30, 1904. It is in evidence that complainant and defendant Ziegler were copartners doing business under the firm name of "Reynolds Electric Company" from November, 1899, to April, 1901. It is defendant Ziegler's contention that complainant approached him, Ziegler, with the statement that he was about to take up the manufacture of what he termed "commutators" for operating electric light signs, for which he thought there was a large field; that, if defendant would furnish the capital, he was satisfied an extensive and profitable business could be built up; that defendant Ziegler thereupon furnished the necessary funds, and the firm thereupon entered upon the manufacture of electric flashing machines of the charged drum and brush contact type. Afterwards the city authorities prohibited the use of these devices, and the firm took steps to employ knife switches, with the result that in September, 1901—four or five months after the termination of the partnership—a flasher with a knife switch was completed by Ziegler as successor to said firm property. It appears that at the time of dissolution neither Dull nor Ziegler knew of the existence of the patent in suit. The partnership was terminated by the sale of Dull's interest to Ziegler in April, 1901. In the amended answer Ziegler charges that he bought the good will of the firm, including all interest in the electric flashing business. From the record it appears that what was sold was the tools and stock on hand. No attention was paid to the good will. Both parties continued to use the name "Reynolds" in their business enterprises, without objection on the part of the other, and the record discloses nothing from which it can be deduced that any kind of a warranty attended the conveyance of Dull's interest to Ziegler. At or soon after the dissolution, Ziegler organized the "Reynolds Electric Company," and subsequently changed the name to "Reynolds Electric Flasher Manufacturing Company," claiming to be the successor of the old firm. Under this state of facts, defendants insist complainant is estopped from claiming infringement of the patent in suit. The evidence does not justify the contention. While it would, probably, bar complainant from the recovery of any damages for acts done during the partnership term, if any, if they amounted to infringement, it cannot be held that Dull's rights under a patent acquired several years after the termination of the partnership, in the absence of fraud, and of anything in the nature of a warranty, were waived by the partnership acts. It is not satisfactorily shown that the flashers manufactured, or the acts done during that period, constituted infringement of the patent in suit. Whatever rights defendants may have in the premises may be protected on the accounting, should the patent and the charge of infringement be sustained.

The Sinclair patent in suit is the main reliance of complainant. The Dull patent is an improvement thereon. The claims of the Sinclair patent under consideration read as follows:

"1. An electric-distribution machine comprising a series of automatic quick-break knife-switches, each of which is for incorporation as part of an electric circuit, a power-shaft, a counter-shaft in gear with the power-shaft, and a series of rotarily-adjustable switch-closing cams carried by the counter-shaft.

"2. An electric-distribution machine comprising an automatic quick-break knife-switch for incorporation as part of an electric circuit, a power-shaft, a counter-shaft, a switch-closing cam on the counter-shaft, and a reducing-gear in train with the shafts.

"3. An electric-distribution machine comprising a series of automatic quick-break knife-switches, each of the same being for incorporation as part of an electric circuit, a power-shaft, a counter-shaft, a series of switch-closing cams on the counter-shaft, and a reducing-gear in train with the shafts.

"4. An electric-distribution machine comprising a series of automatic quick-break knife-switches, each of the same being for incorporation as part of an electric circuit, a power-shaft, a counter-shaft, a series of switch-closing cams rotarily adjustable on the counter-shaft, and a reducing-gear in train with the shafts."

Those of the Dull patent are as follows:

"1. In a device of the character described, a frame, an actuating-shaft journaled in said frame, a gang of switch units associated with the frame, each switch unit of said gang comprising a stationary contact member, and a movable switch-blade, connections interposed between the switch-blades of said several units to unite the same for simultaneous movement, a roller operatively associated with one of said switch-blades for movement therewith, and a cam mounted upon the actuating-shaft arranged to co-act with said roller to move the switch-blades of said gang."

"4. In a device of the character described, a frame, an actuating-shaft mounted in the lower part of the frame, a gang of relatively stationary switch members mounted in the upper portion of the frame, a gang of co-acting movable switch members pivoted there-beneath for movement into contact therewith, and a cam device carried by the shaft arranged and adapted to move said movable members of the gang upward into contact with their stationary members, and to permit them to return to their initial position under the influence of gravity."

"My invention," says Sinclair, "has for its object to provide a simple, economical, effective, compact, easy running, and durable distribution machine for electrical use to cause automatic alternate energizing and de-energizing of electric circuits at predetermined intervals." The original application embraced eight claims, every one of which was rejected by the examiner upon the prior art. Original claim 5 was saved by amendment and constitutes the present claim 1. It reads as follows, viz.:

"An electric distribution machine comprising a series of quick-break knife-switches, each of which is for incorporation as part of an electric circuit, a power-shaft, a counter-shaft in gear with the power-shaft, and a series of switch closers carried by the counter-shaft."

The amendments were made by inserting the word "automatic" before the word "quick," and substituting the words "rotarily adjustable switch-closing cams" for the word "switch closers." Thus limited, the claim was allowed.

The invention, if it amounts to such, is manifestly very narrow. Every element is old. So far as appears from the record, the complainant

and defendant, severally and as a firm, were the first to place upon the market commercially and the first to give name to so-called "electric flashers." Prior to the formation of the partnership, Dull had installed some kind of an electric flasher at the Chicago World's Fair. He describes it as being of the charged drum or brush type, employing a sliding contact. He further says it was not mechanically successful. The flasher first manufactured by the Reynolds Electric Company—consisting of Dull and Ziegler—was similar to the 1893 device, and, like it, attained no commercial success. In the meantime, upon July 25, 1895, Sinclair filed his application for the patent in suit. At the time of the said partnership and for considerable time thereafter it was allowed to lie dormant. Even at the date of the perfection of the flasher by Ziegler, in the fall of 1901, it was altogether buried in the tomes of the patent office, oblivious of its own commercial importance. While, theoretically, defendant Ziegler was chargeable with knowledge of its existence, yet it seems that he, aided, perhaps, by Dull, reinvented the flasher without any suggestion that it had been already discovered.

There is some attempt in the evidence to show that the Sinclair patent was and is inoperative, but it is not sustained. For the purposes of this hearing, it must be deemed in force for whatever it is worth so far as these objections are concerned.

When freed from the influence of the cam or cams, it is upwardly and quickly snapped out of contact with the jaws of the stationary switch member, whereby, it is claimed, arcing is substantially avoided. The chief difference between the Dull patent in suit and that of Sinclair, so far as it is involved in this suit, is found in the fact that Dull's switch blade is returned to a circuit opening position under the influence of gravity. The returning spring shown in Dull's device, it is claimed, draws the blade when released from the influence of the cam, down as far as the point of its discharge from the stationary jaws, whence it is carried down to open current position by gravity, while in the alleged infringing devices the blade descends to open circuit position under the influence of a spring, which gives the descent a speed in excess of that supplied by gravity alone. None of these elements are new. Defendant contends that the claims of the Sinclair patent call for little, if any, more than a quick-break knife-switch and a means of operating it. It does not appear that this form of switch had before been used in operating electric flashers. It does, however, appear that it operates here precisely the same as in the other arts where it is found, as, for instance, in controllers, motors, and also in the Tomlinson patent No. 487,355 of December 6, 1892, for an apparatus for distribution of electricity. In this latter patent this switch-closing cam reciprocates, while Sinclair rotates. The rotarily adjustable switch-closing cam of Sinclair is adjustable simply because the cams can be unscrewed and reattached to the shaft. This, too, is old. The reducing gear is in no important sense different from that of the prior art. It is more intricate than that of the Reco machine and defendant's other patented and alleged infringing machine.

At the time of Sinclair's alleged invention the only flasher shown by the record to be in existence was the World's Fair device above re-

ferred to, or flashers of that type. They were not practicable, and had created no demand. Perhaps this is why Sinclair's patent was so long ignored, although it does not appear that he made any attempt to introduce it. The principal thing he did was to substitute the automatic quick-break knife-switch for the old drum or brush switch. In doing this he was obliged to employ several other theretofore unused elements as applied to flashers, although they were all employed in devices for controlling the distribution and automatic regulation of lighting and extinguishing electric lights in various combinations. These consist in (1) a power-shaft; (2) a counter-shaft; (3) switch-closing cams; (4) cams made adjustable on the counter-shaft rotatively; (5) a reducing gear in train with the shafts. It is not deemed invention to multiply the single switch into a gang, even though operated by one cam. The patents cited by the examiner, and upon which the original claims were rejected, disclose the general principles of the patent under consideration. Whether or not the assembling of the above elements by Sinclair, in view of the prior art, involves anything more than mechanical skill, is a very close question. The advance over the prior art is appreciable, and the result is such as to persuasively argue invention. This, taken together with the presumption accompanying the grant by the Patent Office, the adjustable arrangement of the cams upon the shaft, the simplicity of the whole, the application of the reducing gear for the regulation of the cam speed, the want of which in the drum-brush style of machines is so serious a feature, and the hold the device in suit has gained upon the flasher art in commerce, after its merits were at last appreciated, is thought sufficient ground for holding the Sinclair patent to be valid—very narrow, it is true, yet valid.

Nor is there room for doubt that defendants' devices are infringements. The movable switch blade is moved down in defendants' machines, while in complainant's it is drawn up—in both cases by means of a spiral spring. Whether it is influenced in defendants' case by gravity is uncertain. Even if it were, the case would not be changed. As above stated, Dull's patent, No. 780,641, application for which was filed January 12, 1904, so far as it bears upon the questions in issue, relates essentially to this matter of returning the movable switch member to circuit opening position, under the influence of gravity. In this respect I am of the opinion that this feature was employed by Ziegler as far back as 1901. I do not deem it of importance herein.

For the reasons set out, there is grave doubt whether any damages or profits can be allowed in this case growing out of the infringement. This question, however, can be considered in its place. Complainant may prepare and present the form of a decree in accordance herewith, finding the Sinclair patent valid and infringed, and dismissing the bill as to the Dull patent.

PAINE METALLIC PACKING CO. v. BLAKE & JOHNSON.

(Circuit Court, D. Connecticut. May 7, 1908.)

No. 1,233.

PATENTS—INFRINGEMENT—RING PACKING.

The Paine patent, No. 774,490, for a metallic ring packing, construed, and *held* infringed.

In Equity. Suit for infringement of letters patent No. 774,490 for a metallic ring packing, granted to Jedediah C. Paine November 8, 1904. On final hearing.

Edward K. Nicholson, for complainant.

J. P. Kellogg, for defendant.

PLATT, District Judge. The patent in suit is No. 774,490, dated November 8, 1904, for an improvement in metallic ring packing. Claim 4 is especially put at issue; but it is in a general way broader than the others, and the same question appears in each claim. I quote claim 4 for the sake of clearness:

"4. In a ring packing, the combination with an annular grooved casing and a rod of a plurality of sectional rings surrounding the rod, the said rings being arranged in a plurality of pairs, each pair within a groove, the said rings having allowances for play within the groove, and being divided solely on tangential lines, and so mutually arranged as to break joint, each of said rings having an encircling spring, which serves as the sole means of maintaining contact of the ring with the rod, substantially as described."

It will be noticed that the sectional rings of this claim, as well as the others, are to be treated in a variety of ways, and, among others, are to be "divided solely on tangential lines." Prior to the patent such rings had been combined in pairs; the one on the steam pressure side being divided radially, and the other, which serves to produce a steam-tight joint, divided tangentially. The patentee found that such a construction was faulty, because the one tangentially divided wore away faster than the other, and, besides, that if their positions were accidentally reversed the packing would leak. So he conceived the idea of putting a tangentially cut ring in the place of the one radially divided, thus having a pair of similar tangentially cut rings in one groove or pocket. Thus each forms a steam-tight joint with the rod, and each offers a continuous surface, so that the steam pressure will not pass through radial cuts into the annular cavity and act upon the periphery of the second ring, as had been the case before that time. The steam at chamber pressure forces the rings together and against the side of the annular cavity, thus making a steam-tight joint with the cavity and with the rods. The rings are subject to equal wear, and the tangential cutting so acts that, as the rings or rod wears, the rings follow up, so to speak, and keep the packing close upon the rod.

The defendant's device is for all practical purposes the device of the patent. It gains, by reason of the way the rings are cut, all the advantages of the patent. The defendant says, however, that there is no infringement, because the rings are not divided on a line which forms a pure tangent to the circle made by the inner circumference of

the ring or the outer circumference of the rod. Such a construction of the patent would destroy the life of the conception. It is true that the drawings show the rings divided by a cut that is a pure tangent to the inner circumference of the circle; but it is obvious that practically such cuts cannot be made on an absolute tangent, and, furthermore, the drawing is only shown as one embodiment of the invention. The central thought of the patentee seems to be concerned with two kinds of cuts, radial and tangential. Radial cuts did not work, but tangential cuts did. It is not necessary to say that the instant one departs from a radial cutting one reaches a tangential cutting.

It seems to me that any one who cuts both rings alike, or nearly alike, and in doing so goes so far away from a pure radius and towards a pure tangent as to obtain the good results which the patentee undoubtedly did obtain, is an infringer. The standard dictionaries define tangential as "being or moving in the direction of a tangent." Nothing more than that is needed here. It is quite a trip from a pure radius to a pure tangent. When we leave the radius we move toward the tangent. When we have traveled more than half the distance, we must be in a tangential, rather than a radial, neighborhood.

Let a decree be entered for an injunction and accounting as prayed for.

MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE v. CITY OF
COLUMBUS et al.

CITY OF COLUMBUS v. MERCANTILE TRUST & DEPOSIT CO. OF
BALTIMORE et al.

(Circuit Court, N. D. Georgia, W. D. April 25, 1908.)

No. 59.

1. MUNICIPAL CORPORATIONS—CONTRACTS—WATER SUPPLY—POWER OF CITY.

Cities in Georgia, under the "general welfare" clause in their charters, have power to contract for water supply for their inhabitants and for fire protection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 726.]

2. SAME—CREATION OF DEBT.

Where a city having power to contract for water supply granted a franchise to a water company to use its streets, and made a contract for a supply of water for a term of years, obligating itself to pay the water company a certain sum annually for the use of water for fire purposes, such contract did not create a debt in violation of the state Constitution.

3. CONTRACTS—CONSTRUCTION—WHAT LAW GOVERNS.

A contract will be construed according to the law of the state as interpreted by its courts at the time the contract was made, and not in accordance with subsequent contrary decisions.

4. MUNICIPAL CORPORATIONS—CONTRACT FOR WATER SUPPLY—EXCLUSIVE FRANCHISE—VIOLATION—COMPETITION BY A CITY.

Where a city had power to contract with a water company for water supply for a term of years, it was no objection to such contract that it provided that the water company should have an exclusive franchise,

which provision precluded the city from entering into competition with the waterworks company by the erection of works of its own.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 757.]

5. **WATERS AND WATER COURSES—PUBLIC WATER SUPPLY—CONTRACT—PERFORMANCE—EVIDENCE.**

Evidence *held* to sustain the findings of a master that a water company had failed to comply with a contract with the city to furnish its inhabitants with sufficient and wholesome water, etc.

6. **SAME—FORFEITURE—INJUNCTION.**

A city granted a water company an exclusive franchise to use its streets to furnish water to the city and its inhabitants for a term of years. The service being unsatisfactory, steps were taken by the city to construct and operate an opposition plant, when the bondholders of the original corporation, which was in the hands of a receiver, sued to restrain the city's operation, whereupon the city filed a cross-bill for a decree annulling the contract and restraining complainants from setting up any right or interest thereunder. *Held*, that the city, not being entitled to enter into competition with the water company under its exclusive franchise, was only entitled to a denial of the injunction prayed by complainants in order to provide the city with adequate water facilities on electing to purchase so much of the existing system as was available for use by the city at its fair value.

In Equity.

L. F. Garrard, Hall & Wimberly, and Joseph Packard, for complainant Mercantile Trust & Deposit Co. of Baltimore.

T. T. Miller, J. H. Martin, and Ellis, Wimbish & Ellis, for defendants city of Columbus et al.

NEWMAN, District Judge. This is a bill filed by the Mercantile Trust & Deposit Company of Baltimore, trustee for certain bondholders of the Columbus Waterworks Company, against the city of Columbus, seeking to enjoin the city from selling bonds to build waterworks of its own. There is a cross-bill, in which the city of Columbus seeks to have the contract between it and the Columbus Waterworks Company annulled, on the ground of failure on the part of the waterworks company to carry out its contract. The case is now before the court on exceptions to the report of the master. There was a hearing in the case on an application for injunction pendente lite, the injunction granted, and the case referred to Henry R. Goetchius, Esq., standing master. 130 Fed. 180. The master made a report, and pending the consideration of the same the Supreme Court decided the case of *City of Dawson v. Columbia Avenue Savings Fund, etc., Co.*, 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713. When that decision was announced, believing that case to be in all respects similar to the Columbus Case, on motion of counsel for the city of Columbus, this case was dismissed for want of jurisdiction. The case was taken by the complainant to the Supreme Court of the United States on the question of jurisdiction, and the action of this court was reversed. *Mercantile Trust & Deposit Co. of Baltimore v. City of Columbus*, 203 U. S. 311, 27 Sup. Ct. 83, 51 L. Ed. 198. The mandate from the Supreme Court having been filed in this court, the case was again argued on the exceptions to the master's

report. It has been submitted and has been for some time held under advisement by the court. The master's report is lengthy, going fully, exhaustively, and ably into the facts at issue, and into the various legal aspects in which the case is presented. The facts necessary to an understanding of the case are briefly, but perhaps sufficiently, stated in the report of the case on application for a preliminary injunction in 130 Fed. 180.

A summary of the conclusions of fact by the master in the report now before the court, as stated by him, is as follows:

"(1) I have found that acceptance by the city was based on statement of the water company that the system had been completed in compliance with the contract and upon assurances by the company that the water would be wholesome, abundant, and lasting.

"(2) The contract outlined.

"(3) Selection of source of supply and completion of the works November 6, 1882.

"(4) I have found that the system as accepted by the city in 1882 had not met the general requirements of the contract, and that on complaints to the company the system had been improved to such an extent that in 1889 the service was at that time accepted as satisfactory to the city.

"(5) That from 1889 to May, 1900, there was dissatisfaction and complaints on the part of the city because of insufficiency of the water supply, and especially with the unsupplied needs of the city for water in its newly acquired territory; that the company had notice of this and recognized the necessity of increased water supply; that during this period the city, through its council, twice made an effort to repudiate the contract, but were not sustained by the requisite popular vote on submission of the question to the people; that the company in good faith endeavored to adjust the differences by offer to arbitrate and the city declined the offer; and that finally the city accepted the existing conditions and concluded a supplemental agreement by which the company was given an opportunity to test its ability to carry out the requirements of the contract; that the company failed in this, and that in 1902 both the council and the people determined to no longer depend upon the water company.

"(6) That the water company has at no time complied with section 3, requiring a reservoir of 125,000,000 gallons available supply, and from 1884 it has failed to comply with the requirements of section 12, as to the construction and maintenance of the reservoirs.

"(7) That paragraph 11, as to filtration, has not been complied with on the part of the company.

"(8) That the company has failed to comply with section 5 of the contract as to distribution in not connecting together the ends of its system, and placing mains sufficiently large to at all times give full supply of water.

"(9) With reference to the supply of water, I have found that the company has failed to comply with sections 1 and 10, in that sufficient supply of wholesome, constant, and ample water has not been, and cannot be, furnished from the source of supply as selected, nor is the same sufficient to meet the wants of the city and private consumers for present and future requirements.

"(10) I have found that the company has not complied with section 4 as to supply main.

"(11) That, as to pressure from 1893 to 1902, the pressure was variable and uncertain, that the gravity plan could not sustain it to the requirements of the contract, and that the standpipe and pumping devices adopted to assist it, while practically beneficial, were not at all times satisfactory; that the company has not met the requirements of section 27 in maintaining pressure at 32 pounds, nor supplemental contract requirement of 40 pounds, and that in fires of any magnitude the pressure and water supply is insufficient, and that the supply is not ample for fire protection as required by section 9, and that the receiver by the improvement of the pumping station has greatly bettered conditions.

"(12) With reference to the wholesomeness of the water as required by section 10, I have found that the reservoir water when available is, under normal conditions, a wholesome water, but when the water is low it is not wholesome; that prior to July, 1902, the water furnished by the company was, with few exceptions, within the requirements of the contract, and in these exceptions the city has not availed itself of the provisions of section 13 of the contract to correct impurities; that since July, 1902, the company has not furnished a constant supply of wholesome water, nor has the receiver been able to do so; that the Chattahoochee river cannot be relied on as a constant source of supply for wholesome water, but only so when, on a normal flow of the river, water is taken from points above all possibility of contamination and properly filtered.

"(13) I have found that the purchasers of the water company in 1890 acquired the stock of the company without consideration; that the property was acquired by the issue of \$500,000 of bonds to the purchasers, three hundred and twenty-five thousand (\$325,000) dollars of which was the agreed valuation of the property, and was used by themselves in its purchase; that the price was largely in excess of its actual value, and that the syndicate who originally purchased these \$325,000 of bonds knew or had full opportunity of knowing this fact; that of the cash proceeds of the sale of these \$325,000 being the full amount less 10 per cent. discount and added interest, the sum of \$150,000 was applied to discharge an outstanding bond issue, and the purchasing company and its individual shareholders received the benefit of the remainder; that the subsequent purchasers, and who are still the present holders of these \$325,000 bonds, bought the same from and upon representation of the bond syndicate.

"(14) That there are outstanding 392 bonds, of which 386 are on deposit with the bondholders' committee; that the 67 extension bonds should be placed on the same basis as the 325 bonds originally issued, and that at the time of the filing of the bill the company should be chargeable with interest on 392 bonds.

"(15) That the company has not been able, for the want of available funds to maintain and improve its system as the growth of the city demanded, and that extensions since 1891 have from time to time been, with the exception of a small amount, paid for by a necessary increase of a bonded indebtedness originally out of proportion to the earning capacity of the system, and constantly growing further beyond the ability of the system to maintain; that the system has not been reinforced and strengthened as its needs require, and that the owners of the bonds of the company recognize this fact.

"(16) That the actual amount expended by the receiver to January, 1904, on betterments is \$42,220.85.

"(17) That the probable cost of proposed improvements needed to make the system adequate for the present needs of the city will be \$85,000, exclusive of expenditures made by the receiver, and that such improvements and changes contemplate the river as a permanent source of supply.

"(18) That the present estimated value of the available portion of the system with the river as a source of supply is \$176,562.02.

"(19) [This clause has reference to rentals and is not material here.]"

The master's summary of his conclusions of law is stated as follows:

"(1) I have concluded that the city had the power to enter into the contract, provided no state or federal law was violated.

"(2) That the contract did not create a debt in violation of the Constitution of Georgia.

"(3) [This finding is immaterial here.]

"(4) That the grant of the franchise is to be construed as meaning that the city would not enter into competition with the water company as long as the contract for supplying water to the city could be complied with on the part of the company, and that the grant was permissible as an incident to the performance of the principal undertaking.

"(5) That the act of 1902 is not a revocation of the franchise as defined in this contract.

"(6) That the city in the exercise of its police power could enact the ordinance now sought to be set aside, but with limitations as to the rights of the water company and its creditors as may be determined by the court.

"(7) That the acceptance of the works was conditional, and the company not having fulfilled its assurances of complying with the contract, and that without fault on the part of the city, the latter is not estopped from constructing a system of its own.

"(8) That the city is released of its reciprocal obligations by reason of the continued default of the company.

"(9) That the city could not in its execution of the contract in 1881 bind future administrations to purchase. The clause is to be construed as conferring a privilege of purchase and nothing more.

"(10) That the valuation of the system should be fixed at cost of reproduction and 10 per cent. added for present connections with and supply of buildings.

"(11) That the contract with the city should be rescinded and injunction denied, and that the bondholders are not entitled to continue operating the works under the contract.

"(12) [The twelfth finding is also immaterial here.]"

As to the peculiar rights of the bondholders in this case the master, after some discussion of the matter, concludes as follows:

"I conclude:

"(1) That the holders of the bonds of the Columbus Waterworks Company have no greater legal right than the company to a continuance of the present contract, and the company having failed to perform its conditions, and the city being entitled to a cancellation thereof, as against the company, it has a similar right against the bondholders who have no legal right to a continuance of the contract for their benefit.

"(2) That the city of Columbus is entitled to have said contract rescinded and declared set aside and annulled, and that it should be permitted to carry out the purpose of the ordinance of September 14, 1902, for the construction and operation of a system of waterworks.

"(3) That the water company is not entitled to the enforcement of the specific performance of its contract, nor of the validation thereof, nor to an injunction against the city's carrying out the purposes of its ordinance."

The master then makes the following recommendations based on his findings of fact and of law:

"Reviewing the several findings of fact, and conclusions of law and fact as applicable to this case on its merits, I have to submit, in conclusion, the following:

"The case, is before the court under proceedings brought about by the trustee moving against the Columbus Waterworks Company in the interest of the holders of bonds of the company. Both the plaintiff and defendant in the foreclosure proceedings are parties to the present bill. The city, as defendant herein, is applying through a cross-bill for affirmative relief. The court is in control of and operating the property. Connected with the legal questions involved is the grave question of supplying the population of a large and growing city with wholesome and abundant water for domestic and sanitary uses, and for protection of property. The consideration of public interest will largely influence a court of equity when property upon which an entire city is dependent for its water comes into the power and under control of the court." *Joy et al. v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843. On the other hand, the bondholders, the real parties at interest as to the disposition of the property in litigation, have supplied all the funds both for the original purchase and enlargement of the works, to the extent they have been enlarged. It is true they assumed the risk of the investment, and their legal rights are no higher than those of the water company, but there may be an equity in their favor. There were portions of the system lying within the city of Columbus which could possibly be made available for the future uses of the city from whatever source her water supply is drawn.

While the city is entitled to a rescission of the contract and may proceed to construct her own water system, such a system operated independent of that of the water company would without doubt greatly destroy, if not render entirely valueless, the property to which these bondholders now look for the security of their bonds. Would it not be in accordance with equity and good conscience to require the city, in view of all the facts developed in this case, to utilize this available portion of the system at its reasonable and fair value and the proceeds be appropriated for the benefit of the holders of the bonds? The court, having jurisdiction, and having power to do, under the present bill, whatever may be necessary or proper to fully protect the rights of all and do equity between the parties, can mould a decree which will work no injustice. Whatever be the value of the present waterworks property, any portion of it which can be of use to the city in the construction and operation of future waterworks should be made available for that purpose, and the net proceeds thereof should in equity be applied for relief to that extent of the holders of bonds of the water company. It would be manifestly unjust and inequitable to allow the city to proceed unconditionally with its plan to provide the inhabitants with water, and not protect the interests of these bondholders to the extent, at least, of the value of such portions of the system as may be available for the city's use. To quote the language of one of the able counsel for the complainant: 'They [the bondholders] are entitled to be protected to the extent of the value that is there.' While he referred to the value of the entire system, the statement is equally applicable to the portion which may be available for the city's uses. The bondholders have proposed to sell the present system to the city at a fair valuation. The city contracted for the privilege of purchasing the system, and, while I have found this not to be a binding legal obligation of purchase, it may in equity be enforced to the extent of requiring a purchase of such parts of the system as the city may now use. I have found that the portions lying in the state of Alabama are of no practical value. The valuation I have found is applicable only in case the river is to be used as a source of supply, and I have found that this was not in the minds of the parties when the contract was entered into.

"A decree in this cause refusing injunction and declaring the contract annulled and canceled should not be unconditional. The available property need not be necessarily lost to the bondholders, if they be willing to save it upon the terms decreed by the court. They could be permitted to accept from the city a fair valuation thereof and the city could be required to pay the same before proceeding to carry out the purposes of its ordinance. If, on the opportunity being afforded, the complainant, trustee for the bondholders, declines to accept the valuation fixed by the court and convey to the city the available part of the system, then the city should be permitted unconditionally to proceed with its undertaking.

"I therefore recommend:

"(1) That in order to ascertain what may be the value of the portion of the system located in the state of Georgia, so far as the same can be utilized by the city to supply such a distribution system as would be adequate for the needs and purposes of the city in the construction and operation of a waterworks system, a special reference be had to take testimony of experts upon this question, and that a report be had thereon.

"(2) That, on such report being made, the city be required, in terms of a conditional decree, to pay into court for the use of the trustee complainant in this cause (subject to prior payments as may be decreed), the sum ascertained by said report, said payment to be made within a day specified after the filing of written consent on the part of the trustee for the bondholders to accept said amount in satisfaction of all interest and claim of right which said bondholders allege as existing under the outstanding bonds of the company or otherwise.

"(3) That thereupon the lien attaching by virtue of the trust deed or otherwise held by the complainant to secure the bonds of the water company, so far as the same applies to the property of the company within the corporate limits of the city of Columbus, Muscogee county, state of Georgia, and found under said reference to be of use to the city, be released and canceled, and that the Columbus Waterworks Company and the Mercantile Trust & Deposit

Company of Baltimore execute and deliver to the city of Columbus a conveyance of all said property, free from all liens and incumbrances under said trust deed and mortgage, and that the trustee be required to so enter upon said deed, and upon the several bonds on deposit with it and those held for the committee of bondholders in this cause, and that the holders of such bonds as have not been so deposited or held shall be estopped from setting up any claim or lien upon the property so conveyed, and, further, that the eight bonds held by the receiver be surrendered and canceled, and receiver's certificates be substituted therefor as collateral for the outstanding indebtedness secured by said bonds.

"(4) That out of the funds decreed to be paid into court there shall first be paid any sums necessary for redemption of all outstanding certificates of the receiver, and such other sums as may be proper to be paid after an accounting has been had of the indebtedness of the receiver, and that the property above named be declared free of all lien of receiver's certificates and all other liens.

"(5) That the affirmative relief as prayed in the cross-bill of the city be granted, and that the city be allowed, after the deposit of the aforesaid amount, to proceed to carry out the purposes of the ordinance providing for its waterworks system.

"(6) [The sixth recommendation is immaterial here.]

"(7) That the cost of the litigation be taxed equally between the parties.

"(8) That in the event the city fail to pay in the amount on the day specified as provided in the second paragraph herein, when written acceptance is filed by the trustee as required, then injunction issue against the city, and the bondholders be permitted to carry out the contract as prayed in their amendment to the bill, and all costs be taxed against the city; but in the event the acceptance of the trustee is not filed, as required, then the bill of complainant be dismissed, and the city permitted to proceed to carry out the purposes of its ordinance of September, 1902, and all costs be taxed against the complainant."

The principal legal questions controlling in this case are: (1) Whether the city under its charter had the authority to contract for a supply of water for the city and its inhabitants; (2) whether the contract in this case created a debt in violation of the Constitution of the state of Georgia; and (3) whether the exclusive character of the contract in this case can be upheld.

It is well settled in Georgia, as held by the master, and as determined by Circuit Judge Pardee in the case of *City of Dawson v. Columbia Avenue, etc., Trust Co.*, supra, that cities have the power under the "general welfare" clause in their charters to enter into contracts for a water supply for their inhabitants for domestic use and for fire protection. *Mayor and Council of Rome v. Cabot*, 28 Ga. 50; *Wells v. Mayor and Council of Atlanta*, 43 Ga. 67; *Grace v. Hawkinsville*, 101 Ga. 553, 28 S. E. 1021. That the action of the city council of Columbus in entering into this contract did not create a debt in violation of the Constitution of the state is also held by the master in this case, following the decision in the Dawson Case. After quoting from the report of the special master, approved by Judge Pardee, in the Dawson Case, it was said in this case on the former hearing (130 Fed. 184):

"From these citations it will be seen that the decisions of the Supreme Court of the state were quite as favorable to the validity of the contract in this case as they were at the time of the contract in the Dawson Case. If in that respect there is any distinction in the two cases, it is favorable to the complainant here."

The views of the court in the Dawson Case, and in this case when the former decision was made, are well expressed by the master in the Dawson Case, in this language (130 Fed. 171):

"It cannot, therefore, fairly be said that there was such a settled course of judicial decisions in Georgia on this question at the time of the making of the contract as to constrain the courts of the United States to follow later decisions of the state court, especially in a case, where the rights of innocent third parties are concerned."

The decisions of the Supreme Court of the state of recent years have been to the contrary, but this could not affect the contract if, at the time it was made, the decisions of the Supreme Court were as stated. I see no reason for departing from what was held in the Dawson Case, and what was before held in this case as to this question.

The next, and perhaps most important, legal question involved in this case is that of the exclusive character of the contract. When this case was before the court on the application for injunction pendente lite, the Walla Walla Case, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, was the most important and controlling case on the subject of the exclusive character of such contracts as this. Since that time a number of decisions have been made. The three most recent cases are Knoxville Water Co. v. City of Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353, City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, and the quite recent case of Water, Light & Gas Company of Hutchinson v. City of Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. —. These three cases cite quite a number of preceding cases, none of which need be discussed here in the view that is taken of the question as determined by the facts of this case, and of the contract under consideration. In the Knoxville Case it is held by a majority of the Supreme Court (four justices dissenting) that an agreement on the part of a city with a waterworks company not to enter into a contract with any other parties for the establishment of waterworks during the period of the contract did not prevent the city itself from erecting waterworks. In the Vicksburg Case it was held that the exclusive character of the contract entered into in that case prevented the city from entering into competition with the waterworks company by the erection of waterworks of its own. In the Hutchinson Case the decision seems to have been based on local statutes and decisions of Kansas, and it was determined by the Supreme Court that, under those statutes and decisions, the city of Hutchinson was not authorized to enter into an exclusive contract. The case here is more nearly like the Vicksburg Case. Assuming, as I have, that the city had authority, under the general welfare clause in its charter, to enter into this contract, and that it did not, as the decisions stood at the time the contract was made, create a debt in violation of the Constitution of the state, there is nothing, so far as I have been able to see, and certainly nothing has been brought to the attention of the court, under the statutes and decisions of this state which would prevent the city of Columbus from making an exclusive contract for a limited period, if that contract was a necessary and indispensable incident to the contract for a supply of water. That such a grant of an exclusive privilege was necessary and indispensable to the main undertaking of the city seems to me to be beyond question. Considering the size of the city of Columbus at the time this contract was entered into, and the number of

its inhabitants, it would have been an impossibility to have had any one enter into a contract of this sort, if the parties so contracting were to be met immediately, or soon thereafter, with competition from another waterworks company, or from the city itself engaging in the business of supplying water to the city and its inhabitants. Such a contract would have been utterly valueless, and no one would have undertaken the expenditure necessary for the establishment of such a system of waterworks as was contemplated by this contract, and was actually established, unless they had been guaranteed an exclusive right for some reasonable period at least for rendering the service and receiving the return expressed in the contract. Competition from other parties, or from the city, would, of course, have destroyed the entire value of the outlay. It is clear that responsible parties would not have entered into any such contract except for its exclusive character. This being true, it comes within the decision in the Vicksburg Case, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102. The language of the court in that case, in the opinion by Mr. Justice Day, is so pertinent here that I quote from it at some length, as follows:

"The contract in the respect under consideration is found in section 1 of the ordinance, and undertakes to give to Bullock & Co., their associates, successors, and assigns, the exclusive right and privilege, for the period of 30 years, from the time the ordinance takes effect, of erecting, maintaining, and operating a system of waterworks, with certain privileges named, for the furnishing of a supply of good water to the city of Vicksburg and its inhabitants for public and private use.

"Without resorting to implication or inserting anything by way of intent into this contract it undertakes to give by its terms to Bullock & Co., their associates, successors, and assigns the exclusive right to erect, maintain and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract, and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named: Has it done so by the express terms used? It has contracted with the company in language which is unmistakable that the rights and privileges named and granted shall be exclusive. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the Walla Walla Case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of waterworks, which may and probably would practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned.

"The term 'exclusive' is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century Dictionary, we find it defined to mean: 'Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided; sole; as, an exclusive

right or privilege; exclusive jurisdiction.' We think, therefore, it requires no resort to implication or intendment in order to give a construction to this phase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which says in plain and apt words that it shall have an exclusive right, a sole and undivided privilege. To hold otherwise in our view would do violence to the plain words of the contract, and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. On the authority of the Walla Walla Case, the city had the power to exclude itself for the term of its contract, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that, for the term named, the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far at least as the city's right to compete is concerned. Any other construction seems to us to ignore the language employed and to permit one of the parties to the contract to destroy its benefit to the other. We think the court below did not err in reaching this conclusion."

The above language appears to be conclusive of the question before the court in this case. The contract in that case was exclusive, and in this case it is exclusive. It was for 30 years, in both cases. I do not see either any material difference between the local law in Mississippi and the law in Georgia at the time the Columbus contract was entered into. My conclusion, therefore, is that the exclusive feature of this contract must be upheld.

It may be proper, however, in this connection to consider the effect of certain provisions of the Constitution of Georgia which were relied upon by counsel for the city. Article 1, § 3, par. 2, Const. Ga. 1877, provides that:

"No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities, shall be passed."

The succeeding paragraph (3) provides:

"No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

The provision of the Constitution of the state of Mississippi is as follows:

"Corporations shall be formed under general laws only. The Legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever in its opinion, it may be for the public interest to do so; provided, however, that no injustice shall be done to the stockholders."

The Supreme Court, in the opinion in the Vicksburg Case, 202 U. S. 464, 465, 26 Sup. Ct. 660, 664, 50 L. Ed. 1102, after referring to the fact that the Constitution in which this provision occurred was adopted in 1890, and the contract in that case was created by an ordinance which was passed in 1886, refers to the case of Hamilton Gas-light & Coke Co. v. City of Hamilton, 146 U. S. 258, 13 Sup. Ct. 96, 36 L. Ed. 963, and proceeds in this language:

"Furthermore, the Mississippi Constitution contains this provision which is not in the Ohio Constitution considered in the Hamilton Case namely: 'Provided (in exercising the right of amendment or repeal of a charter) no injustice shall be done to the stockholders.' If it be true that the complainant

below had a binding contract excluding competition by the city in furnishing a water supply for the period of thirty years, we think it would be a palpable injustice to the stockholders to permit the competition of the city by new works of its own, which, whether operated profitably for the municipality or not, might be destructive of all successful operation in furnishing water to consumers by the private company."

I think this citation of authority alone sufficient without referring to other cases in which similar clauses in state Constitutions are discussed. The effect of the action of the city of Columbus on the creditors and bondholders of the waterworks company will be hereinafter referred to. The master discusses the question raised by counsel for the city as to the right of the city, in the exercise of its police power, to provide for another supply of water. He concludes that the city has such right, subject to certain rights of the water company and its creditors, which he discusses later.

Assuming, therefore, that this is a valid contract, binding upon the city, and that the city was precluded thereby from entering into competition with the waterworks company by erecting a system of its own, we come now to the question of whether or not the waterworks company on its part has complied with its contract. I do not agree with the master entirely as to some of his findings in this respect. It seems to me, under the facts as shown by the evidence, that when the city council was informed that the waterworks system had been completed, and the council with the aid of experts examined the system and expressed its satisfaction and approval, it could not afterwards set up defects in the original construction of the system; so that as to the sufficiency of the reservoir, mains, filters, etc., I should be disposed to disagree with the master, but, as to the master's finding that there was a failure to furnish an abundant supply of pure and wholesome water, the facts in evidence before him justified his finding, particularly as to September, 1902. While there were some failures before that to give the city and the people all they ought to have had in this respect, these failures were passed over by the city, and, as a rule, the trouble was remedied, and the satisfaction of the city council expressed in the changes and improvements made. The people of the city twice refused during the contract, in 1894 and in 1897, to vote by the necessary two-thirds majority in favor of the issuance of bonds by the city for the erection of a waterworks system of its own. Although there had been complaints from the time of the completion of the waterworks in 1882 until 1889, the master found that in 1889 the system had been improved to such an extent that it was accepted as satisfactory to the city. For several years there were negotiations between the city and the waterworks company with reference to supplying water to additional territory which had been taken into the city, and these negotiations appear to have resulted in a practical agreement in 1900, although there were some few items of disagreement. The master's finding as to the condition from 1889 to 1900 is expressed as follows:

"I find that from 1889 to May, 1900, except at comparatively short intervals there was dissatisfaction and complaints on the part of the city because of the insufficiency of the water supply, and especially with the unsupplied needs of the city for water in its annexed territory; that the company had

notice of this, and recognized the necessity of increased supply. I further find that during this period the differences between the company and the city led to an effort by the council on two separate occasions to repudiate the contract, but that it was not sustained by the requisite popular vote, thereby indicating the desire of the people to give to the company an opportunity to carry out the terms of the contract; that the company in apparent good faith endeavored to adjust the differences by offer to arbitrate and the council declined, and that finally the council accepted existing conditions, and concluded a supplemental agreement by which the company was given an opportunity to test its ability to fully meet the requirements of the contract, and that in 1902 both the council and the people determined to no longer depend upon the water company."

The source of supply of water selected by White, and accepted as has been stated, by the city, was in Alabama, four miles west of Columbus. A reservoir was first constructed of stone, and afterwards, in 1885, a second or upper reservoir, immediately above the lower and first reservoir, was constructed by building a dam across the upper end of the first reservoir. The real difficulty, as gathered from the evidence, seems to have been the inadequacy of the supply, and also the failure on the part of the company to construct the upper reservoir as it should have been. The master finds that when the stream supplying these reservoirs became abnormally low, and the upper and lower reservoirs not properly supplied, that the water became stagnant and impure, and greatly limited in quantity. He finds that this condition existed in 1894, 1895, 1898, and 1899, and notably so in 1902. The serious condition which existed in 1902 led unquestionably to the action of the people of the city in voting almost unanimously in favor of the issuance of bonds, which is in controversy here. Of course, one of the conditions, and perhaps the main condition, which caused the trouble in 1902, was an unusual drought. This condition really existed again in 1904 for a short time, and would have been serious perhaps but for the prompt action of the receiver, under the authority of the court, in remedying the difficulty by arranging to obtain water from the Chattahoochee river at a point above contamination.

There may be some merit in the claim made by counsel for the complainant that the action of the city council and of the people interfered to some extent with the ability of the waterworks company to carry out its contract. This, if true, was mainly so as to the agitation in the city council and among the citizens on the subject of municipal ownership, thereby affecting the credit of the waterworks company and its ability to make further improvements. But, even making some allowance for this, in my judgment the facts in evidence were sufficient to justify the master in finding that there was a failure on the part of the company to furnish an abundant supply of pure and wholesome water as provided in the contract, and finding the company at fault in this respect. It is a serious matter to undertake to supply the inhabitants of a city with an ample supply of good and wholesome water, and persons entering into a contract to do this necessarily must do so with an understanding of the important character of the undertaking. This is particularly true of a growing city. Taking this whole record together, and considering all the evi-

dence, the master, as has been stated, was justified in reaching the conclusion that there was a failure to comply with the contract in this respect.

The prayer of the cross-bill filed by the city is that it have a decree annulling the contract with the waterworks company, and that the cross-defendants be perpetually enjoined from setting up any right or interest thereunder. This would be in effect decreeing a forfeiture of the waterworks company's rights under its charter and under the ordinances of the city and under its contract. This will not be done in a court of equity, and certainly not except upon the same conditions that the prayer of the complainants in the original bill for an injunction will be denied. It should not be done unconditionally in any event, and clearly not as against the bondholders. Substantially and practically the action of the court in either finally granting or denying the injunction will settle the rights of the parties in this case, so that a decree upon the cross-bill is really unnecessary, even if it is allowable.

I come now to the consideration of the recommendation of the master as to the conditions upon which a final decree denying the injunction sought by the complainant should be entered. As shown by the record in this case, on December 22, 1902, a bill was filed by the Mercantile Trust & Deposit Company of Baltimore, trustee for the bondholders, against the company. William S. Green was appointed receiver, and permission was granted the receiver to issue \$50,000 of receiver's certificates, the trustee for the bondholders consenting thereto, for the purpose of making improvements to the waterworks plant. The receiver assumed charge on January 15, 1903. At the time the report of the master was filed the receiver had expended \$47,220.85 in improvement of the plant, the larger part of which was for a filter plant and pumping station. Since that time the receiver has expended a considerable additional amount in improvements. From the time he took charge the receiver has, with one exception, been furnishing the city with fairly good water, and with a sufficient supply of the same. The exception was in the summer of 1904, during a protracted drought, when the streams in Alabama were almost dried up, and the Chattahoochee river very low. The main difficulty was that the intake was at a point below where there was some contamination of the river. This was promptly remedied, and, since that time there has been no complaint, at least none has been brought to the attention of the court. The bondholders, acting through their committee, have done everything reasonably within their power to make the present waterworks system effective and satisfactory. I am not satisfied that under the facts of this case it is brought within the ruling of the Supreme Court in *Farmers' Loan & Trust Co. v. City of Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573. In that case it was held that the rights of the bondholders were no higher than those of the company; the decision being based, of course, on the facts of that case. In this case the city has for five years accepted and received the benefit of the efforts of the bondholders to give the city a good supply of water. While, of course, the bondholders were interested in protecting their security,

the result of the work and improvements for which they furnished the funds has been to give the city what is conceded I think by all parties to be at least a fairly good supply and quality of water. They must continue to do this until the end of this litigation, whenever that may be, for the idea could never be entertained of allowing the waterworks to be stopped and the city left practically without water, as it would be now unless this system was continued. The maxim, "He who seeks equity must do equity," is applicable here. I conclude that not only in justice and fairness, but testing the matter by sound principles of equity, the city, as against these bondholders, should be required to take so much of this waterworks plant as may be hereafter determined, at a fair valuation, as a condition of, and before a decree is entered in its favor finally denying an injunction in the case against the issuance by the city of its waterworks bonds.

The master finds that the present estimated value of the available portion of the system, with the river as a source of supply, is \$176,-562.62. This does not include the value of that portion of the company's property in Alabama, including its lands, reservoirs, pipes, and right of way in Alabama. It seems to me that it would be impracticable to detach this portion of the system from the other, in the manner suggested by the master. The Alabama property must be in any view of it of considerable value, and for some time to come, allowing for any direction this case may take, it should and doubtless will be used as a partial source of supply. There is a provision in the contract that:

"At the end of fifteen years from the completion of the works the city shall have the right to purchase the same with all the rights, franchises, and property at a price to be mutually agreed upon, or the valuation may be ascertained by three disinterested nonresidents of Columbus or Muscogee county, one to be a hydraulic engineer, the city to appoint one arbitrator, White one, and these two to select a third. When the value of the works is thus ascertained and declared, the city shall pay the sum named with ten (10) per cent. added; and the city shall, in this purchase, assume all the obligations of White, the lawful acquittances of which shall be received by White as a part of the cash payment of the declared value of the waterworks. The obligations include such as are for operating, maintaining, and extending the same, and the duties incident thereto. In assuming money obligations for indebtedness, or choses in action, due from White to others, the same shall be in lieu of cash payments to equal amounts, and no obligation to assume money liabilities greater than the value to be paid by the city; but the city has the right to decline the purchase after the value is ascertained upon payment of expenses of arbitration. If the city does not buy on this valuation when ascertained the right and privileges of White shall continue in force until the final purchase of the works by the city. The right to purchase shall inure to the city every 15 years, but in every case White is to have 12 months previous notice of the city's intention to purchase."

In my opinion this provision of the contract adds to the duty of the city to take this waterworks plant at a fair valuation, as it was clearly in the minds of the parties, the city, and White, the assignor of the Columbus Waterworks Company, that, if the city should desire to establish municipal ownership, it might take this plant at a fair valuation. It adds something at least to my mind to the equities of the bondholders in the present situation. I can understand and

appreciate fully the desire of the authorities and of all the people of Columbus for an adequate supply of good water. Nothing is more necessary to the welfare and comfort of the people. They are entitled to this, and should have it. But there is no reason whatever why the present waterworks plant, or certainly the greater part of it, cannot be utilized in connection with any new source of supply that may be resorted to by the city. I agree substantially with the recommendation of the master stated above as to the terms upon which a decree denying an injunction should be entered, except that I think it should be conditioned upon paying the fair value of such property of the company; that is, the whole or a part as the court may decree, after ascertaining in proper manner the value now of the property in Georgia, and the value of the entire property with that in Alabama added. Considerable additions and a number of improvements have been made to the property in Columbus since the master's report. The city should have the option, however, of having the value of the property submitted to arbitration, as provided in the contract, in case it should elect to do so. This arbitration should fix the value in the manner just mentioned; that is, the value of the property in Georgia, and the value with the property in Alabama added, so that both valuations will be before the court.

Before a final decree is entered in this case, a reasonable time should be given the city authorities to consider the matter and determine what action they think it advisable to take. This litigation has already been greatly protracted, and probably 60 days' time for this purpose will not be unreasonable, and no final decree will be entered for that time.

UNITED STATES v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court, D. Maryland. January 8, 1908.)

1. POST OFFICE—MAIL MATTER—GOVERNMENT AS BAILEE.

The government in the operation of the post office department is in law a bailee of the mail matter intrusted to it for transmission.

2. SAME—ACTION ON BOND.

Where mail matter is stolen by government clerks, the government's moral obligation to pay over to the bailors the amount recovered on the bond of the clerks in default is sufficient to enable the government to maintain an action on the bond, though the government is under no legal obligation to the senders or addressees of ordinary unregistered mail lost or stolen in transit.

3. TRIAL—PRAYER FOR PEREMPTORY INSTRUCTION—EVIDENCE.

On a prayer for a peremptory instruction in a federal court, the question is not whether there is literally no evidence, but whether there is any evidence, on which a jury can properly proceed to find a verdict for the party producing it, on whom the burden of proof is imposed, and whether a verdict on the evidence submitted by plaintiff would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men.

4. SAME—DIRECTION OF VERDICT.

Where the evidence given at the trial with all legal inferences that the jury could justifiably draw therefrom is insufficient to support a verdict for plaintiff so that such verdict, if returned, must be set aside, the court

is not bound to submit the case to the jury but may direct a verdict for defendant.

5. EVIDENCE—WEIGHT OF EVIDENCE—CONFLICTING THEORIES.

When plaintiff produces evidence that is consistent with a hypothesis that the defendant is not liable and also with one that he is, the evidence tends to establish neither hypothesis.

6. POST OFFICE—RAILWAY POSTAL CLERKS—BONDS—ACTIONS.

Evidence of the guilt of a postal clerk of stealing certain letters from the mails *held* insufficient to establish a breach of his fidelity bond.

John C. Rose and Morris A. Soper, for plaintiff.
James U. Dennis, for the United States.

MORRIS, District Judge. On December 1, 1904, the defendant, American Surety Company of New York, became surety on a bond to the United States of America in the penalty of \$1,000, conditioned that one Charles W. Hammel "shall, from and after December 1, 1904, faithfully discharge all the duties and trusts imposed on him as such railway postal clerk in the railway postal office above named, or any other railway post office to which he may be hereafter transferred or assigned, or in any position of transfer clerk to which he may be detailed, either by law, or the rules and regulations of the Post Office Department of the United States, and shall faithfully account for and pay over to the proper official all moneys which shall come into his hands as such railway postal clerk; and shall, upon the termination of his term of office or employment, return to the proper official all property of every kind which shall be in his possession as such railway postal clerk." On November 7, 1906, the United States of America brought this suit on said bond against said surety, alleging a breach of the conditions. To the declaration the defendant pleaded (1) non est factum; (2) performance; (3) non damnificatus.

The plaintiff to support its case proved the bond, and read in evidence the stipulation filed in the case which embodies the agreed statement of facts. The defendant thereupon filed the following motion:

"The defendant, American Surety Company of New York, excepts to all the testimony of the senders and addressees, and each of them, of the letters mentioned in the list of letters incorporated in the stipulation heretofore filed in this case, and moves the court to strike out all the testimony of said senders and addressees of said letters, as set forth in said stipulation, because the said evidence is incompetent and irrelevant in this case, as the obligee (the plaintiff) mentioned in the bond is under no obligation to refund to such senders and addressees the sum or sums lost by them, and the losses of such senders and addressees should not be considered in estimating the damages to the plaintiff."

The plaintiff then closed its case, and the defendant submitted this prayer:

"The defendant, American Surety Company of New York, prays the court to instruct itself, sitting as a jury, that the plaintiff has offered no evidence in this case legally sufficient to entitle it to recover, and that the verdict must therefore be for the defendant."

On the above motion to strike out testimony it is necessary to consider the right of the plaintiff to maintain such an action as this, when

it is not under legal obligation to pay to the senders or the addressees of mail matter damages consequent to them through the loss of such mail matter.

It is to be noted that the mail matter involved in this suit is ordinary, unregistered mail, and the plaintiff is under no legal obligation to the senders or addressees thereof, even though there should be a recovery on this bond, but, in the event of a recovery, there would be a moral obligation on the plaintiff to pay to the claimant the amount so recovered. The government in the operation of the post office department is in law regarded as a bailee of the mail matter intrusted to it for transmission.

The defendant contends that the right of the bailee to sue a third person to recover the possession of the property bailed, or for damages on account of it, being based on the liability of the bailee to answer to the bailor for the property, there would be no liability of such third person to the bailee, if the bailor could not recover from the bailee, except that the bailee might, perhaps, bring a possessory action to recover the specific property in order to enable it to carry out the purpose of the bailment, and if there is no right of recovery against the principal there is no such right against the surety. I cannot agree with this contention of the defendant. The moral obligation to pay over to the bailors the amount recovered under the bond would be sufficient to enable the bailee in this case to maintain the action. *National Surety Co. v. U. S.*, 129 Fed. 70, 63 C. C. A. 512; *American Surety Co. v. U. S.*, 133 Fed. 1019, 66 C. C. A. 679; *U. S. v. American Surety Co. (C. C.)* 155 Fed. 941; *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114. The motion will therefore be refused.

The prayer of the defendant is next to be considered. The rule of law controlling federal courts in passing upon such a prayer is plain. The question is "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." *Commissioners of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59, citing *Gibling v. McMullin*, 2 Privy Council App. 317, 335. As it is put by Mr. Justice Brett in *Bridges v. Ry. Co.*, L. R. 7 H. L. 213, 233, the question is whether the verdict on the evidence submitted by the plaintiff would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men. When the evidence given at the trial, with all legal inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict for the plaintiff, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Randall v. B. & O. R. R.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. In meeting the burden of proof in this case, it is not enough for the plaintiff to show that the wrong complained of might have been occasioned by the default of Hammel that he was pilfering from the mails and had the opportunity to take the things of value contained in the 120 letters. When the plaintiff produces evidence that is consistent with an hypothesis that the defendant is not liable and also with one that it is, his evidence tends to establish

neither. *Ewing v. Goode* (C. C.) 78 Fed. 442; *L. & N. Ry. Co. v. E. T. V. & G. Ry. Co.*, 60 Fed. 993, 9 C. C. A. 314.

Hammel worked on the railway postal cars operated between New York City and Washington, D. C. One of the items of mail on which this suit is based is proved to have been mailed at New London, Conn., addressed to a person in Waycross, Ga. Other items are proved to have been mailed in Philadelphia, Pa., addressed respectively to persons in Baltimore, and there are 120 items included in the claim on which this suit is brought. As to any one of those items, is there any evidence, with all the inferences that a jury could justifiably draw from it, sufficient to support a verdict for the plaintiff that the court would sustain? I am of opinion that there is not. Such a verdict would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men.

Even allowing his testimony full weight in support of the plaintiff's hypothesis that the defendant is liable, Hammel cannot identify any one of the letters as having been taken by him. Each one of those items of mail enumerated in the stipulation was handled by, and accessible to, many post office employes, and subject to possible theft, loss, or destruction by each of them; but because these items in the course of proper transmission through the mails would have passed through the hands of Hammel or been accessible to him, and because he admits that he stole from the mail during the period when these letters disappeared, it is sought to hold the surety on his bond responsible for the loss of the letters. The evidence is too inconclusive to support the suit. The law does not presume the guilt of a person, but it does not follow that, in such a case as this, Hammel is to be considered as the only thief then in the employ of the post office department. The letters on which the claim is made might have been stolen, lost, destroyed, or miscarried before or after they were accessible to Hammel, or may have been taken by others on the mail car with him.

Being of opinion that the evidence offered by the plaintiff is insufficient to support its case, under the rules of law above set forth, I would set aside a verdict found for the plaintiff by a jury in this case, and I therefore grant the prayer of the defendant, which asks me to say that there is no legally sufficient evidence entitling the plaintiff to recover, and that the verdict must be for the defendant.

FLEISCHMAN CO. v. MURRAY et al.

(Circuit Court, D. South Carolina. January 29, 1908.)

1. COURTS—FEDERAL COURTS—INJUNCTION—"COURTS OF A STATE."

The South Carolina Dispensary Commission created by Sess. Laws 1907, p. 835, No. 402, for the purpose of winding up the South Carolina State Dispensary, disposing of its property, and paying its debts, is not a "court of a state" within Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), providing that an injunction shall not be granted by any court of the United States to stay proceedings in any "court of a state" except in cases where

such injunction may be authorized by any law relating to proceedings in bankruptcy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1689-1690.]

2. STATES—OFFICERS—COMMISSION—"OFFICERS OF THE STATE."

The members of the South Carolina Dispensary Commission created by Sess. Laws 1907, p. 835, No. 402, with power to wind up the South Carolina State Dispensary, are not "officers of the state" within the ordinary acceptation of the term, and, if officers at all, are officers appointed solely for the performance of specific duties.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6635-6638; vol. 8, p. 7804.]

3. INTOXICATING LIQUORS—REGULATION—DEPARTMENTS—DISPENSARY FUNDS.

All dispensary funds collected by and deposited to the credit of the State Dispensary Commission in the course of the winding up of the affairs of the State Dispensary under Sess. Laws 1907, p. 835, No. 402, requiring payment of the State Dispensary indebtedness from such funds, and the remaining surplus, if any, into the State Treasury, constitutes a trust fund for the payment of the claims of dispensary creditors.

4. COURTS—ACTION AGAINST OFFICERS—ACTION AGAINST STATE—"SUIT AGAINST THE STATE."

A suit to compel the State Dispensary Commission appointed to wind up the affairs of the State Dispensary under Sess. Laws 1907, p. 835, No. 402, to pay a dispensary creditor from the trust funds held by the Commission for the liquidation of dispensary indebtedness, was not a suit against the state within Const. U. S. Amend. 11, providing that the judicial power of the United States shall not extend to any suit at law or equity commenced or prosecuted against one of the United States by citizens of another state.

[Ed. Note.—Federal jurisdiction of suits against state, see note to *Tindall v. Wesley*, 13 C. C. A. 165.

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.]

5. SAME—STATE AS PARTY.

The state of South Carolina was not an indispensable party to a suit by a state dispensary creditor to compel the South Carolina Dispensary Commission to pay complainant's claim from trust funds in the hands of such Commission.

6. EQUITY—MATTERS OF DISCRETION—ABUSE.

A court of equity has power to prevent an abuse of discretion by a state board, and require that the board's power be exercised according to law and in such a manner as not to unjustly injure property rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 89-92.]

7. INTOXICATING LIQUORS—REGULATIONS—DISPENSARY COMMISSION—MANDATORY DUTIES.

Under Sess. Laws 1907, p. 835, No. 402, creating the South Carolina Dispensary Commission, and directing it to pay all just liabilities of the State Dispensary, the Commission had no discretion as to the allowance of claims, its duty to allow and pay all just claims being mandatory.

8. COURTS—ACTS OF STATE—SOVEREIGNTY.

The decision of the South Carolina Supreme Court that the act authorizing the establishment of the State Dispensary and the purchase and sale of whisky by the state was constitutional did not constitute a decision that the state in so acting was performing governmental functions, and therefore could not be sued by creditors for the price of goods sold to such dispensary.

George B. Lester and Merrick & Barnard, for complainant.
J. Fraser Lyon, Atty. Gen., W. F. Stevenson, Felder & Rountree,
and Abney & Muller, for defendants.

PRITCHARD, Circuit Judge. This is a suit in equity brought by the complainant to have the defendants declared trustees as to a certain fund in their hands, to determine the amount due to the complainant payable out of the said fund, and to compel the payment of the amount so found to be due.

The record shows that in 1892, the General Assembly of the state of South Carolina passed an act (Laws 1892, p. 62) regulating the purchase, sale, and distribution of intoxicating liquors within said state, and providing for a board consisting of three members, to be known as the "Board of Directors of the State Dispensary." The said act also provided for a Dispensary Commissioner to be elected by the General Assembly, and made it the duty of the board of directors of the State Dispensary to purchase all alcoholic liquors for lawful use within the state, and to sell the same to the various county dispensaries, as provided in said act. The law further provided that all money arising from the sale of liquors by the board of directors of the State Dispensary should be deposited with the State Treasurer, to be held by him as a separate and distinct fund, and kept to the credit of the said board of directors of the State Dispensary; that the liquors purchased by the said board of directors of the State Dispensary should be paid for out of this fund upon a warrant to be issued by the said Dispensary Commissioner, such warrant to be issued by the Dispensary Commissioner at the direction of the said board of directors of the State Dispensary, and no part of this fund could be lawfully paid out by the State Treasurer, except upon warrants so issued; that while said law was still in force, the complainant sold to the board of directors of the State Dispensary, at prices mutually satisfactory and agreed upon, a large quantity of whisky and other spirituous liquors, all of which whisky and spirituous liquor, except a small portion of which was afterwards returned by the defendants, were duly accepted and sold by the said directors of the State Dispensary at a substantial profit, in accordance with the dispensary law, and the proceeds of such sales were in due course of administration deposited in and became a part of the fund hereinbefore referred to; that the General Assembly of the state of South Carolina, at its session held in 1907, passed an act providing for the abolition of the State Dispensary, which act was duly approved on the 16th day of February, 1907, and section 47 of which is as follows:

"Sec. 47. The State Dispensary is hereby abolished, and all acts and parts of acts inconsistent with this act, are hereby repealed: Provided, that this act shall not have the effect of preventing any violation of the present criminal law relating to the dispensary being punished as now provided by law for offenses heretofore committed." (Laws 1907, p. 480.)

That at the same session the said General Assembly of the state of South Carolina passed another act entitled "An act to provide for the disposition of all property connected with the State Dispensary and

to wind up its affairs," which said act is in words and figures as follows:

"Session Laws, S. C., 1907.

"No. 402.

"An act to provide for the disposition of all property connected with the State Dispensary, and to wind up its affairs.

"Sec. 1. Be it enacted by the General Assembly of the state of South Carolina that immediately upon the approval of this act, the Governor shall appoint a commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of \$10,000.

"Sec. 2. Said Commission shall immediately organize by the election of a Chairman and a Secretary from their number.

"Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several county dispensaries by disposing of all goods and property connected therewith, by collecting all debts due and paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: Provided, that no alcoholic liquors or beers shall be disposed of within the state, except to county dispensary boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations, from whom purchased, and for determining the legality of said purchases, they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney General, and such expert accountants as stenographers, and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management, or control, at any time in the past, and to take testimony, either within or without the state: Provided, further, that all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

"Sec. 4. The compensation of each member of said Commission shall be \$5.00 per day for each day actually employed about the business and actual expenses for the time engaged: Provided, that they shall receive no compensation for service rendered on this Commission after January 1st, 1908.

"Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand, after paying all liabilities.

"Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employes as they may deem necessary, and to contract with them at the time of employment for their compensation.

"Sec. 7. The said Commission shall submit to the Governor at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated, a report in full of their actings and doings.

"Sec. 8. That said Commission shall have full power and authority to investigate the past conduct and affairs of the Dispensary, and all the power and authority conferred upon the committee appointed to investigate the affairs of the Dispensary, as prescribed by an act to provide for the investigation of the Dispensary, approved January 24th, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this act: Provided, that for the purpose of the investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole committee.

"Approved the 16th day of February, A. D. 1907." Laws 1907, p. 835.

This act was approved on the same day as the act abolishing the State Dispensary, to wit, the 16th day of February, 1907, and, within a short time thereafter, the Commission provided for was created by the appointment of the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, and Avery Patton, as commissioners, and said defendants, having duly qualified and organized pursuant to the said act, became and do now constitute the State Dispensary Commission, and as such are charged with the execution of all the powers conferred and the performance of all the duties imposed upon said Commission by the said act. That immediately upon their qualification as commissioners, and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties, and, in accordance with the act providing for their appointment, took possession and control of the entire business and property of the State Dispensary, including the money which was at that time deposited with the State Treasurer to the credit of the board of directors of the State Dispensary, and said defendants have sold the property of said State Dispensary, except real estate, and collected many of the debts due to the said State Dispensary, and now have in their hands the proceeds arising from said sales and collections, which, together with the sum received from the State Treasurer, amount to about \$800,000; that all of the money realized from the sale of the property of the said State Dispensary and the collection of debts due to it, has been from time to time, as received by the defendants constituting the State Dispensary Commission, and now is deposited to the credit of said Commission in certain banks in the state of South Carolina, subject to withdrawal only by said Commission, and no part of said money is in the Treasury of the State of South Carolina, or has ever been mingled with any funds belonging to said state; that the complainant furnished to the defendants, at their request, an itemized statement of its account against the State Dispensary, which account has been compared with the books kept by the State Dispensary and found to be in substantial agreement with said books; that complainant's account has also been audited by the company employed by the defendants for that purpose, and the complainant insists that, in accordance with said audit and the books of said State Dispensary, its account is correct, and that there is now justly due and owing to it, out of the funds in the hands of the defendants, directed to be applied to the payment of the just liabilities of the State Dispensary, a balance of \$66,501.19, which balance is a just liability of the said State Dispensary; and although complainant has demanded said amount, the defendants have refused to pay the same or any part thereof. Complainant therefore asks that a receiver be appointed to take charge of and administer all the moneys now in the hands of the defendants, arising out of the sale of property belonging to the State Dispensary of South Carolina, or from the collection of debts due to it, or direct and decree that the amount due to complainant be immediately paid to it upon the execution of a good and sufficient bond conditioned to pay to defendants such sum or sums as may be found to be due to them by complainant and adjudged to be paid by it; that this court appoint a master with a view of having its claim passed upon and determined, and also requests this court to

grant a writ of injunction restraining the defendants from paying out or disposing of any of the moneys now in their hands until there can be an adjudication of the matters in controversy between complainant and defendants.

It is contended by counsel for defendants, first, that the funds in the hands of the State Dispensary Commission, created by the act of February 16, 1907, belong to and are the property of the state, which has the right to control the same, and which, through the said Commission as its agent, is in possession thereof. Second. That the said State Dispensary Commission is the mere agent or instrumentality of the state vested with the ministerial function of winding up the State Dispensary's business, selling the goods and property on hand, collecting the debts due the state in connection with said business, and holding the proceeds for the state and subject to its right of disposition thereof. And vested also with the judicial function of investigating all claims in connection with said business and determining the validity thereof, and that this Commission is a court within the meaning of section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581). And also vested with the ministerial function of paying from the funds held by them for the state such of the said claims as they may upon said investigation find and decide to be just liabilities of the state. Third. That the pending action is in effect an action against the state, because it seeks to lay hold of funds belonging to the state and in the hands of the said Commission, as its agent, and through the said Commission in the possession of the state, and further seeks to have such funds applied to the payment of alleged liabilities of the state. So that the state is an indispensable party to the action. Fourth. That the state cannot be held to have waived its constitutional immunity from suit by the said act creating the "State Dispensary Commission," except to the extent of the remedies therein provided for and allowed to claimants for the collection of such debts as may be due them by the state in connection with its said dispensary business, and, therefore, such claimants are limited to the remedies therein provided for and allowed. Fifth. That the said act creating the State Dispensary Commission having been passed and the remedies therein provided for having been allowed, as a purely voluntary matter on the part of the Legislature of the state, the said act is subject to be repealed, and the allowance of the remedies therein provided for is subject to be recalled at any time at the pleasure of the Legislature and in its discretion.

Counsel representing the defendants do not agree as to the contention that this Commission is a court within the meaning of section 720—one of the distinguished counsel being of the opinion that this Commission is not a court within the meaning of that section. The court has carefully considered the arguments on this point, and, after much investigation, has reached the conclusion that the contention of the defendants in this respect is untenable. It is admitted that the Commission does not have the power to enter final judgment or to issue an execution, and while it is invested with certain powers, they are not to any appreciable extent judicial in their character. The authority conferred upon them to make inquiry is only for their own in-

formation and guidance, and does not confer upon them the power to judicially determine the matters submitted to them, and, this being so, the court is forced to the conclusion that it is not a court according to the well-defined meaning of the term.

The next question is as to whether this is a suit against the state or whether it is a suit to which the state is an indispensable party, and, in order to reach a correct determination of this question, it becomes necessary to inquire as to the nature and character of the duties required to be performed by the defendants under the act authorizing their appointment. The defendants are charged with the duty of settling and adjusting the unsettled claims against the State Dispensary at the time it was abolished, and are required by the provisions of the act hereinbefore mentioned to ascertain and pay such sums as may be found to be due the several creditors of the State Dispensary. These defendants are not "officers of the state" within the meaning of the ordinary acceptance of the term. If officers at all, they are officers appointed solely for the purpose of performing specific duties. In the case of *W. U. Tel. Co. v. Myatt* (C. C.) 98 Fed. 335 (foot of page 360), the court says:

"The act of the Legislature creating the court of visitation and the act extending the powers and jurisdiction thereof to telegraph companies cast upon the officials who are defendants in this suit the special duty of administering and enforcing said laws. Their offices were created solely for such purposes, and such defendants are not general officers of the state, whose duty it is to see to the enforcement of laws generally, and who act only by formal judicial proceedings in the courts of the state. This suit, therefore, is not against the state of Kansas, and hence is not within the prohibition of the eleventh amendment to the Constitution of the United States."

By this suit it is sought to enforce the rights of complainant in accordance with the provisions of the act in question. The object of this suit is not to coerce the defendants into doing something which the state law forbids them doing, but to compel them to do what the state statute requires shall be done.

At the time that the State Dispensary was abolished, State Dispensary funds to the amount of about \$150,000 were on deposit in the State Treasury, and there was property connected with the State Dispensary and a large amount due to it for goods which had been sold to the county dispensers. The defendants have sold the property and collected a large number of the debts, the proceeds arising from such sales and collections amounting to about \$650,000, which, together with the \$150,000 received from the State Treasurer, makes a total of about \$800,000. The amount of money in the State Treasury belonging to the dispensary fund, as well as the amount realized as hereinbefore stated, was turned over to the defendants, and by them placed to their credit in a number of banks in the state. This sum was placed in their hands for the specific purpose of carrying out the provisions of the act, to wit, the adjustment and settlement of the claim of complainant and those who were similarly situated. It is obvious, from a careful reading of the statute, that the Legislature intended that this fund should be treated as a special trust fund arising out of the operation of the State Dispensary, to be used primarily

for the purpose of settling all just liabilities incurred by the State Dispensary in the purchase of goods during its existence. The purpose sought to be accomplished by the Legislature was the payment of the outstanding indebtedness of the State Dispensary, as well as the disposal of its property and to wind up its affairs as a business concern. The fact that this money was realized from the sale of goods purchased from the creditors of the State Dispensary, when considered in connection with the action of the state Legislature in placing the entire funds in the hands of the defendants for the express purpose hereinbefore mentioned, clearly constitutes this a trust fund in the hands of the defendants, as trustees, who are charged with the duty of carrying out the purposes of the act.

While it is estimated that the State Dispensary's indebtedness amounted to only about \$600,000, yet the Legislature provided that all the funds, amounting to \$800,000, should be placed under the dominion and control of the defendants, thus clearly indicating that it was the intent of the Legislature that every dollar of the funds realized from the State Dispensary was to be treated as a trust fund, first, for the purpose of settling these claims, and then providing that any surplus remaining should be paid into the State Treasury as funds properly belonging to the state. This action on the part of the Legislature is significant, and clearly indicates that the chief object in appointing the Commission was to provide for the payment of claims similar to that of complainant. The Legislature having authorized these defendants to receive into their custody and control the funds in the hands of the State Treasurer, the state thereby surrendering its possession of the same, for the purposes hereinbefore mentioned, shows most conclusively that this fund was intended to be treated as a trust fund, and was to be used by the defendants for the purpose of carrying out the provisions of the act under which they were appointed. It cannot be reasonably insisted, in view of these circumstances, that the state is an indispensable party to this suit, inasmuch as it is not necessary that the state should be a party in order that there may be a final determination of the matters involved in this controversy. Therefore this is not a suit against the state within the meaning of the eleventh amendment.

The principal question involved in this controversy is as to whether the claim of complainant is a just liability against the State Dispensary. If it should be determined to be a just liability, the statute in question makes it the duty of the defendants to pay it, and, under these circumstances, the question sought to be litigated is one in which the state is not interested in the sense contemplated by the eleventh amendment. In the case of *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448, and other like cases, it was sought to compel the state officers to perform a duty either not directed to be done by the statute, or prohibited by it, or to enforce payment out of general funds, or where there was no special fund which the state itself had appropriated to and charged with its payment.

In the case of *Rolston v. Missouri Fund Com'rs*, 120 U. S. 411, 7 Sup. Ct. 610, 30 L. Ed. 721, the court said:

"There [in the *Jumel Case*] the effort was to compel a state officer to do what the statute prohibited him from doing. Here, the suit is to get a state officer to do what the statute requires of him."

The court in a further discussion of this subject, said:

"It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the eleventh amendment of the Constitution of the United States, and *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448, is cited in support of this position. But this case is entirely different from that. There, the effort was to compel a state officer to do what a statute requires of him. The litigation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustee when they make a certain payment. The trustees claim that they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied; but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the trustees must do in order to fulfill the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for."

This principle is fully sustained in the cases of *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 389, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Scott v. Donald*, 165 U. S. 112, 17 Sup. Ct. 262, 41 L. Ed. 648; *Tindal v. Wesley*, 167 U. S. 220, 17 Sup. Ct. 770, 42 L. Ed. 137.

The failure of the defendants to comply with the statute cannot be treated as a refusal of the state to comply with the statute. On the contrary, it is a refusal on the part of the defendants to do that which they have been directed to do by the statute. Therefore a suit instituted against the defendants for the purpose of requiring them to perform the duties enjoined upon them by the statute is a suit against them as individuals, and is not in any sense a suit against the state.

As hereinbefore stated, it is insisted by counsel for the defendants that the commissioners are vested with discretion and judgment to pass upon the question as to whether or not the claims of creditors are just and valid, and that, therefore, this court cannot interfere with such judgment or discretion. The rule that courts will not control an officer in the exercise of a discretion conferred upon him is subject to qualification, and this is especially true in a court of equity when its exercise affects individual rights. It is well settled that the courts have the power to prevent an abuse of discretion and require that it be exercised according to law and in such manner as not to unjustly injure property rights.

"Auditing officers will be required by mandamus to make their audit according to law. If the compensation is fixed by statute or agreement, they will be required to audit the compensation so fixed. If they have already audited an account for a less sum than that fixed by statute or agreement, they will be required to set aside the audit already made and to reaudit according to law." *Am. & Eng. Enc. Law* (1st Ed.) vol. 14, 149. *People v. Elmira Auditors*, 82 N. Y. 80.

The act authorizing the appointment of these commissioners does not undertake to give to them discretion as to what claims to pay, but expressly directs them to pay all just liabilities. Hence, it follows that, if a claim is just, their duty is mandatory, and they possess no judgment or discretion as to its performance. It appears from the allegations of the bill that these defendants have already exercised the discretion with which they are invested by auditing and adjusting several accounts claimed to be due.

Among other things, it is charged in the bill that the defendants have improperly managed the funds placed in their hands. A careful consideration of the evidence fails to sustain this contention; it clearly appearing that these defendants have done no wrong in that respect, and that they are gentlemen of high character and standing.

It is insisted by counsel for defendants that this suit is instituted solely with a view of avoiding an investigation of the transactions between the State Dispensary and the complainant and other creditors in the purchase of whisky and other spirituous liquors. This contention is unfounded, inasmuch as this court will afford every opportunity for a complete and thorough investigation of any and all transactions connected with the former management of the State Dispensary in the purchase of the goods the payment for which is now sought. While the Supreme Court of South Carolina has decided that the act authorizing the establishment of the State Dispensary and the purchase and sale of whisky by the state was constitutional, it cannot be reasonably contended that in so doing the state was performing the functions usually exercised by a state necessary to preserve its autonomy and maintain its sovereignty. Nor can it be assumed that it was contemplated, at the time of the adoption of the eleventh amendment, that a sovereign state would ever engage in the purchase and sale of spirituous liquors for profit. The state having seen fit to engage in this business, and at the same time to deprive its citizens of the right to engage in such business in competition with the state, thereby placed itself in a position where it could not, with consistency, avail itself of the immunity conferred by the eleventh amendment in a suit like the one at bar in which it is sought to collect a debt contracted by the individuals placed in control of such business with implied, if not direct, authority to contract such debts. Having deprived its citizens of the right to engage in this particular line of business, reserving the right to monopolize the same through its agents appointed for that purpose, it would be manifestly unjust to permit the state, under any circumstances whatsoever, to avoid the payment of debts contracted by the purchase of goods from the sale of which it has derived enormous profits. And even if this were a suit against the State Treasurer instituted for the recovery of funds set apart for the express purpose of paying the indebtedness thus contracted, as in this instance, it might well be questioned as to whether such officer could claim immunity under the eleventh amendment. However, the court does not undertake to pass upon this phase of the question, inasmuch as the record shows that this is not a suit against a state official, or in any sense such a suit as is contemplated by the eleventh amendment.

For the reasons hereinbefore stated, the court is of opinion that it

has jurisdiction, and that the injunction heretofore issued should be continued to a final hearing.

At the time this opinion was announced, counsel stated in open court that the Attorney General of South Carolina had made application to the Supreme Court of that state for a mandamus to compel the defendants to pay over the sum of \$15,000—that amount being appropriated by an act of the Legislature—out of this fund to the use of the Attorney General, the same to be used in prosecuting parties charged with violation of the law in connection with the management of the State Dispensary. 60 S. E. 928. This action on the part of the Attorney General is in the nature of a surprise and was entirely unnecessary, inasmuch as this court, if proper application had been made by the defendants or the Attorney General, would have gladly authorized the use of the same for such purpose, it appearing that after the payment of this amount there will remain in the hands of the defendants funds amply sufficient to satisfy all claims involved in this controversy. This seems to be an unwarranted attempt to provoke a conflict of jurisdiction between this court and the state courts of South Carolina.

FLEISCHMANN CO. v. MURRAY et al.

WILSON DISTILLING CO. et al. v. SAME.

(Circuit Court, D. South Carolina. March 27, 1908.)

COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A federal court in a suit before it involving rights of the complainants under a state statute is not bound to adopt a construction placed upon such statute by the Supreme Court of the state after complainants' rights had accrued, and subsequent to their determination by the federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 956, 957.

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468.]

In Equity.

J. Fraser Lyon, Atty. Gen., W. F. Stevenson, Anderson, Felder, Rountree & Wilson, and Abney & Muller, for complainants.

Mordecai & Gadsden, Rutledge & Hagood, George B. Lester, Frank Carter, and Alf. S. Barnard, for defendants.

PRITCHARD, Circuit Judge. This is a motion to vacate injunction and receivership orders on the ground that they are predicated upon an interpretation of the act of 1907 (25 St. at Large, p. 835) as amended by the Legislature of 1908 (Act Feb. 24th) in conflict with the interpretation thereof by the Supreme Court of South Carolina, in the case of The State of South Carolina, ex rel. J. Fraser Lyon, as Attorney General, Petitioner, v. W. J. Murray et al. (decided March 14, 1908) 60 S. E. 928. As a general rule, this court will adopt the construction which the state court puts upon a state statute. This is especially true as affecting the court's decision in respect to a rule of property.

The questions involved in this motion were determined by this court in an opinion rendered on the 29th day of February, 1908, in which, among other things, it was held that the act authorizing the appointment of the defendants as commissioners to settle and adjust the outstanding indebtedness incurred by the State Dispensary created the fund in their hands a trust fund for the benefit of the complainants, and that the acceptance of the same by the defendants constituted them trustees holding such fund for the purposes contemplated by the statute. The court having considered the opinion of the Supreme Court of South Carolina, which holds that this is a suit against the state and therefore inhibited by the eleventh amendment, is of opinion that this court is not bound by the principles enunciated therein, inasmuch as such opinion was rendered subsequent to the decision of this court and necessarily involves a construction of the Constitution of the United States.

In the case of *Burgess v. Seligman*, 107 U. S., page 33, 2 Sup. Ct., page 21 (27 L. Ed. 359), among other things, the court says:

"We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. * * * So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. * * * In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the state court has since adopted a different view."

Also, in the case of *Pease v. Peck*, 18 How. 599 (15 L. Ed. 518), the court says:

"When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state."

This court entertains the highest regard for the Supreme Court of South Carolina and the greatest respect for its decisions, but

its opinion in this instance being rendered after the rights of the complainants had accrued under the act, and subsequent to a determination by this court of the questions involved in a suit brought by the complainants, the court does not feel justified in adopting the opinion of that court as controlling in this particular case. If the Court had any doubt as to the correctness of its ruling, it would gladly yield to the decision of the state court, but having no such doubt, the motion of defendants is overruled.

At the time the opinion was announced in this case, among other things, the court stated that if application should be made for the payment of the \$15,000, appropriated by the Legislature for the state of South Carolina for the prosecution of parties charged with violation of law in connection with the management of the State Dispensary, that it would gladly authorize the same.

Inasmuch as it appears there will be funds amply sufficient to pay all debts and liabilities of the Commission after the payment of this amount, and in order that the state may not be embarrassed in its prosecution of those who may have violated its laws, the court will, of its own motion, sign an order authorizing the payment of the said amount to the Attorney General.

Ex parte STANCAMPIANO.

(Circuit Court, S. D. New York. April 24, 1908.)

ALIENS—PROCEEDINGS FOR DEPORTATION—SECOND ARREST ON SAME CHARGE.

The decision of the Secretary of Commerce and Labor, finding that an immigrant arrested for deportation under Immigration Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (U. S. Comp. St. Supp. 1907, p. 402), is not subject to deportation, does not render that question *res judicata*, nor prevent a second arrest of the alien to try the same question again.

Application for Writ of Habeas Corpus.

Giuseppe L. Maggio, for petitioner.

Henry L. Stimson, U. S. Dist. Atty.

WARD, Circuit Judge. This is an application for the discharge under a writ of habeas corpus of Giuseppe Stancampiano, an alien who entered this country March 22, 1906, and is now detained under a warrant of the Assistant Secretary of Commerce and Labor, dated March 16, 1908, pursuant to Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (U. S. Comp. St. Supp. 1901, p. 402), upon a charge of having been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry. The objection is that the alien was arrested under a similar warrant in December, 1907, upon the same charge, and after a hearing before the board of special inquiry was discharged from custody by the Secretary of Commerce and Labor on the ground that he was not the person described in the Italian certificate of conviction.

The immigration authorities are clothed with executive, and not with judicial, duties. The finding of the Secretary of Commerce and Labor is not a technical *res adjudicata*, and there is nothing in section 21 to prevent him from arresting an alien a second time to try the same question again, if he is satisfied that the alien has entered the United States in violation of the act. This is no violation of the alien's rights, because he was admitted into the United States subject to the condition that he might be deported within three years thereafter, if he entered in violation of the act. The questions involved are questions of fact, upon which the determination of the executive officers of the United States is final. *Pearson v. Williams*, 202 U. S. 281, 26 SUP. CT 608, 50 L. ED. 1029.

The writ is discharged, and the alien remanded to the custody of the Commissioner of Immigration.

UNITED STATES v. BOND.

(Circuit Court, S. D. Texas. February 4, 1908.)

No. 2,017 (1,714).

1. CUSTOMS DUTIES—CONFUSION OF GOODS—MIXTURE OF COAL AND SLACK.

An importation consisted of a mixture of bituminous coal and slack, in the proportion of about two to one. *Held*, that the two classes of merchandise should be subjected to the rates of duty respectively provided therefor in the tariff, on the basis of this proportion, regardless of their intermingled condition; that, as such proportion could be fixed by the use of scale and screen on a single tub, the law would not cast on the importer the burden of the useless separation of the two kinds of coal.

2. SAME—EVIDENCE—SUFFICIENCY OF TEST.

The proportion of slack in an importation of 175 tons of coal was sufficiently determined by testing a sample weighing 113 pounds.

On Application for Review of a Decision by the Board of United States General Appraisers.

Lock. McDaniel, U. S. Atty.

Harris & Harris (Edward F. Harris, of counsel), for importer.

BURNS, District Judge. This case arises upon petition to review the action of the Board of General Appraisers in sustaining the protest of the importer against the assessment of duty upon certain bituminous coal, imported through the port of Galveston on the 6th day of September, 1904.

Entry was duly made of 175 tons, described as "surplus bunkers" and invoiced as bituminous coal; duty thereon was assessed under paragraph 415 of the tariff act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat 190 (U. S. Comp. St. 1901, p. 1674), at 67 cents per ton; and the entry was liquidated in accordance therewith. This action upon the part of the collector of customs was but the exercise of sound dis-

cretion; and he was, in the light of the Treasury Decisions, without the alternative to give the matter other direction. The importer contends that 35 per cent. of said coal is found to be "slack or culm," and under said paragraph 415 subject to duty at 15 cents per ton. The acting appraiser makes the following return:

"I took a fair representative sample of 113 pounds, used a half-inch screen, and with following result:

	Per cent.
Slack, 40½ pounds.....	0.35841
Lump, 72½ pounds.....	0.64159"

Petitioner contends that a fair interpretation of the tariff clause relating to the duty upon bituminous coal has no application to slack or culm, where the latter is a part of and not segregated from the general cargo; that, to make the rate of 15 cents per ton available to the importer, the slack or culm must be an individual importation in the sense that it must be distinct, separate, and not confused and intermingled with bituminous coal carrying a higher rate of assessment; and that, not being so separated and segregated, the higher rate should attach. The contrary view is announced by the Board of General Appraisers. It is found as a fact that of the coal in question 35 per cent. thereof is what is commonly known as "slack"; and upon the test, made, so far as this record speaks, in a fair and proper way, there appears to be no difficulty upon the part of those charged with the assessment and collection of the duty in ascertaining the proportion which the slack bears to the lump, the part to the whole.

Hence it follows that, if a correct result can be had by the use of scale and screen, the object and purpose of the law has been attained—the quantity of each grade or class ascertained. And, this being so, the law will neither require nor invite the importer to perform an act of separation, useless in result and burdensome in cost, when, as in this case, it appears that the quantity of coal and slack can be estimated and fixed by the weighing of a single tub.

The action of the board should be in all things affirmed, with directions to the collector to reliquidate the entry in accordance with the views here announced; and the decree will so provide.

NORTHWESTERN S. S. CO., Limited, v. MARITIME INS. CO., Limited.

(Circuit Court, W. D. Washington, N. D. January 16, 1908.)

No. 1,370.

1. INSURANCE—CONSTRUCTION OF POLICY—LAW GOVERNING.

A policy of insurance on an American vessel issued in England, and there delivered to brokers who paid the premium, is an English contract, to be construed and enforced according to English law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 173, 174.

What law governs policies, see notes to *Corley v. Travelers' Protective Ass'n*, 46 C. C. A. 287; *Globe v. Rutgers Fire Ins. Co. v. David Moffat Co.*, 83 C. C. A. 100.]

2. SAME—MARINE INSURANCE—POLICY AGAINST WAR RISKS.

In a policy insuring a vessel on a voyage from Seattle to Vladivostok during the war between Japan and Russia, against war risks only, a provision that it should cover only "those risks excluded by the 'warranted free of capture, seizure or detention' clause in marine policy or policies" must be construed as referring to marine policies generally, and not to any particular policy on the vessel, and the policy to cover the risk of the vessel's capture and confiscation by the Japanese.

3. SAME—AVOIDANCE OF POLICY—FAILURE TO DISCLOSE "MATERIAL FACTS."

The law of England, as of other countries, requires an applicant for marine insurance to make a full disclosure of all the material facts known to him at the time affecting the risk which the insurer is to assume, but he is not required to disclose facts unknown to him at the time, nor immaterial facts, nor matters of common and general knowledge among those engaged in the insurance business at the place of the contract. "Material facts" are only such as are likely to influence the mind of a reasonable underwriter in deciding whether to accept the risk and in fixing the rate of premium to be charged, and the question of materiality is one of fact to be decided upon consideration of all the circumstances and conditions affecting the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 572.

For other definitions, see Words and Phrases, vol. 5, pp. 4406, 4407.]

4. SAME—SCOPE OF POLICY—DUTY OF INSURED IN CONDUCTING VOYAGE.

A policy insuring a ship for a voyage insures only for the particular voyage intended which must be prosecuted with diligence, and by the most direct and practicable known route. The ship must be seaworthy at the commencement of the voyage and at the commencement of each successive stage of the voyage, and every reasonable precaution for the safety of the ship and cargo must be taken so that the voyage may be terminated without unnecessary delay, and without loss to either the owner or insurer; the adoption of customary and reasonable means to promote the success of the venture, and to avoid known dangers, is not a ground for exempting the insurer from the liabilities expressed in the policy.

5. SAME—AVOIDANCE OF POLICY.

Defendant insured a vessel against war risks on a voyage from Seattle to Vladivostok during the war between Russia and Japan. She carried a cargo consisting principally of salt beef and was captured by a Japanese vessel, her cargo condemned as contraband of war, and herself as prize. She cleared for Shanghai, a neutral port, and carried documents showing that as her destination, but her bill of lading and other papers showed her to be an American merchant vessel, the true nature of her cargo and her true destination, and she was not condemned for lack of such documents. *Held*, that the nature of the cargo, the intended clearance for Shanghai, and the carrying of false documents were not matters material to be disclosed to defendant when the insurance was obtained, and the fact that they were not so disclosed did not invalidate the policy in view of the facts that the cargo was known to defendant to be of a character which would probably be treated as contraband in case of capture, that the policy contained express permission for the ship to run a blockade, and that the measures taken to conceal her destination did not increase the risk but lessened it, and if known would not have influenced a reasonable underwriter to decline it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 573-577.]

6. SAME.

The owner of the vessel before she sailed gave the master a letter of special instructions directing him to proceed to Dutch Harbor, to coal there, and then to proceed by a designated route through the Okhotsk Sea to Vladivostok. She coaled at Dutch Harbor, but in the Okhotsk Sea was caught in floating ice, which was unusual at that season, and

detained for 40 days, and was then compelled to make for the nearest port for provisions and coal, and it was while on such deviation that she was captured. The policy contained a clause permitting the ship to "sail to, touch, and stay at any ports or places whatsoever without prejudice to this insurance." *Held*, that none of such matters constituted a defense against liability on the policy, the route taken being the most direct and ordinarily safe, the stopping to coal being within the terms of the policy, and, moreover, a proper act in view of the length of the voyage, and the letter of instructions and false documents carried not having been intended to deceive in case of capture, since they were surrendered with others showing the true facts, but were furnished and the route prescribed merely as a precaution against capture, which the owner, as between itself and the insurer, owed to the latter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 722-737.]

7. SAME.

The policy was not avoided by the fact that an agent of the consignee and owner of the cargo sent from China to inspect the same and deliver it to the consignee was made freight clerk on the vessel on the voyage, there being no evidence that he was in any way connected with the Russian government.

At Law. Action upon an insurance policy insuring the steamship Tacoma against war risks only, the steamship having been captured by the Japanese and condemned as a prize during the recent war between Japan and Russia. Tried before the court, a jury having been waived. Findings and judgment in favor of plaintiff.

John P. Hartman, for plaintiff.

Kerr & McCord, for defendant.

HANFORD, District Judge. This action is founded upon a policy insuring the steamship Tacoma, a merchant vessel of the United States, against war risks only, for a voyage from Seattle to Vladivostok, while there, and to a port of safety, with liberty to run blockades, issued during the time of the recent war between Japan and Russia. The Charles Nelson Company, a corporation, doing business at San Francisco, acted as agent for the owner of the ship in obtaining her employment for the voyage in question, and in obtaining through an insurance agency in San Francisco, and brokers in London, insurance on the ship and her cargo—including this policy and other war risk policies. This policy was issued in England, delivered to the brokers there, and the premium was paid there through the brokers. Therefore I hold that it is an English contract, to be construed and enforced according to English law. It is made upon a printed blank in the standard form of English marine policies, with certain clauses usual in ordinary marine policies deleted, and additional phrases written in blank spaces so as to make it a war risk policy. The clauses which are important to be considered in this case are as follows:

"Now this policy witnesseth that in consideration of the said person or persons effecting this policy promising to pay the said company the sum of five hundred and eighty-four pounds, 12/10d as a premium at and after the rate of twenty guineas per cent. for such insurance, the said company takes upon itself the burthen of such insurance to the amount of two thousand, seven hundred and eighty-four pounds, and promises and agrees with the insured, their executors, administrators and assigns, in all respects truly to perform and fulfill the contract contained in this policy. And it is hereby agreed and

declared that the said insurance shall be and is an insurance (lost or not lost) at and from Seattle to Vladivostok, while there and back to a safe neutral port. With liberty to run blockade. To return 5 per cent. for no claim under this policy. This insurance is only to cover those risks excluded by the 'war-ranted free of capture, seizure or detention' clause in marine policy or policies. * * * And it shall be lawful for the said ship or vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance. * * * War risk only. In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage."

Although the policy was issued to the Charles Nelson Company, it was intended to protect the owner of the ship, and there is no controversy as to the right of the plaintiff to collect the insurance by an action in its own name, if the defendant is liable at all. In attempting to make the voyage contemplated from Seattle to Vladivostok, the ship was detained by ice in the Okhotsk Sea more than 40 days, and when released her fuel and provisions were nearly exhausted, so that necessity compelled her to resort to a near-by Japanese port for supplies, and, while heading for that port, she was captured in the open sea by a Japanese cruiser, and was condemned as a prize of war, and confiscated by the Japanese government. It is the intention of this court to not rest this decision upon any fact at variance with the findings of the Prize Court, therefore the text of its decision will be considered as an exact statement of the grounds for the decree condemning the vessel. It is as follows:

"Text.

"The American Steamship "Tacoma" is hereby adjudged as a prize of war.

"Facts and Reasons.

"The S. S. Tacoma in question is a merchant ship carrying the American flag, owned by the petitioners and registered at Seattle, Washington, U. S. A. The said ship had taken on board about 9,000 barrels of salt beef (some barrels have been consumed by the crew of the ship on the voyage from Seattle) consigned by Charles Nelson & Co., San Francisco, for the purpose of carrying them to Vladivostok. This beef was bought in America to supply Vladivostok on a contract between Dessino, a Russian general in Shanghai, and Denby, a Russian merchant, and Ebbeke & Co., both in Shanghai, in November, 1904; also she took on board some steel bars and a case of machine accessories owned by Alexander Georgevitch Boulman, who is the freight clerk of the ship. That the consignee of said salt beef was the Russo-China Bank at Vladivostok, and the said Boulman (who was commissioned by the said Denby with full power to represent or act for him in the business of purchase of goods to be supplied to the government offices, companies, or individuals by Denby. He was also commissioned by the said Ebbeke & Co. to inspect the salt beef bought in America to be sent to Vladivostok, to embark himself on the ship loading said beef, and to deliver it to the consignee) was taken as the freight clerk of the ship by the order of the petitioners. That the master of the ship, while he was instructed by the ship owners on January 2, 1905, to the effect that he should go to Vladivostok, but if there was any obstruction like blockade or ice on the way there then to proceed to Shanghai; had secured a clearance paper and a bill of health for Shanghai under false pretenses; in the manifests submitted to the Customs the destination was also made for Shanghai; and in another copy of the manifests the destination was for Shanghai via ports; and that a part in the cargo receipt where the destination was to be entered had been cut off. That the ship sailed from Seattle on January 5, 1905, Shanghai being en-

tered as her destination in the official logbook, the rough log, the mate's log, and the engineer's log; on the 19th of the same month leaving Dutch Harbor, where she called to take coal, she sailed along Aleutian Islands, and tried to get to Vladivostok through Okhotsk Sea by Boussole Straits, but on her way she was surrounded by ice, and after drifting about for many days she succeeded in continuing her voyage toward her destination on March 13, 1905, and she was captured by H. I. M. man of war in the sea about 40 miles southwest of Shibetontera Point on Shikoku Island at 8 a. m. on March 14th last.

"The above facts are supported by the statement made by Lient. Wataru Ukawa, an acting officer for the commander of H. I. M. S. Takachiko, the statements of inquiries made of the said officer, S. S. Connauton, the master of the Tacoma, and Alexander Georgevitch Boulman, a Russian freight clerk of the ship, the documents seized from the said Boulman, the ship's registry, the bill of lading; though the ship's master declares this bill serves for both the bill of lading and the charter party, we consider it is only a bill of lading by its nature, the clearance papers, the bill of health, two copies of manifests, the cargo receipt, the logbook, the rough log, the mate's log, the engineer's log, and a letter addressed to the ship's master by his owners dated January 2, 1905.

"The main points of the petition are that, even though the cargo on the ship is contraband of war, the ship should not be confiscated with the cargo, for it does not belong to the ship owners; that the ship owners had been engaged in the conveyance of the cargo with a good will, for they instructed the master to proceed to Vladivostok, but in case he cannot get there on account of blockade or ice, to go to Shanghai, in a letter on February 5th (the date will be January 2d), and Vladivostok is distinctly mentioned as the destination in the bill of lading; that the reason that Shanghai was entered in the manifests and clearance paper was the master's thought, in case he could not go to Vladivostok in accordance with the instruction of the owners, but it was not intended to escape the seizure thereby, thus having two different destinations in the ship's papers cannot be called a fraudulent action from the standpoint of international law, for such a conflict could be discovered very easily. Further, salt beef is not absolute contraband of war, and when it was to be carried to a point like Vladivostok, having two status as a commercial port and a naval port, it is proper to consider that it was for Vladivostok as a commercial port, and not for military supply, unless there was a proof to the contrary, as we have a precedent in the case of the Neptunas captured during the war between England and Holland in 1798; also the use of said cargo is not limited for military purposes only; and that the steel bars and machine accessories belong to Boulman of which the consignors had forwarded at the request of the said person and that they are not contraband, as stated before. Therefore a petition is made to the court for a decision to the effect that the said steamer should be set free.

"In considering the case of the salt beef of the cargo on the ship in question is the enemy's supply having been bought in America by Denby, a Russian merchant, and Ebbeke & Co., Shanghai, on a contract they made in November, 1904, with Dessino, a Russian general, who takes part in the enemy's military secrets, residing at Shanghai at present, and sent to Vladivostok, a Russian important naval base and commissary base; also we can see it is a supply for the enemy's military use, for the consignee of the cargo was the Russo-China Bank at Vladivostok, therefore it is proper to consider it contraband of war; that the steel bars and machine accessories belonging to the said Boulman are also doubtless contraband for they are materials for ship-building and were destined to Vladivostok; that, notwithstanding it was settled before the ship left Seattle that the ship was bound for Vladivostok according to the letter received by the shipmaster from his owners dated January 2d last, a clearance paper and bill of health for Shanghai had been secured at Seattle; that the port of destination in the cargo receipt was torn off; that Shanghai was entered in the logbook, the rough logbook, and the mate's log and engineer's log; that the ship had tried to get to Vladivostok through Soya Straits, which is one of the most difficult courses in the winter on account of storms, snow, or ice. These are not excusable negligence or for convenience of the voyage or procedure, but they were means employed to conceal the true destination and to escape the ship's capture under false pre-

tenses. Although the true destination is mentioned in the bill of lading, and the letter to the shipmaster from his owners, it cannot break the said facts. Further, that according to the written and oral statements made by the acting officer for the commander of the Takachiko when he visited the ship, the master had tried to conceal the said two documents by saying they are not useful; and that the petitioners persuaded Boulman to be freight clerk of the ship while they were aware the said Boulman was commissioned by Ebbecke & Co with special business as stated by the said person. Again, that according to the letter of the ship owners to the master there is a fact that the petitioners had appointed a special course for the ship to reach Vladivostok in order to escape the capture of the ship by the imperial ships. From the above we can conclude that the petitioners not only had known the nature of the cargo on the ship perfectly, but had furnished their ship for its transportation—i. e., they performed an action for assistance of the enemy by furnishing the ship. It is admitted by both the theory and practices of the international law that any ship performing such a deceitful action, and rendering assistance to the enemy clearly, shall be confiscated with the cargo which is contraband of war. Thus the ship in question is to be confiscated, and it is not necessary to explain on other points of argument made by the agent of the petitioners. Accordingly the decision is as in the text."

Proof of the loss was presented to and received by the defendant, and there is no controversy as to the observance or nonobservance of the formalities required in submitting the proof of loss to the defendant, nor pretense that the defendant at the time of its refusal denied liability on the specific ground that the loss was not occasioned by an exposure of the ship to a risk covered by the policy, nor for failure to submit evidence relating to other insurance. In the argument, however, its counsel say, in effect, that this policy covers only these risks excluded by the warranted free of capture, seizure, and detention clause in other marine policies, insuring this vessel for the same voyage, and that the plaintiff by failure to prove that this risk was excluded by the f. c. s. and d. clause in such other policy, or policies, has not established a valid claim against the defendant. This objection to the plaintiff's case is manifestly an afterthought, and, if it ever had any merit, it was waived by the failure of the defendant to make a timely objection to the sufficiency of the proof of loss. Furthermore, it is the opinion of the court that the argument is without merit, because it is based upon a provision of the policy which is ambiguous, in that it does not refer specifically to any particular policy or policies, therefore it must be construed as referring to marine policies, generally, and it must be construed consistently with the intentions of the parties indicated by the instrument itself, and the proved circumstances and conditions existing when it was delivered, accepted, and paid for. The parties knew, then, that Japan and Russia were at war with each other, and that by making a voyage to a Russian port the ship would incur the hazard of capture, detention, and confiscation by the enemy of Russia, and that there was no other inducement for payment of the high rate exacted for war risk insurance. What did happen was necessarily contemplated when the contract was made, and the intention of the parties to effect insurance of the ship against capture and confiscation by one of the belligerent nations is indicated by the manner in which this policy was prepared. The blank used, contained the warranted f. c. s. and d. clause which excluded liability of the insurer for all consequences of riots, insurrections, hostilities; or warlike opera-

tions, whether before or after declaration of war. This was deleted to make a war risk policy. It excludes the risk of capture by a warship of one of the belligerent nations, and it is the clause referred to for definition of the liability which the insurer assumed. It is the opinion of the court that the above recitals contain the facts necessary to make a complete prima facie case for the plaintiff, and that it is entitled to prevail in this case, unless one or more of the grounds of defense pleaded in the defendant's answer are valid.

The defenses relied upon may be fairly epitomized as follows: (1) Misrepresentation and concealment of material facts by the plaintiff and its representatives in negotiating for the policy. (2) Sending the vessel on the voyage with false documents without the insurer's knowledge and consent. (3) Giving to the master of the vessel a letter of special instructions of the following tenor:

"Capt. S. S. Connauton,

"Seattle, Wash., January 2d, 1905.

"S. S. Tacoma.

"Dear Sir: When you are clear of the Port of Seattle, you are expected to proceed direct to Dutch Harbor, Alaska, and there take aboard all the coal your vessel can safely carry in addition to her cargo. After you have received this coal aboard you are expected to proceed to Vladivostok, and I advise you to sail via the Boussole Straits through the Kurilo Islands, and from there until you get your bearings for Cape Aniva; from there to the La Perouse Straits. As you round the southwesterly point of Saghalin Island steer slightly northward until you are clear of the island and then hold over directly towards the Siberian mainland until you get in sight thereof, and then proceed southward towards Vladivostok. Under the conditions of the bills of lading you are not obliged to enter the port of Vladivostok, if it should be closed by ice, so that it would be an injury to your vessel and its crew to try to do so. Neither are you supposed to run any blockades, and therefore if you should find upon your arrival off the port of Vladivostok that owing to existing hostilities between Japan and Russia the port is blockaded by Japanese war vessels you are to proceed to the port of Shanghai or some other neutral port to there discharge your cargo.

"Yours truly,

Northwestern Steamship Co., Ltd.,

"per John Rosene, President."

(4) Having the shipping articles for the voyage signed by an emissary of the Russian government in the capacity of freight clerk, and having him on the vessel as an officer, without knowledge or consent of the insurer. (5) Deviation, without consent of the insurer. (6) The loss was a consequence of the plaintiff's own act in sending the vessel on the voyage carrying false documents.

The law of England is controlling in this case, and, to inform the court on the subject, the depositions of Mr. John Andrew Hamilton, King's Counselor, and Mr. Ralph Iliff Simey, two eminent English lawyers, were taken in London. Conditions affecting commerce and shipping have changed since the latest decisions by courts of England having any bearing upon the questions to be decided in this case, therefore, rather than attempt to make deductions from authorities, the court will be guided by their testimony in so far as general principles are stated. The substantial parts of the deposition are here quoted:

"Mr. John Andrew Hamilton, K. C., being first duly sworn, deposeth and saith in answer to interrogatories as follows:

"Q. 287. May I assume that you have the statements as to Boulman which are contained in the defense in your mind when I ask you questions upon it? A. Yes.

"Q. 288. Have you also in your mind the facts as to simulated papers and the instructions to the captain to go to Dutch Harbor? A. Yes.

"Q. 289. Did you hear Mr. Sumner's evidence that he would not have taken the risk had he known Boulman was going on board in that capacity? A. Yes.

"Q. 290. And also his evidence that the presence of Boulman made such a danger to the adventure as to alter the commercial nature of the risk he was taking? A. Yes.

"Q. 291. According to English law what was the duty of the plaintiffs, or their agents, towards the defendants, as underwriters, in respect of the communication of those facts, or any of them, before the policy was issued? A. The duty is to disclose all facts known to the assured which are material to the risk, or which would affect the mind of a reasonable underwriter in accepting the risk, or affect the amount of premium he would charge in accepting the risk. What is material is a question of fact.

"Q. 292. Assuming failure to communicate a material fact within that principle, what is the result upon the policy? A. The policy is voidable at the option of the underwriter.

"Q. 293. What are the criteria of materiality, so to speak, in English law? What are the guiding principles by which a jury should be directed as to whether a fact is material or not? A. There are some facts as to which a jury would be allowed to find that they were material without any evidence of underwriters, or persons connected with underwriting. As a rule, facts are left to a jury as material upon evidence given that they are material. The evidence is given by persons who are connected with marine insurance as laymen, and not as lawyers.

"Q. 294. If it were proved, for instance, that the communication of a particular fact would substantially increase the risk of the adventure, would that fact be material within the meaning of the doctrine? A. The jury would be told, if they believed that the particular fact which was not disclosed was one which would have increased the risk of the adventure, and would therefore have affected the mind of a reasonable underwriter in considering whether he would take the risk or not, and at what rate of premium, that they would have to find that there had been a material concealment.

"Q. 295. Assuming that the statements made by Mr. Sumner as to his view accurately expresses what a reasonable underwriter would say, was the non-disclosure of the shipment of Boulman a material fact? A. If there was no other evidence but that which Mr. Sumner has given, an English judge would leave it to the jury, and would tell them that in the absence of any evidence to the contrary that was evidence that the fact was material. If the judge was deciding the case without a jury, upon such evidence as that, uncontradicted, he would find there had been concealment of a material fact.

"Q. 296. Do the same principles apply, then, to the other circumstances of simulated papers and the orders to deviate, if there was deviation? A. I think so; that is to say, if those were facts known to the assured, or intentions formed by him, or instructions given by him, and he did not disclose them, and it was proved that they were material to the risk, there would be then a right in the underwriter to void the policy on becoming aware of the facts which had not been disclosed. * * *

"Q. 300. Does the carriage of contraband cargo necessarily infect the carrying ship with the contraband quality of the cargo? A. Not according to the English rule of law affecting Courts of Prize.

"Q. 301. Under what kind of circumstances does condemnation of the ship follow upon condemnation of the cargo where the ship is a neutral ship? A. One case is where the contraband cargo belongs to the ship owner; but, speaking generally, if the court came to the conclusion that the ship owner was guilty of what I think they call 'provoked conduct' in some decisions, connected with the deliberate and intentional carriage of the contraband cargo, they could condemn the ship. There are old authorities, if you think it necessary that I should refer to them, in which it is laid down. Two of the best passages are in the case of *The Ringende Jacob*, 1 Christopher Robinson's Reports, p. 89, and the case of *The Neutralitet*, 3 Christopher Robinson's Reports, p. 295. Lord Stowell says in the first case, at page 90: 'But in the

modern practice of the courts of admiralty of this country, and I believe of other nations also, a milder rule has been adopted; and the carrying of contraband articles is attended only with the loss of freight and expenses; except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances.' There are other passages to the like effect.

"Q. 302. I observe a passage in Maclachlan's Law of Merchant Shipping (3d Ed.) at page 566, which says: 'When this misconduct of the neutral is connected with malignant and aggravating circumstances, as where the cargo is shipped with a false destination, and the vessel proceeds with false papers on board, both ship and cargo are liable to confiscation on the homeward as well as the outward voyage, notwithstanding she may have discharged and loaded again several times in the interval at intermediate ports, and be at the time of capture clear of contraband on board.' Is that a correct statement of the law in the circumstances indicated in the passage? A. I think so.

"Q. 303. Does it result from that that the simulation of papers belonging to the cargo affects the risk upon the ship? A. I should think it did.

"Q. 304. What is the English law as to the effect upon the carrying ship of her carrying simulated or false papers without leave in the policy to do so, where the simulated papers is one of grounds of condemnation? A. If the vessel has no leave to carry simulated papers given in the policy, and if she is condemned upon that ground, and the assured has sent her to sea with those simulated papers, and is in privity with her going to sea with those simulated papers, he has then brought about the loss by his own act and cannot recover upon his policy or indemnity against it.

"Q. 305. Would any return of premium be due from the underwriter to the assured in that event? A. In that event I think not, because the vessel is at risk, and might be lost quite independently of the simulated papers by, in this case, consequences of the hostilities. The underwriter, therefore, has earned his premium by running that risk.

"Q. 306. Could you give me a reference to one or two authorities which support that statement of the law as to the effect of carrying simulated papers? A. You will find all the law authoritatively collected and set out in Arnould's Marine Insurance of which the last edition is the seventh, in 1901. You will find the law about carrying simulated papers, referred to in section 732, and it contains a case, which is a very good illustration, of *Oswell v. Vigne*, 15 East's Reports, p. 70, and another case in the same volume of Reports at page 364 of *Bell and Others v. Bromfield*.

"Q. 307. By Mr. Maurice Hill: You have told my friend about the duty of disclosing facts. Is that a duty which is upon the assured at the time when the ship is signed? A. Yes.

"Q. 308. He must disclose material facts which are then known to him? A. Yes.

"Q. 309. If facts come to his knowledge after that date, is he under an obligation to disclose them? A. No; I think not.

"Q. 310. You spoke of his having formed an intention. If he has formed an intention to do something at the time of the slip, and that intention is material, must that be disclosed? A. I think so.

"Q. 311. If no intention is formed at the time, but an intention is formed afterwards, has that to be disclosed? A. I think not. The rule appears to be, according to the English practice of effecting insurance by means of a slip in anticipation of a policy, that when the insurance is effected, and has become binding as a matter of business, the obligation to disclose ceases, and subsequent matters are not the subject of an obligation to disclose.

"Q. 312. Now, upon this obligation to disclose, need the assured disclose matters which are matters of general knowledge? A. He need not disclose such matters as the underwriter may be presumed by reason of his business to know. If it is a matter of general knowledge, but it is not reasonable to suppose that the underwriter would know it as part of his business, then I think it would have to be disclosed.

"Q. 313. But matters which underwriters generally may be supposed to be aware of need not be disclosed? A. No.

"Q. 314. The matters which Mr. Leslie Scott put to you, if I understood him, as matters which might, according as in fact they were material or not, have to be disclosed were the Russian agent, simulated papers and instructions to go to Dutch Harbor. Is it your view that an intention to deviate is a matter which must be disclosed? A. A mere intention to deviate would not, I think, because the rule is what is covered by warranty need not be made the subject of disclosure, and there is an implied warranty not to deviate, so that if it is merely the intention to deviate, the warranty not to deviate covers any mischief arising from that.

"Q. 315. I thought that applied, in view of your answers at the end of the examination in chief with regard to simulated papers, to an intention to use simulated papers. A. No; I think not, because there is no warranty to document the vessel, or not to document the vessel, that is implied. It is merely if the vessel is condemned because the owner has sent her to sea with false papers; he has brought his loss upon his own head.

"Q. 316. Mr. Leslie Scott also asked you some questions about the effect of the carriage of contraband. Of course, on this particular ship, that will depend upon the law as applied by Japan. A. Well, no doubt a Court of Prize has the right to enforce the law of its own country as to what is contraband, and will do it whether it has the right to do it or not; and, therefore, if the question is what is contraband, I think that depends, for all practical purposes, on the law of the country in which the Court of Prize is sitting.

"Q. 317. Would not the same answer apply to the effect upon the ship of carrying contraband; that is to say, the question whether contraband would lead to the forfeiture of the ship or not? A. There is nothing that binds a Court of Prize that I know of to follow Lord Stowell's decisions unless it happens to be sitting upon affairs of His Majesty the King. If the Japanese Court of Prize, for example, did not choose to follow those decisions, or did not know of them, its decision would none the less be valuable as a judgment in rem.

"Q. 318. Even in England, if the cargo is being carried for use by the belligerent forces, it would justify condemnation of the ship, would it not? A. If the ship has been acting as a storeship, or a ship in the service of the belligerents, yes.

"Q. 319. If an English Prize Court arrived at the conclusion that a cargo of beef on board a ship were proceeding to the enemy's port to feed the enemy's forces, would it not in English prize law lead to a condemnation of the ship? A. I cannot tell you that offhand. I do not remember any case to that effect.

"Q. 320. And you do not remember any case to the contrary? A. No; I do not think there has been any occasion to decide such a case for about 100 years. There may be such cases, but I do not pretend to remember them. I confess I did not regard this as a case in which the question of contraband was most material.

"Q. 321. The cases to which you have referred are all something like 100 years old? A. The *Ringende Jacob* was in 1798 and the *Neutralitet* in 1801.

"Q. 322. I think the cases also which you referred to in 15 East's Reports would be a little later? A. Yes, about 1812.

"Q. 323. The law of England with regard to marine insurance has been recently codified, has it not, in the Marine Insurance Act of 1906. A. Yes.

"Q. 324. Of course, running blockade by English law, if captured, would justify forfeiture of the ship, would it not? A. Oh, yes; that is to say, if it was a genuine blockade.

"Q. 325. Do you agree with me that if a ship set sail for a blockaded port it could be taken at any time on its voyage and be forfeited? A. I think not. I have not looked that up, but my memory is that a ship is not breaking blockade until she begins to enter the blockade. I think if you refer to the cases between 1860 and 1865 you will find that it was never admitted that blockade runners could be forfeited until they were off the port. I may be wrong, but that is my recollection of it. Of course, when a vessel is in or entering a blockade port, liable to seizure or to be sunk, it is a different matter. Questions used to arise as to whether a vessel leaving Nassau was breaking the blockade of Charleston; it is a question of degree, I suppose.

"Q. 326. The question, of course, whether simulation of papers affects the risk or not, is, like other questions, a question of fact? A. It is a question of fact, certainly, and evidence about it is admissible; but in the absence of any evidence, I think the court or the tribunal of fact can, from the mere fact itself, by the English law come to the conclusion that it must be material.

"Q. 327. I can quite understand that being so where there is nothing else which will lead to the condemnation of the ship if she is captured, but supposing the case of a ship setting out to run blockade and running blockade and being captured; the simulation of papers does not affect the risk in such a case, does it? A. The rule is that assured must disclose whatever would affect the mind of a reasonable underwriter so that the reasonable underwriter might have the chance of considering it for himself. I do not think it can be said as a matter of law that a professed blockade runner with simulated papers on board is already doing a thing so dangerous that the possession of the simulated papers cannot make it any more dangerous, or, at any rate, that the reasonable underwriter could not be affected by the knowledge. It is a question of fact.

"Q. 328. In the same way, I suppose, if a ship were known to be carrying a cargo of munitions of war for the enemy it would be again a question of fact whether the simulation of papers materially affected that risk? A. I suppose so.

"Q. 329. By Mr. Leslie Scott: Mr. Maurice Hill asked whether those cases you referred to were not old, and it appears they are about 100 years old. In your opinion, do those cases contain decisions which would be now followed by the courts of this country? A. Certainly. * * *

"Q. 332. What is the effect upon the policy of a deviation from the voyage named in the policy? A. A loss happening after the commencement of the deviation is not recoverable.

"Q. 333. What effect has that fact upon the premium? Does it impose any obligation upon the underwriter to return it? A. No. * * *

"Mr. Ralph Pliff Simey, being first duly sworn, deposeth and saith in answer to interrogatories as follows:

"Q. 541. I think you were present at this commission during the examination and cross-examination of Mr. Hamilton. A. I was.

"Q. 542. Unless my friend asks me to do so I do not propose to take you in detail through the questions I put to Mr. Hamilton. Did you hear the evidence given by Mr. Hamilton and the whole of his answers? A. I did.

"Q. 543. Did you agree with them? A. Generally speaking, I do agree with everything he said, but there are two small points which I want to correct in Mr. Hamilton's evidence, one of which he has asked me himself to correct. The first is that Mr. Hamilton expressed the opinion that a breach of blockade was only constituted when there was an actual attempt to break through the physical blockade of the enemy. By English law the blockade is broken as soon as the vessel starts with the object of breaking the blockade. I believe the French law is different, but by English law I think I am correct in that statement.

"Q. 544. What is the other point? A. The other point is this: Mr. Hamilton was asked a question about deviation, and he was asked whether an intention to deviate formed prior to the acceptance of the contract ought to be communicated to the underwriters as a fact which ought to be disclosed to prevent any concealment, and Mr. Hamilton answered that inasmuch as deviation was an implied warranty in the policy it was not necessary to communicate to the underwriter the fact that the ship meant to deviate. I do not think Mr. Hamilton would have given that answer if he had observed the terms of this policy where there is what is commonly called a deviation clause. I think, where there is a deviation clause which gives the vessel power or right to deviate, under those circumstances, it might be material and might be the duty of the ship owner effecting the insurance to disclose the fact of a previously formed intention to deviate.

"Q. 545. You say 'might be material.' What do you indicate by the word 'might'? A. I only mean that the doctrine which Mr. Hamilton invoked to the effect that it is not necessary to disclose things which are covered by a warranty expressed or implied does not appear to me to apply to a policy where there is as in this case a deviation clause.

"Q. 546. The word 'might' is the conditional mood. A. The question whether it is material or not is a question of fact.

"Q. 547. On this question that was put by Mr. Maurice Hill this afternoon to Mr. Wells as to the effect of going from Seattle to this place Dutch Harbor in accordance with the terms of the letter of instructions to the captain, I wish to call to your recollection the terms of the letter: 'When you are clear of the port of Seattle you are expected to proceed direct to Dutch Harbor, Alaska, and there take aboard all the coal your vessel can safely carry in addition to her cargo.' Under this policy, was there any intermediate stage between Seattle and Vladivostok? A. The policy speaks for itself upon that point.

"Q. 548. According to English law I ask your opinion as an English lawyer whether or not this policy contains a provision for any stage between these two places. A. I can only say that I have read the policy, and it does not.

"Q. 549. That being so, what was the warranty in respect of coal on the vessel sailing from Seattle? A. The warranty in respect of coaling would be a portion of the warranty of seaworthiness, and if the vessel were to leave Seattle without a sufficient supply of bunker coal to take her to the proper terminus of the voyage the vessel would be unseaworthy.

"Q. 550. Mr. Maurice Hill raised the point that there was a terminus beyond Vladivostok, namely, a neutral port. Under this policy, would there be a warranty that the vessel should have sufficient coal to take her from Seattle to the neutral port, or would it be sufficient if she had enough coal to take her on the stage from Seattle to Vladivostok? A. With reference to Vladivostok, to a neutral port, the doctrine of voyage in stages might come in, and if the owner or the captain on leaving Seattle thought that there was a reasonable chance of putting on board at Vladivostok any extra coal to carry him from Vladivostok to a neutral port, then I think it would be a sufficient compliance with this warranty if he put on board at Seattle enough to take him to Vladivostok.

"Q. 551. If he had not enough coal on leaving Seattle to get to Vladivostok, would that be a breach of the warranty? A. Do you mean of seaworthiness?

"Q. 552. Yes. A. I think so.

"Q. 553. If the policy did not provide for liberty to call for the purpose of taking on board coal otherwise than for bunkers, would the calling at Dutch Harbor be a deviation? A. Do you mean if it did not provide for taking on coal for cargo?

"Q. 554. Yes. A. It would be a deviation whether it did or did not.

"Q. 555. Is that a copy of the policy which you have had before you? (Handing.) A. Yes. (The copy policy was put in and marked R. I. S. 1.)

"Q. 556. By Mr. Maurice Hill: Is the law correctly stated in your edition of Arnould at section 705 about stages for coaling where it says: 'It is commercially impossible for cargo steamers on long voyages to take on board at the beginning a sufficient supply of fuel to last the whole voyage. Two decisions of the Court of Appeal, both in actions on charter parties, have established the rule that when a steamship starts on a long voyage with only enough coal for part of the voyage, the intention being to take on board a fresh supply at one or more intermediate ports, the voyage is considered as divided into stages for the purpose of coaling, and the warranty of seaworthiness attaches at each coaling port for the stage which ends at the next coaling port.' You then refer to the case of *Thin v. Richards*, [1892] 2 *Queen's Bench*, p. 141, and *The Vortigern* [1899] *Probate*, 140. 'The decision in the later case was expressly declared to be applicable to contracts of insurance.' A. The American courts I think will have *Thin v. Richards* and *The Vortigern*. And what we say there is entirely derived from those cases.

"Q. 551. According to your view, the law as it existed in 1901 was correctly stated in your edition, published in that year, of Arnould. A. We thought so. * * *

"Q. 561. I am not quite sure if I followed your answer, but I think from what you told me I may take it you did not mean that where there is a voyage in stages for the purpose of coaling that those stages must be stated in the policy. A. I think the question only arises where there is liberty to touch and stay.

"Q. 562. Take the ordinary case of an insured from London to Buenos Ayres calling at Las Palmas, and calling at Las Palmas for coal on the voyage home. A. Am I to assume there is power to call?

"Q. 563. That there is nothing at all in the policy about it. A. I think it would be a deviation to call.

"Q. 564. I mean there is the ordinary power to proceed and sail and touch and stay at any port or ports for places without prejudice whatsoever to the insurance. A. I do not think that clause is in the present policy, but I am not sure.

"Q. 565. Will you look at R. I. S. 1. The copy handed to me contains the clause: 'And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, and wheresoever for all purposes without being deemed a deviation and without prejudice to this insurance.' A. Yes, that is so in this copy too.

"Q. 566. Having regard to the fact that that clause at any rate is in the policy, may I take it it is not in your view essential that the policy should state the places at which the ship will call to coal? A. I do not think it would be necessary that the policy should state the places, but the places would have to be on the ordinary course of the voyage, and whether or not Dutch Harbor is on the ordinary course of a voyage from Seattle to Vladivostok is a question of fact.

"Q. 567. Supposing it were analogous to Las Palmas on the voyage from the Plate to England as a coaling station, then there would be no breach of the insurance if the ship called there to coal? A. For bunker coal?

"Q. 568. Yes, for bunker coal. A. Well, I think a question might arise as to whether or not the captain had acted reasonably within the terms of his policy in dividing the voyage into those stages.

"Q. 569. That would be a question of fact? A. Yes."

From this it appears that the law of England is not different from the law of other countries. The basic principle is that, in their contractual relations to each other, parties are required to be candid and reasonable in negotiating contracts, and to keep good faith with each other in discharging contract obligations. The law applicable to insurance contracts requires an applicant for insurance to make a full disclosure of all the material facts, known to him at the time, affecting the risk which the insurer is to assume. Material facts are only such as are likely to influence the mind of a reasonable underwriter in deciding whether to accept the risk and in fixing the rate of the premium to be paid. The question of materiality is one of fact, to be decided upon consideration of all the circumstances and conditions affecting the transaction. A policy insuring a ship for a voyage insures only for the particular voyage intended, which must be prosecuted with diligence and by the most direct and practicable known route. The ship must be seaworthy at the commencement of the voyage and at the commencement of each successive stage of the voyage, and every reasonable precaution for the safety of the ship and cargo must be taken so that the voyage may be terminated without unnecessary delay, and without loss to either the owner or insurer. The truth of the converse propositions is necessarily implied. The insured is not required to disclose facts unknown to him at the time of making an application for insurance, nor immaterial facts, nor matters of common and general knowledge among those engaged in the insurance business at the place of the contract. Adoption of customary and reasonable means to promote the success of the venture, and to avoid known dangers, is not ground for exempting the insurer from the liabilities expressed in

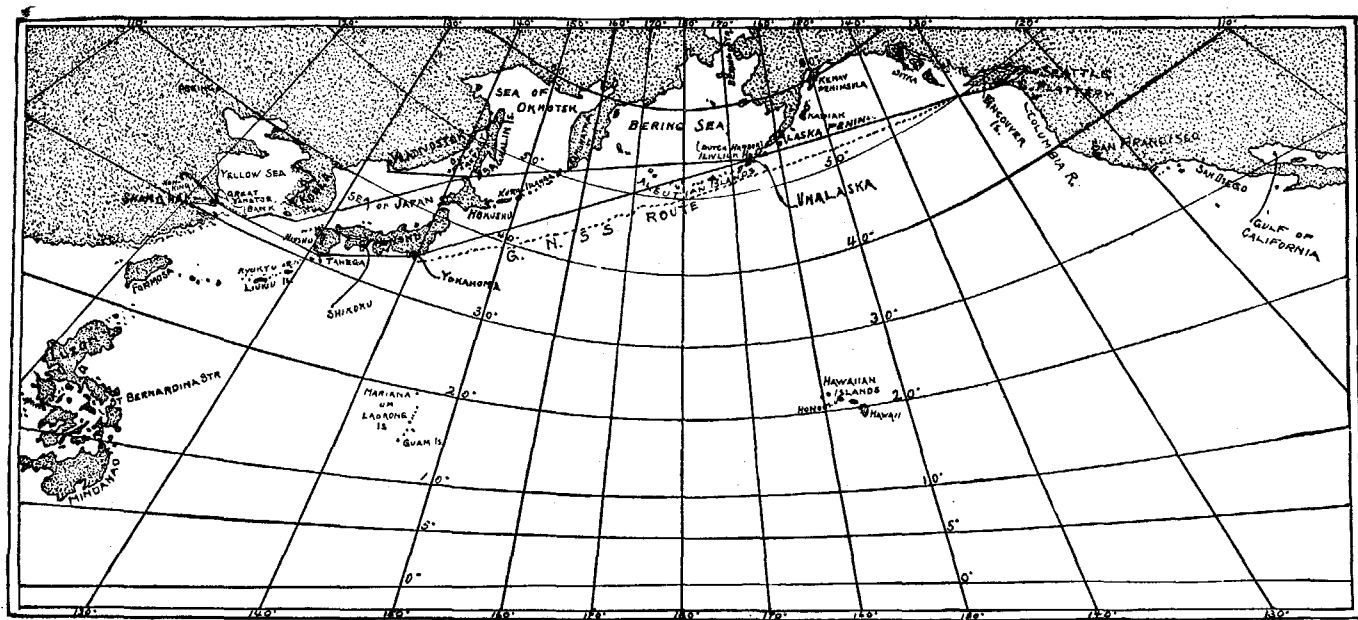
the policy. With these fundamental principles in view, the defenses must now be analyzed.

1. The only charge against the plaintiff under the heading of "misrepresentations" is that the defendant was informed that the cargo to be carried by the Tacoma on the voyage for which she was insured was fodder. There is a total failure of proof to convict the plaintiff, or any of its representatives, of having made any statement or suggestion that the cargo to be carried was fodder. On the contrary, the evidence is convincing that the only mention of fodder in the negotiations was in a letter written by Mr. Wells, the defendant's underwriter, to its head office, and he must have confused the Tacoma transaction with some other.

2. The plaintiff stands charged with unfairness in having concealed from the defendant important facts affecting the risk including the description of the cargo, the carrying of simulated documents, the employment of a Russian as freight clerk, the letter of instructions to the captain, prescribing the route to be traveled by the ship, and an intended deviation. Each of these specifications must receive consideration. By giving due credit to the decision of the Prize Court, this court is constrained to hold that the cargo was contraband of war; that although Vladivostok was the port at which it was intended to discharge the cargo, the ship cleared for Shanghai, and her bill of health, manifest, shipping articles, and logs indicated the latter port as her destination, and it will be assumed that these facts were known to, or intended by, the plaintiff when the insurance was effected, and that the defendant was not so informed. So much being conceded, the important question to be determined is, were these facts material? With respect to this main question, the defense rests upon a theory that the testimony introduced, to the effect that the defendant's underwriter would not have approved nor accepted the risk if he had been informed of the facts above recited, is conclusive. This might be true, if it were necessary to ascertain just how a particular underwriter would be influenced by information of particular facts. But that is outside of the range of inquiry in this case. Here, the question to be considered is whether the facts would have influenced a reasonable underwriter at the time of the transaction; and the conditions and circumstances which were generally known to insurance people at the time must be kept in view. The war between Japan and Russia was an existing condition. It was generally known that Vladivostok was a Russian port, and a base of supplies for the Russian military and naval forces engaged in the war. It was known to all men engaged in insurance business that previous to the war only a few ships required insurance for voyages from American ports to Vladivostok, and none of them required war risk policies, and that after the commencement of hostilities there was a notable increase in the number of vessels dispatched to Vladivostok, all carrying cargoes of food, fodder, and general merchandise, that the owners were willing to pay the high rates exacted for war risk policies, that modern means of speedy communication between distant places, and newspaper enterprise in sending broadcast intelligence of the sailing and destination of ships, were advantageous to the belligents, and enhanced the risks to ships so advertised. For

that reason insurers encouraged the practice of clearing ships for neutral ports and providing them with simulated documents, in the hope that, by suppressing information of an intended voyage at the time of its commencement, a ship might elude the vigilance of spies, news reporters, and warships of the belligerents. Important circumstances to be considered in this connection are that the Tacoma was in fact a merchant vessel of the United States, that she was provided with proper documents showing her nationality, and that she was not condemned by the Prize Court for lack of such documents. Her manifest gave true information as to the nature of her cargo, and the name of the consignee. Although her clearance, and logs, and shipping articles named Shanghai as her port of destination, these were not intended to deceive captors nor to defeat the right of search, because the written instructions to her captain and her bill of lading gave true information as to her destination, her route of travel, and the conditions which were to govern him in deciding whether to attempt to enter Vladivostok, or go to Shanghai to deliver the cargo to the consignee. The beef, steel bars, and machinery which the ship carried did not affect the risk to the prejudice of the insurer, because such commodities were in the same class as fodder and general merchandise which other ships were employed to carry, and such cargoes were not deemed objectionable by insurers. The evidence proves that the defendant insured the beef for the same voyage. The policy in suit contains an express permission for the ship to run a blockade, and for that permission no extra premium was charged. The cargo, whether food for men or animals, was needed by the belligerent forces on both sides, and there could be little doubt that either description of commodities would be treated as contraband of war, if captured, therefore the court finds as a fact that the nature of the cargo and the falsity of the ship's documents with respect to her port of destination were not matters which would have influenced a reasonable underwriter and did not enhance the risk, and, upon said findings, the court bases its conclusion and decision that said matters were not material.

3. The policy was issued December 23, 1904, and the letter of instructions to the captain was dated January 2, 1905. As it did not exist when the policy was applied for, failure to mention it was not a concealment of a material fact. The instructions which it contained were appropriate and well intended to guide the captain in making the voyage by the route which was the most direct and practicable, and most favorable for eluding the warships of Japan, which was a duty owed to the insurers as well as to the owner of the cargo. It is true that the vessel got into difficulty in Okhotsk Sea by encountering masses of drifting ice, but it is proved by uncontradicted evidence that such an occurrence was not to be expected, because it was very unusual for the ice to become detached so as to drift into the open sea during the winter months. No point on the route which the letter dictated is farther north than the latitude of Liverpool. To show more clearly the grounds upon which the court bases its finding that the sailing course prescribed in the letter of instructions was the most practicable, reference is made to the annexed photographic copy of a map showing the countries, islands, seas, and places mentioned.



The decision shows that the letter was considered by the Prize Court as evidence supporting its conclusion that the ship was in fact dispatched to Vladivostok, and that it was relied upon, in contesting the forfeiture, to refute the argument that the ship's documents were falsified with intent to deceive captors, and the court held that although it gave true information as to the destination of the ship, it was insufficient to exculpate the owner. There is a wide difference between efforts of a ship to avoid capture, and efforts to deceive captors, which in international law is regarded as provoking conduct. In this connection it is proper to notice that in its decision the Prize Court censured the captain of the Tacoma for having tried to conceal the bill of lading and the letter of instructions referred to "by saying they are not useful." Said papers were in fact, as appears by the decision, exhibited by the captain and surrendered, and a mere casual remark expressing his opinion that they were not useful would not be considered by any court which intended to be fair as evidence of an attempt to conceal documents which were in fact relied upon in defending the ship in judicial proceedings against her. Another triviality is mentioned in the decision of the Prize Court as if it were a guilty act; viz., that the port of destination had been torn off from a paper called "the cargo receipt," and this is made the basis of an accusation by the defendant against the plaintiff, or the captain of the ship, of mutilating the ship's documents. The cargo receipt concerned only the carrier and the shipper, or consignee of the cargo, and as the arrangement between them was that the cargo was to be delivered at Vladivostok, if practicable to do so, otherwise at Shanghai, or some other neutral port, spoliation of that paper was not a valid ground for forfeiture of the ship, when the ship's bill of lading and the letter of instructions to her captain contained true information as above indicated. In other words, a mere cargo receipt was not a document of the ship which could have deceived captors, and it could not have been mutilated for the purpose of deceiving.

4. Throughout the defendant's pleadings, evidence and arguments, Boulman, the freight clerk is characterized as an "agent of the Russian government," "Russian officer," and "Russian emissary." In the argument it is asserted that he was commissioned by Gen. Dessino to purchase and inspect the cargo of meat and to embark himself on the vessel and to deliver the meat to the consignee. There is not a scintilla of evidence tending to prove that he was ever in the service of the Russian government or Gen. Dessino in any capacity whatever. On the contrary, the findings of the Prize Court which must be accepted as conclusive are that the beef was bought to supply Vladivostok on a contract between Gen. Dessino and Denby, a Russian merchant, and Ebbeke & Co., both of Shanghai, that it was consigned to the Russo-China Bank at Vladivostok, and that Boulman was commissioned by Denby to represent or act for him in the business of purchasing goods to be supplied to the Russian Government or individuals, and that he was also commissioned by Ebbeke & Co. to inspect the beef and deliver it to the consignee. As freight clerk he had no authority to control the vessel in any particular, and being an agent of merchants domiciled in a neutral city, who had contracted to procure

the beef to supply the needs of a city, having a dual "status as a commercial port and a naval port," his engagement as a subordinate officer of the vessel did not constructively nor in fact identify the ship with a belligerent nation, nor a contraband cargo. This is the conclusion of this court, and the decision of the Prize Court contains no declaration to the contrary. That decision was arbitrary, resting upon the epithet "deceitful action," referring to the letter of instructions, whereby, as the decision recites, the owner "appointed a special course for the ship to reach Vladivostok in order to escape the capture of the ship by the imperial ships." The giving of the letter was a cautious, but not a deceitful, act. It gave true information, and it could not deceive or mislead anyone. True it is, that the letter appointed a course for the ship, deemed the most safe for a ship liable to be captured by Japanese warships. If that was censurable from the standpoint of a Japanese Prize Court, it is not so, when the question to be decided is whether the insurer of the ship was prejudiced by a breach of duty on the part of the shipowner. To absolve the insurer from liability, because the letter was given, it would be necessary to assume that duty to the insurer required the ship to avoid the most practicable route to her port of destination, and to sail only in waters patrolled by belligerent ships so that it would be easy for them to capture her. That idea is contrary to the fundamental rule which requires the holder of an insurance policy to have regard for the interests of the insurer, and to act in good faith so as not to incur a loss by unnecessary exposure of the insured property to perils which are obvious.

5. The charge of deviation without consent has not been proved. The map shows that the route traveled was the most direct and practicable route from Puget Sound to Vladivostok. Dutch Harbor is a coaling station on that route. That is a physical fact which the testimony to the contrary given by the defendant's witnesses cannot overcome. The ship touched and tarried there only for the purpose of refilling her bunkers, which was a prudent thing to do, considering that she had traveled 1,700 miles to that point, and had over 2,500 miles of distance yet to go, with the chances of being delayed. Any fair, reasonable insurer would not find fault even if permission had not been granted in the policy. It is true that the ship was not on her proper course towards Vladivostok when she was captured. But the circumstance of her being then on a course towards the nearest port where supplies could be obtained was a consequence of unexpected difficulties, and necessity as above stated, and that is not a cause for forfeiture of her insurance. Stopping at Dutch Harbor for coal, and making for a near-by port to replenish her stores which had been exhausted during her detention by ice, cannot be considered as deviation without consent, because this policy contains a clause permitting the ship to "sail to, touch, and stay at any ports or places whatsoever without prejudice to this insurance."

6. In support of the last of its defenses, the defendant contends that by an inflexible rule of English law, if an insured vessel is condemned as a prize of war for having false documents, and if her owner sent her to sea with such documents, he is deemed to have brought the loss upon himself by his own act, and unless consent to carry simulated

documents is contained in the policy, the insurer is absolved from liability. Mr. Hamilton testified, in answer to question 315, that there is no implied warranty in an insurance policy to document or not document the vessel, but if the owner has sent her to sea with false documents, and she is condemned for that cause, he has brought the loss upon his own head. This statement must be understood as Mr. Hamilton's application to the hypothetical case which he had in mind of the general principle that, when simulated documents are used to conceal belligerent property, or to deceive captors, the vessel may be confiscated on the ground of malignant circumstances or "provoked conduct." That general rule, however, is not properly applicable to the case now in hand, and Mr. Hamilton was not interrogated with reference to a case of a captured vessel having false documents which were surrendered, with other documents which contained true information covering all matters affecting the rights of belligerents. This difference in the facts suggests again the thought that the defendant has no just ground for complaining because the owner of the Tacoma did not make a public announcement at the commencement of her voyage that she would carry food and machinery to Vladivostok. The records of the custom house are searched daily by news gatherers, and the information obtainable there is promptly transmitted to every commercial port of enough importance to be concerned. If the Tacoma had cleared for Vladivostok, knowledge of the fact would certainly have been transmitted to Yokohama, so that a cruiser could have been detailed to intercept her, and it would probably have captured her, without losing much time in searching. With the Japanese cruisers the Tacoma had no business except to keep out of their way. The defendant would place the entire blame for the loss upon the plaintiff for having done things which were made the pretext for the decree forfeiting the ship, but the court cannot ignore the primary duty of the plaintiff to conduct the business so as to minimize the risk of capture. As before said, this was a duty owed to the insurers as well as the owner of the cargo, and it would have been a treacherous act for the captain or owner to have given voluntary aid to the captors in the vain hope of gaining a reward in immunity of the ship from confiscation.

The evidence proves that English insurers paid on many ships that were confiscated by the Japanese during the war, ignoring defenses as meritorious as those which have been pleaded in this case. This defendant was sued in England on some of its policies, and in those cases after pleading similar defenses, acting on the advice of English lawyers, it paid the insurance money sued for, without having submitted those controversies to an English court for decision. I believe that if this case had been brought in a court of England, it would have been settled, or decided as this court decides, in favor of the plaintiff.

Ex parte HAMAGUCHI.

(Circuit Court, D. Oregon. April 6, 1908.)

No. 3,260.

1. ALIENS—RIGHT TO ENTER—IMMIGRATION ACT.

Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1907, p. 401), provides that any alien, who shall enter the United States in violation of law shall, on the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came. Section 21 (34 Stat. 905 [U. S. Comp. St. Supp. 1907, p. 402]), declares that, in case the Secretary be satisfied that an alien has been found in the United States in violation of the act, he shall cause the alien to be taken into custody and returned as provided in the preceding section. The act also specifically provides for inspection at water ports of entry, and authorizes the Commissioner General of Immigration to prescribe rules for entry at border ports, pursuant to which Blaine, Wash., was designated by rule 24 as a border port of entry from Canada, and by rule 25 it was declared that if an alien arrives in Canada, whose destination is the United States, inspection shall be had at certain ports in Canada, and if applicant is entitled to admission, he shall receive a certificate from the United States Commissioner of Immigration for Canada, which, on presentation at the border port, shall entitle him to entry without further examination or identification, but that, if an alien destined to Canada applies at a border port for admission, he shall submit to inspection by a board of special inquiry at certain border ports, including Blaine. *Held*, that where a Japanese laborer, excluded by executive order March 14, 1907, came to Canada destined to the United States, or came destined to Canada and thereafter surreptitiously entered the United States, passing through Blaine at night, without presenting himself to the inspecting officers, he was unlawfully in the United States and subject to deportation.

2. SAME—IMMIGRATION RULES—VALIDITY.

Immigration Act Feb. 20, 1907, c. 1134, § 32, 34 Stat. 908 (U. S. Comp. St. Supp. 1907, p. 408), provides that the Commissioner General of Immigration shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico, and section 22 (34 Stat. 905 [U. S. Comp. St. Supp. 1907, p. 403]) gives general authority to establish rules and regulations to carry out the provisions of the act. *Held*, that rule 24, providing that any alien who enters the United States across the Canadian border at any other point than those designated shall be deemed to have entered the country unlawfully, does not exceed the scope of Immigration Act Feb. 20, 1907, c. 1134, § 36, 34 Stat. 908 (U. S. Comp. St. Supp. 1907, p. 409), declaring that all aliens who enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor from time to time designates, shall be adjudged unlawfully in the United States, etc., and is valid, though no penalty is prescribed for violation thereof.

3. SAME—STATUTES—CONSTITUTIONALITY.

Immigration Act Feb. 20, 1907, c. 1134, §§ 1-44, 34 Stat. 898-911 (U. S. Comp. St. Supp. 1907, pp. 386-418), requiring deportation of aliens unlawfully within the United States, is constitutional.

4. CONSTITUTIONAL LAW—DEPORTATION PROCEEDINGS—"DUE PROCESS OF LAW."

The summary proceeding for the deportation of aliens recently within the United States, who have not acquired a status entitling them to remain, prescribed by Immigration Act Feb. 20, 1907, c. 1134, §§ 1-44, 34 Stat. 898-911 (U. S. Comp. St. Supp. 1907, pp. 386-418), constitutes due

process of law; such unnaturalized aliens not being entitled to the rights of citizens.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2227, 2256; vol. 8, p. 7644.]

5. ALIENS—DEPORTATION—FORM OF PROCEEDING.

Where, in proceedings for the deportation of a Japanese alien not entitled to enter the United States, the facts developed at the hearing, at which the alien was represented by counsel, from the alien's own testimony, showed that he was unlawfully within the United States and was subject to deportation, it was no objection to an order of deportation that he was charged with "having entered the United States without inspection," instead of "being unlawfully within the United States."

Habeas Corpus.

The petitioner, a Japanese, shows that he is detained in custody by J. H. Barbour, inspector in charge of the immigration service at Portland, Or., by virtue of a certain telegram from the Secretary of the Department of Commerce and Labor, and a letter from the Commissioner General of the Bureau of Immigration and Naturalization of the United States; the detention being for the purpose of deporting petitioner to the Empire of Japan. Upon an order to show cause why a writ of habeas corpus should not issue as prayed, the inspector in charge, excepting to the petition for insufficiency, was permitted, by leave of court, to return and show orally why he detains petitioner in custody. From the showing, it is made to appear that on February 3, 1908, the inspector received from the Acting Secretary of Commerce and Labor a telegram, as follows: "Arrest Nobusaburo Hamaguchi, and bring before yourself for hearing; forwarding record of the proceedings to the Department. Entered the United States without inspection. Expenses execution, conveyance Portland, and detention authorized." A hearing was had on the following day, which is exhibited by the inspector's report to the Acting Secretary, as follows: "In re Nobusaburo Hamaguchi, native of Japan, aged 18 years, male, arrested on warrant of the Secretary of the Department of Commerce and Labor for having entered the United States without inspection. Examination conducted by Inspector in Charge J. H. Barbour. Counsel Walter H. Evans, appearing for alien."

Then, after setting out the testimony as given by petitioner before the inspector, the report concludes: "I transmit herewith record of hearing before me in the case of Nobusaburo Hamaguchi, arrested upon the Department's telegraphic warrant, dated the 3d instant, for entering the United States without inspection. It will be noted that in his sworn testimony the alien confesses to having entered the United States without inspection, crossing the international boundary near Blaine, Washington, during the night of October 5, 1907. In view of said admission, I would respectfully recommend that Nobusaburo Hamaguchi be deported to Japan."

Based upon this report, the Acting Secretary of Commerce and Labor transmitted, on February 9, 1908, to the inspector in charge, the following letter and directions: "Sir: The Department is in receipt of your letter of the 7th instant, No. 1349-1, with accompanying papers relating to the case of Nobusaburo Hamaguchi, charged with having entered the United States without inspection. As a result of the evidence presented it satisfactorily appears that the said alien is in this country in violation of law, and warrant of deportation has issued to the inspector in charge at Seattle, Washington, authorizing the return of the said person to Japan, at the expense of the immigrant fund. * * * You are instructed to detail an officer or employé to take charge of Nobusaburo Hamaguchi and convey him to Seattle, Washington, for deportation." The inspector further returns that the petitioner is being held for deportation in pursuance of such directions from his superior officer.

From the testimony of the petitioner, it appears that he came from Vancouver, B. C., into the United States by way of Blaine, Wash., on October 5, 1907; that he was alone, and came in on foot; that he crossed the boundary at Blaine, in the nighttime, and was not inspected; that he had a passport to Vancouver, but not to the United States; that he obtained the pass-

port to the Hawaiian Islands, then "transferred to Vancouver"; and that he left the passport in a boarding house in Vancouver. It is conceded that the occupation of the petitioner is that of laborer.

Veazie & Veazie, for petitioner.

W. C. Bristol, U. S. Atty., for Inspector Barbour.

WOLVERTON, District Judge. The principal insistence of counsel for petitioner against deportation is: That "petitioner is held and sentenced on the charge of entering the United States without inspection"; that "the law contains no provisions against entering the United States at a border point without inspection"; and that "it (the law) contains no provision against entering contrary to the rules of the Department. It prescribes no penalty for infraction of a rule of the Department."

Counsel are, I think, proceeding upon a mistaken premise, in that they base their defense upon the assumption that the petitioner is being held solely because he entered the United States without inspection. On the contrary, he is being held for deportation by reason of his being in the United States unlawfully. But of this later.

It is essential that reference be made to some provisions of the law, and to certain rules and regulations of the Department of Commerce and Labor adopted with a view to making the law effective. By section 1 of the immigration act of Congress of February 20, 1907 (chapter 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1907, p. 389]), a tax of \$4 is imposed upon every alien entering the United States, and adequate provisions are made for its collection. It is further provided, however, as follows:

"That whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone."

By sections 12, 13, 14, and 16 provision is made requiring manifests, a listing, examination by health officers, and due inspection at the port of arrival, of all aliens entering the United States by water transportation. Section 20 provides:

"That any alien who shall enter the United States in violation of law * * * shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came.

"Sec. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act. * * * he shall cause such alien * * * to be taken into custody and returned to the country whence he came, as provided by section twenty of this act.

"Sec. 22. That the Commissioner-General of Immigration * * * shall establish such rules and regulations * * * and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act; * * * all under the direction or with the approval of the Secretary of Commerce and Labor."

"Sec. 32. That the Commissioner-General of Immigration, under the direction or with the approval of the Secretary of Commerce and Labor, shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico, so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries, and shall have power to enter into contracts with transportation lines for the said purpose."

"Sec. 35. That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory.

"Sec. 36. That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act: Provided, that nothing contained in this section shall affect the power conferred by section thirty-two of this act upon the Commissioner-General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico."

By executive order issued March 14, 1907, in pursuance of the authority extended to the President, it is directed that Japanese and Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada, or Hawaii, and come therefrom, shall be refused permission to enter the continental territory of the United States; and the Secretary of Commerce and Labor is authorized to take such measures, and to make and enforce such rules and regulations, as shall be found necessary to carry the order into effect. Immigration regulations were adopted July 1, 1907. Rule 1 relates to the collection of the head tax, and provides, among other things, that:

"The head tax payable on account of aliens entering the United States from foreign contiguous territory shall be levied and collected * * * at Canadian border ports according to the terms of an agreement between the Commissioner-General of Immigration and certain transportation companies, embodied in rules 24 and 25 hereof."

Rule 24 provides that:

"In accordance with section 36, the following are named as Canadian border ports of entry for aliens; and any alien who enters the United States across such border at any other point shall be deemed to have entered the country unlawfully, and shall be arrested and deported under sections 20, 21, and 35 of said act, in the manner provided by rule 34"—among which ports is designated Blaine, Wash.

And rule 25 that:

"In view of the agreement between the various steamship and railroad companies in the Dominion of Canada and the Commissioner-General of Immigration of the United States of America, inspection and entry of aliens into the United States from foreign countries, through Canadian territory, under the immigration act, will be accomplished in accordance with the following provisions: (a) All aliens arriving in Canada, destined to the United States, shall be inspected at any one of the following ports: [Naming Vancouver, B. C., among others.] And the holders of certificates, duly signed by the United States Commissioner of Immigration for Canada, shall be entitled to admittance to the United States, at any one of the places of entry along the border thereof named in rule 24, without further examination by the United States immigration officers as to their right to enter, upon their identification and their surrender of said certificates to such officials."

By subdivision "f" all aliens of a class, etc., are required to apply at a border port within one year after their arrival in Canada, provided, however:

"That aliens destined in good faith to Canada, and who shall have settled at some point in the Dominion of Canada, who shall apply as above [that is, at a border port] for admission to the United States within one year after arrival in Canada, shall be examined by the boards of special inquiry located at any one of the following points: [Blaine being designated among others.] That the decisions of the said boards of special inquiry shall have the same force and effect as decisions rendered by boards of special inquiry at sea-ports of the United States."

Sections 20 and 21 of the immigration act clearly authorize deportation of any alien who shall enter or be found in the United States in violation of law or of said act. The act, it will be seen, itself specifically provides for inspection at water ports of entry; but, as it relates to border ports, it authorizes the Commissioner-General of Immigration to prescribe rules for both entry and inspection, and also to enter into contracts with transportation lines for such purpose. In pursuance of this authority, rules 24 and 25 were adopted, by the former of which Blaine, Wash., is designated as a border port of entry from Canada. By the latter, if an alien arrives in Canada whose destination is the United States, inspection is required to be had at certain ports in Canada, and, if the applicant is entitled to admission into the United States, he receives a certificate from the United States Commissioner of Immigration for Canada, which he is required to present at the border port, and upon doing so his lawful entry may be effected without further identification or examination. But if the alien was destined to Canada, and applies at a border port for admission to the United States, he is required to submit to inspection by a board of special inquiry located at one of certain designated ports, among which Blaine, Wash., is specified. So that such an alien entering by way of Blaine, Wash., would very naturally apply at that particular port for inspection.

The applicant either came to Canada destined to the United States, or he came destined to Canada. If destined to the United States, he should have applied for inspection at one of the ports of entry designated in subdivision "a" of rule 25, and secured the certificate of the United States Commissioner of Immigration for Canada, entitling him to admission to the United States; or, if to Canada, he should have submitted himself for inspection at a border port, presumably at Blaine, Wash. But he did neither. He came in, passing Blaine in the nighttime, without seeing any of the inspecting officers.

The mere statement of the case renders it clear that he entered the United States in violation of law, and the evidence, from his own mouth, shows that he was subsequently found in the United States in violation of the immigration act. But it is candidly conceded that petitioner came into the United States in violation of law, and that he is here unlawfully. Notwithstanding, he insists that the government shall get him out lawfully. This is his right, and the government would be unfaithful to the correct and regular exercise of its civic authority were it to proceed otherwise. The position, however,

is not one, it must be admitted, which appeals strongly for a liberal construction of statutory enactment, that he may be permitted to remain. Nevertheless, I assume, as in all legislation that is not penal in character, that the ordinary rules of construction should be applied, that the true intentment of Congress may be ascertained, and its will carried into effect.

Being within the United States unlawfully or illegally, section 35 requires that he shall be deported to the trans-Atlantic or trans-Pacific port from which he embarked for the United States, or, if such embarkation was for a foreign contiguous territory, then to the foreign port at which he embarked for such territory. This section fully covers the exigency of the present controversy; petitioner being found within the United States illegally. Nor do I think a different result would follow, if it be said, which it may be, as above suggested, that the petitioner entered the territory of the United States unlawfully, and is therefore subject to deportation as is prescribed by section 36. For such an entry, that section requires that he be deported as provided by sections 20 and 21, which latter sections prescribe that he shall be deported to the country whence he came. To my mind, section 35 was intended to be explanatory of the designation or expression "country whence he came," and must be read in *pari materia* with sections 20, 21, and 36. If the petitioner had presented himself to the inspection officers at Blaine, being without a certificate signed by a United States Commissioner of Immigration for Canada, he would have been required to submit himself for examination by a board of special inquiry located at that place, and if that board had found that he was not entitled to enter, he would, of course, have been refused admission. But, having gained entry into the United States without an observance of the immigration laws and of the rules and regulations adopted in pursuance thereof, he must be dealt with as one unlawfully coming within the territory, and unlawfully found therein, and abide the consequences to follow pursuant to law. So that it makes no difference whether the petitioner embarked for the United States or for Canada, having entered the United States from the latter country without subjecting himself to an inspection.

I have proceeded thus far as though the rules were valid and operative for the purposes for which they were intended. And why are they not? The law specifically authorizes their adoption to cover the very exigencies that are present here. "The Commissioner-General of Immigration * * * shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico." Such is the explicit provision of section 32, in addition to the general authority conferred by section 22 for establishing rules and regulations for carrying out the provisions of the act, and the rules provide for inspection at such border ports, so that there can be no excess of authority here. The rules prescribe no penalty, nor do they advance beyond the law in their regulation. True, by rule 24, it is provided that any alien who enters the United States across such border at any other point than those designated shall be deemed to have entered the country unlawfully; but this is no more than is provided by

section 36, and does not go beyond the purpose of that section. That the law does not impose a penalty against transportation lines for bringing in aliens across territorial borders, or require of them that they shall return the alien at their own expense, does not militate against the authority of the Commissioner-General of Immigration to prescribe rules for entry and inspection, as conferred by section 32. It is the law itself that prescribes that an entry in disregard of the requirement of the rule shall constitute an unlawful entry, which condition establishes the status of the alien as such, and subjects him to deportation, not because he is amenable criminally for any offense committed against the government, but because he has no right to remain within the continental territory of the government.

As to whether the immigration acts requiring deportation of aliens unlawfully within the United States are constitutional, and as to what is due process of law as applied to the right of a hearing in that relation by such persons, are questions fully determined by the Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721, and prior adjudications. In that case Mr. Justice Harlan, remarking on the constitutionality of prior immigration legislation, but of a like character as the present, says:

"That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court."

Further on he continues:

"It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

And then he uses language especially applicable to the case at bar:

"Taking all its enactments together, it is clear that Congress did not intend that the mere admission of an alien, or his mere entering the country, should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government. On the contrary, if the Secretary of the Treasury became satisfied that the immigrant had been allowed to land contrary to the prohibition of that law, then he could at any time within a year after the landing cause the immigrant to be taken into custody and deported. The immigrant must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officer if within a year he was found to have been wrongfully admitted into or had illegally entered the United States."

In the present state of the law, the Secretary of Commerce and Labor has been substituted in authority for the Secretary of the Treasury. The summary proceeding for deportation of aliens recently within the country, who have not acquired a status entitling them to remain, has become firmly established as lawful and constitutional.

United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. —, recently decided by the same court.

This brings us to the question of the regularity of the present proceeding. The report of the inspector in charge to the Department of Commerce and Labor is that the petitioner was brought before him "for having entered the United States without inspection." After a full hearing, the fairness of which is unquestioned, the inspector recommended to the Department that the petitioner be deported to Japan. To this recommendation came a response as follows:

"As a result of the evidence presented it satisfactorily appears that the said alien is in this country in violation of law."

The specific objection to the proceeding is that petitioner was tried on a charge of entering the United States without inspection, and not for being unlawfully within the United States. However, if he entered by evasion of a border port, and thereby escaped inspection, he was unlawfully within the United States, for which deportation would follow under the immigration act. Having not been inspected, the proceeding was at least equivalent to an inspection by the inspector in charge, and, finding that the petitioner was unlawfully in the country, it became his duty to make report accordingly. Thereupon it was incumbent upon the Commissioner of Immigration to take the proper steps for petitioner's deportation. That petitioner was not specifically charged with being unlawfully within the country does not militate against the authority of the Commissioner-General to deport him, finding that he was in fact unlawfully herein. Nor has the petitioner been deprived of a hearing with reference to that charge. Neither was he misled to his injury by the actual charge preferred. The petitioner was represented by counsel, and all the facts were developed at the hearing, and came from witness' own mouth, warranting his deportation. The summary proceeding provided by law does not require that technical regard for forms that is deemed essential in criminal proceedings, and, having had a full hearing, whereat it was developed that he is unlawfully within the country, and the finding and recommendation of the inspector in charge being against him, I am not disposed to require that the procedure be gone through with again for the sake of stricter observance of form; the law having been observed in substance. It would be better in all such cases that the party be charged with being unlawfully within the country, specifying in what particulars the unlawfulness consists; but where a full and fair hearing has been had involving that charge, I think it would be extremely technical to hold that deportation should not follow until a further hearing be given.

The petitioner, being a Japanese laborer, comes clearly within the class of citizens whom the executive order declares shall be refused permission to enter the United States. He embarked upon a passport to Hawaii, and transferred to Canada, and thereafter made his way into the United States. Having embarked for contiguous territory upon a passport to such contiguous territory, with a view, pre-

sumptively, of entering the United States, because he did do so, and having entered clandestinely and without submitting himself to the proper authorities for inspection, he must be held to be unlawfully within the United States, and therefore his deportation was properly directed. *Lavin v. Le Fevre*, 125 Fed. 693, 60 C. C. A. 425.

The petition for a writ of habeas corpus will be denied.

UNITED STATES v. PORT OF PORTLAND.

(District Court, D. Oregon. March 9, 1908.)

No. 4,856.

1. COLLISION—STEAMER AND DREDGE IN TOW—DREDGE NAVIGATING WITHOUT RUNNING LIGHTS.

The government lighthouse tender *Manzanita* passing down the Columbia river from Portland after dark came into collision with the dredge *Columbia* and was sunk. From the Waterford light on the north side the *Manzanita* took a southwesterly course across toward the Westport light on the south shore, which was the usual course. The dredge which had been at work near Puget Island on the north side of the channel was taken in tow by a tug, made fast to her starboard quarter, and started up the river, as indicated by the evidence, gradually working across toward a point on the south shore some distance above the Westport light. She had 27 pontoons trailing behind extending about 1,000 feet and some carrying lights. She had no lookout and carried no running lights, and owing to her height those of the tug could not be seen from her port side. She had also lowered her cutter which extended under the water 30 feet in her front. The tow moved very slowly against the ebb tide which lasted until about the time of collision, its speed being not more than from 1 to 1½ miles an hour. The *Manzanita* not being able to see the lights of the tug, and seeing no running lights on the dredge, supposed her to be stationary, and as the evidence tended to show kept a course toward her intending to pass on her starboard side. When within half a mile or less the *Manzanita* gave a signal of two whistles and stopped. She received no answer, and started ahead at slow speed, starboarding to pass the dredge's bow, but when so passing was rammed by her cutter and sunk. *Held* that the tug and tow were in fault for navigating at night with no lookout nor running lights on the dredge, for not answering the *Manzanita*'s signal, and for keeping the dredge's cutter lowered and projecting beyond her bow; that under the rule that where the fault of one vessel was gross and sufficient to account for the collision any doubts as to the management of the other should be resolved in her favor there was a lack of the clear and convincing evidence required to establish contributory fault on the part of the *Manzanita*, the long line of pontoons extending toward the north side of the river apparently justifying her in attempting to pass on the other side of the dredge which appeared from her lights to be stationary.

[Ed. Note.—Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.]

2. SAME—NARROW CHANNEL RULE—COLUMBIA RIVER.

The Columbia river, in the vicinity of the Westport light, is a narrow channel, and subject to article 25 of the Inland Navigation Rules (Act June 7, 1897, c. 5, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring steam vessels when safe and practicable to keep to the side of the fairway which lies on their starboard side.

3. SAME—DAMAGES RECOVERABLE—LOSS OF SEAMEN'S EFFECTS.

The United States is entitled to recover as collision damages against a vessel through whose fault a government vessel was sunk for loss of personal effects of its seamen, it appearing that it is its policy and practice to make such loss good to the seamen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 291.]

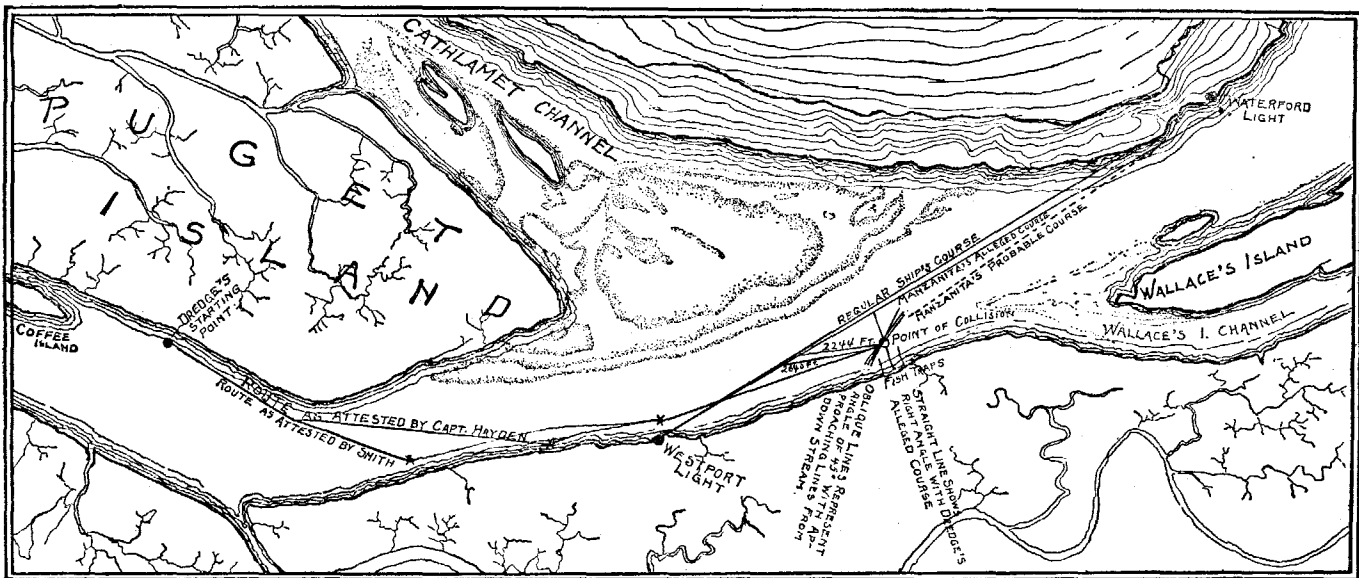
In Admiralty. Suit for collision.

W. C. Bristol, U. S. Atty.

Williams, Wood & Linthicum, for respondent.

WOLVERTON, District Judge. The libellant is seeking by this cause to recover damages sustained on account of a collision between the dredge Columbia, while in tow of the tug McCracken, and the United States lighthouse tender Manzanita. Under orders from the superintendent of the Thirteenth Lighthouse District to proceed in haste to Astoria, the Manzanita left Portland between 12:15 and 1 p. m. on October 6, 1905. While on the way, and at a point a short distance above Westport reach light, the collision occurred of which complaint is made.

The Manzanita is a vessel of 450 tons, 155 feet in length, appraised as serviceable, and at the time was navigating with a full crew of men. The master and second mate were on the bridge, a lookout was at his proper station, the quartermaster at the helm, and an engineer at the engines. The vessel had her running lights lit, a white light at the mast-head and another at the stern. She was drawing 11 feet 4 inches aft and 6 feet 6 inches forward. Waterford post light stands on the north bank of the Columbia river, at a bend near Waterford fishery, and is distant from the place of collision about 2.15 miles. On the opposite side of the river, a little more than a mile from the place of collision, is located the Westport stake or reach light. The former stands on a slight eminence, of 60 to 75 feet, and the latter on the level beach, slightly higher than the surface of the water. The accustomed course of navigators in descending the Columbia river is to pass near the Waterford light, continuing beyond from a quarter to a half mile until the light is shut in by the stern, and then to head direct for Westport light; the latter course being southwest by west, or, by some compasses, southwest by west half west, or southwest by half west. After passing in proximity to the Westport light, and beyond for some distance, the course is again changed so as to make the narrow channel running between Puget and Coffee Islands. It is established by the consensus of the evidence that the current of the stream runs near the north bank of the river passing Waterford post light, continuing on in that direction to about Cape Horn, where it sets over toward the Oregon shore, and approaches nearest thereto some distance below Westport light, when it again changes its course across the channel, and makes its way between the islands above designated, that being now the ship's channel for the larger craft. I append hereto a rough map, being laid upon a section of government's chart No. 6,142. The figures representing the soundings are not accurate for the present date, and are not relied upon for data in connection with the controversy:



The dredge Columbia is a craft 265 feet in length, with a frame extending 13 feet in front and a cutter, used for loosening the substance of the bed of the stream, extending 17 feet beyond the frame, thus giving the cutter an extension beyond the prow of the dredge of 30 feet. She had 27 pontoons attached, extending by her stern a distance of from 900 to 1,000 feet. A pipe 30 inches in diameter, used for conveying away the earth and sediment loosened by the operation of the cutter, was carried back over these pontoons. When the dredge is at work the pontoons stand in line with the current, but when navigating they trail behind the dredge. On the morning of the collision the dredge had been in operation at a point between half and three-quarters of a mile up the river from Coffee Island, and within 200 feet of the Puget Island shore. At about 4 o'clock p. m. she was taken in tow by the tug McCracken, and began her course up stream, with her destination at Doublebower. The tug was made fast to the dredge on her starboard quarter aft, there being a scow attached in front of the tug, and another on the opposite or port side of the dredge. The dredge carried no running lights, but it had in place an electric white light above the pilot house, and two lanterns attached beneath the electric light, and her state and working rooms were lit up; besides which she carried seven lights distributed upon the pontoons aft. The tug was provided with running lights and the usual masthead and aft lights. The dredge's upper deck was more than 25 feet, and her pilot house 27 feet 6 inches, above the water, while the tug stood about 21 feet above. The time that the collision occurred is variously stated as from 6:30 to 6:50 p. m., the night being dark, but clear. The point of collision is about $3\frac{3}{4}$ miles distant from the place where the dredge began her voyage. The tide was ebbing at 4 p. m., but at the time of the collision had turned, and was flooding slightly. These constitute in the main the general features of the situation about which there is but slight, if any, dispute.

To understand further the situation, as nearly as it can be ascertained from the conflicting evidence, we will have to pay attention to the salient parts of the testimony of the principal witnesses for the respective litigants. Patrick J. Byrne, who was master of the Manzanita, testifies that the collision occurred about 6:45 p. m.; that the Manzanita was run into and sunk by the dredge Columbia; that she was struck by the cutter of the dredge about the starboard fore rigging, which stove a hole in her, by reason whereof she sank immediately; that when he came to the Waterford light—that is, abreast of it, and about 350 feet distant, as he afterwards explains—he headed for Westport light, on a course approximately southwest by west, except that he might have found it necessary to head the ship a little southward on account of the current, which was then strong; that he had just passed the Waterford light when he first saw the dredge; that he could see the dredge very plainly, and the pontoons stretched across the starboard side of the channel down towards Puget Island; that he could not make out the number of pontoons, but they seemed to be a long distance across, extending over toward the Puget Island side; that “she appeared as though she was dredging or anchored. It was slack water. The pontoons were right across the channel.” “She

was on the starboard side of the channel, headed across toward the Oregon side;" that she seemed to be about two points to the starboard of the Manzanita. Witness then relates that he examined the dredge with a glass, and could see no running lights; that when about a mile and a half below Waterford light, he slowed down and stopped—meaning the engines; that he then starboarded his helm about two points and sounded two whistles, with a view to notifying the dredge that he was going to pass, so it could strike its lines down, as he thought it was either at anchor or dredging; that it was impossible to see the tug's lights, as she was on the starboard side of the dredge, and the dredge was crossing the channel; that at that time the Manzanita was going down towards the dredge's port side; that he received no answer to his two whistles; that he then gave his boat a turn ahead on the same course—the dredge being pretty well on his starboard bow still—and immediately stopped her, and then went on his course, still assuming that the dredge was at anchor or dredging until it was too late; that after they struck he saw the McCracken's sidelights; that the Manzanita sank, headed a little south of the Westport light, the depth of water on her inshore side being 29 feet, and that he was about a quarter of a mile from the dredge when he stopped the boat the last time. Witness estimates that the Manzanita was running 9 or 10 knots an hour before she was put under a slow bell, after which she ran probably three knots. On cross-examination the witness testifies as follows:

"Q. Your course from Waterford to Westport is what? A. About west, southwest by west. Q. That is compass course? A. Yes, sir. Q. You keep the light ahead of you? A. We seen the light, sir. Q. Well, you run by the compass? A. We run from light to light. I was heading for the light from Waterford to Westport. Q. Continuously, were you? A. Yes, sir. * * * Q. And ran straight for the light up to and beyond the time when you first sighted the Columbia; is that right? A. I ran on that course till I stopped, sir. Q. Until you stopped? A. Yes; and then I changed the course. * * * Q. And where with reference to the Westport light? Was she nearer you than the Westport light, or was she beyond the Westport light? A. She was above Westport light. * * * Q. On your starboard bow? A. Yes, sir. Q. Dead on, on your starboard bow, or was she a point or more off? A. About two points, as near as I can remember. Q. About two points on your starboard bow? A. Yes, sir. Q. That is, she was nearer, according to your testimony, to the Washington shore than your course for the Westport light; is that right? A. I was heading for Westport light, and she was on my starboard bow about two points toward the Puget Island side, toward the Washington side. Q. Toward the Washington shore, and away from Westport light, as you say you saw it? A. Westport light was to the left of her. Q. As you looked towards her? A. As I looked towards her, yes. Q. And what distance off was it, Captain, that you saw her? A. Oh, she was probably, when I first saw her, she was probably about a mile and a half. I can't tell to the distance. * * * She was towing across; she was trying to cross the channel. * * * Q. Now, what distance were you when you slowed down, Captain? A. From where, sir? Q. From the dredge? A. Oh, less than half a mile. Q. Then, how long after you slowed down was it that you stopped? A. Right away, immediately; about two seconds. Q. And how long did you remain stopped? A. I have forgotten the time, sir. Q. You were still running on the course you say you were on? A. No; I had starboarded two points after the first stop. Q. I mean you were on your course till after you had stopped your engines, were you not? A. Yes, for Westport. Q. Headed for the light, were you? A. Yes, sir. And after I stopped her, I starboarded two points. Q.

When was that that you starboarded two points? A. After I stopped her. Q. When with reference to the collision happening? A. I can't tell you the time, sir. * * * Q. When did you blow two whistles? A. I was less than half a mile from her. Q. Was that before or after the time, Captain, that you starboarded your helm, that you blew the two whistles? A. Right away after I starboarded the helm."

Further on he says, "The dredge was on the starboard side of the channel. She wasn't taking up the Oregon side at all; she was on the Washington side." And, again, he says, "I didn't know she was in motion. If I had known she was in motion, it wouldn't have happened." "She struck us about right angles. * * * Pretty near broadside." The tide had "just turned flood." With reference to the distance the Manzanita was away from the dredge when she changed her course, the witness is at variance with his testimony previously taken, before Mr. Sholes, wherein he states that the Manzanita altered her course probably half a minute before she struck; probably a ship's length off from the dredge; that he thought there was going to be a collision, and he starboarded his helm to prevent it—this was when his boat was about a ship's length away from the dredge—and that he did not think the dredge was under way until after they struck. But on his second examination he asserts that he was mistaken in his statement on the previous occasion.

Michael Nolan, who was second officer on the Manzanita, corroborates Capt. Byrne in the main. He was officer of the watch at the time, and on the bridge with the captain. He relates that almost immediately after passing Waterford light, the Manzanita's course was directed for Westport reach light; that he "observed the dredge Columbia well on the starboard bow of the Manzanita * * * about two points": that it was his "opinion that the dredge Columbia was either anchored or at work in dredging"; that he noticed the pontoons were in a position to indicate that the dredge was at work; that they were stretched out from the dredge to the Washington side of the channel; that the Manzanita continued on the same course until within about a quarter of a mile from the dredge, when the ship was stopped and two whistles blown, to indicate to the dredge that the Manzanita would pass to the starboard of her, to which there was no reply; that witness took a pair of glasses and looked for the lights on the dredge, and that he could find none except the lights in the living rooms and those on the dredge for the safety of the crew; that "there was no indication at all to know that she was under way or steaming." "There was nothing in the background of the dredge Columbia that could be seen from the Manzanita's bridge that would indicate that she was under way. At the time it was dark—the sky was clear—and there was no lights at the back of the dredge Columbia to indicate that she was under way. There was no running lights up whatsoever. * * * There was no lights at the back of the dredge Columbia whatsoever; but right directly ahead of the dredge Columbia Westport reach light was very plainly seen from the Manzanita;" that after the two whistles were blown and the engines stopped, a man was called to the lead and two soundings were made, showing 30 feet of water; that when the Manzanita sank she was headed about the same course as she was before—"right

for Westport reach light, right directly down the stream"; that after the collision witness, having a small boat, rowed from the starboard side of the dredge directly around the pontoons, coming back upon the port side; that he found the first four or five of the pontoons bunched up together on the starboard quarter of the Columbia, but that the remaining pontoons were stretched out towards the Puget Island shore, on the north side of the river. On cross-examination witness further testifies that he saw the lights of the Columbia almost immediately after passing Waterford light, about two points on the starboard bow, and that his ship was heading about for Westport reach light; that he first saw the Westport reach light about the time the Manzanita was stopped, and that he did not look for the light before; that the Manzanita was about a quarter of a mile from the dredge when she stopped her engines; that witness then saw the Westport light, and that the dredge Columbia lay to the north of Westport reach light, closer to the Washington shore; that he saw the lights on the fish traps, and that they were on the Manzanita's port bow about four points, approximately; that the second course of the vessel was not altered again until the collision occurred, and that the two vessels came together almost at right angles; that witness thought there was going to be a collision when the Manzanita was about a ship's length from the Columbia, at which time the dredge was about $7\frac{1}{2}$ points on the Manzanita's bow; that nothing was done to change the Manzanita's course; and when asked whether he did not know that the dredge was under way, the witness answered:

"No, sir; I did not. How could I know it? There was two whistles blown by the Manzanita; the dredge Columbia made no reply; there was no running lights visible from the dredge Columbia; and it was impossible for me to understand that the McCracken was towing the dredge Columbia, or that the dredge Columbia was under way."

Henry E. Wilson, the engineer on the Manzanita, testifies that the Manzanita was struck just abaft the collision bulkhead; that the engines were stopped about five minutes before the collision; that he got a signal to stop, and responded to it; that two whistles were sounded; that he got another signal to go ahead; and when the engines had made two or three revolutions, he received another signal to stop, and the engines were controlled accordingly.

These witnesses are testifying from the view point of the Manzanita approaching the dredge. The following were looking from the dredge and tug:

Eugene H. Hayden, master of the tug McCracken, testifies that on the 6th of October the dredge was at work about 200 feet south of the southerly shore of Puget Island; that they finished the work there in the forenoon, and made preparation for moving up the river to Doublebower; that they made the start between half past 3 and 4 o'clock in the afternoon, and that their rate of navigation was between a mile and an eighth and a mile and a quarter per hour; that they probably did not average a mile when they started; that the tide had not begun to turn then, and as the tide kept slackening, they made better time; that the tide was ebbing when they started, and was still

ebbing when the collision occurred; that witness was himself a lookout, and had a mate for the same service; that just as it began to get dusk witness left the pilot house of the tug and went to supper; that as he came out from supper he saw a steamer approaching; that he could see her red light away over on the Cape Horn side, over by Waterford, witness being at the time upon the dredge, on the port side; that witness took her to be a tug; she had a mast light; that he used no glasses; that it was about 10 minutes prior to the collision; that he did not again see the steamer until she drifted across their bow and the vessels came together, and that there were two or three men supposed to be on the lookout—the witness then being in the pilot house of the tug, at the helm; that he followed the Oregon shore all the way from the time he reached the Westport reach light, hugged that shore, keeping in as close as he dared, between 200 and 300 feet away; that he swung out by the lights to clear the fish traps; and that the collision occurred about 6:30 or 6:35. When asked why he did not comply with rule 6 of the pilot rules, witness answered that he did not hear any whistle to pass; that he thought the Manzanita was another tug coming down, which they were expecting to meet them and to help them up the river; that at the time he first saw the Manzanita she had not then made the turn at the Waterford post light. Witness further testifies that he reached the Oregon shore probably 500 or 600, maybe 1,000 feet below Westport light, and that he was heading right straight up with the current; that he was 200 or 300 feet from the fish traps when the collision occurred, and that the pontoons were trailing straight behind the dredge; that the Manzanita sank in about the same position that she was in when struck; that it is witness' belief that she did not move after she was hit; that the dredge swung clear and dropped below her, and that one of the spuds of the dredge was then dropped; that the Manzanita crossed nearly at right angles to his course; that she was headed directly in to the Oregon shore, with her bow on; and that the tug's engines were stopped just as soon as the Manzanita loomed up across her bow.

Charles F. Smith, inspector for the government on the dredge Columbia at the time, testifies that the dredge started from Coffee Island about four in the afternoon; that they crossed over to the Oregon side, and kept up as close to the shore as possible; that witness saw the Manzanita about a quarter of a mile off; that he had just come out of the dining room, and was standing on the port side of the dredge; that the Manzanita was lit up—he did not notice the side lights; that she seemed to be coming directly toward the dredge—that is, at an angle toward the dredge; that he watched her as she approached until she struck about four or five minutes afterwards; that the lights did not seem to change until they got within two or three boat lengths of the dredge; that the Manzanita swerved around and came directly across the dredge's course; that the pontoons were trailing on behind the dredge; that when the Manzanita struck she stayed on the cutter about a minute, when she slid off and sank; that she went down where she was struck, and that the current was about slack; that when the Manzanita struck, she was heading right into the fish traps; that she was between 100 and 200 feet out from the

traps; that when she came in contact with the dredge she was going in the same direction as the prolongation of the fish traps. The witness here indicates the course of the Manzanita on the plat, which shows it to have been approaching the traps at an angle of about two points to her port. On cross-examination, the witness relates that from the time the dredge approached the Oregon shore, there were fish traps along at intervals up as far as the traps where the collision took place; that there were some four or five along in that neighborhood; and that the dredge kept out from the fish traps as much as 100 feet, which would carry its course out in the channel some 400 or 500 or 600 feet, perhaps 700 feet.

Nels Halvorson testifies that he was the carpenter on the dredge Columbia; that at the time of the collision the dredge "was working over toward the Oregon shore"; that he first saw the lights of the vessel, which afterwards turned out to be the Manzanita, when he came out from the supper table; that he "noticed the light and heard her two whistles blown;" that he was standing at the time "just about amidship of the dredge, on the port side;" that the lights bore as nearly direct toward the witness as could be; that they were about four or five ship's lengths off—that is, 600 or 700 or 800 feet away; that he could just see the outline of the hull of the approaching vessel; that he could see the pontoons of the dredge at the time, and that they were trailing a little bit to the dredge's port side, but not much, just enough so that witness could see all the lights displayed; that after witness saw the lights, he called the attention of the mate of the steamer McCracken to them, then went over to his room, stepped inside, got his hat, and came out again on the deck; that he then saw the steamer changing its course to pass the dredge; that she was then about 300 feet off—he could not tell exactly; that when he saw the maneuver he expected a collision, and went forward to look at it; that the vessels came together at an angle "pretty close to 45 degrees;" that the Manzanita sank a few feet from the cutter's frame, and that the dredge stopped, so far as he knew.

Frank Doherty, watchman on the dredge Columbia, testifies that when he first saw the Manzanita he was on the port side of the pilot house of the dredge; that he had just come out from supper a few minutes before; that he saw both of the lights, and that the boat seemed to be approaching him directly; that the lights looked as if they were coming in on the port side of the dredge about midship or a little forward; that he did not hear any whistles; that some time after he first saw the lights the boat seemed to change her course to port, enough so that it brought her diagonally across the dredge's bow, and that he was not sure as to the distance off when the boat changed her course; that at the time the dredge was over "coming up on the Oregon shore side," and that the boats came together diagonally.

From this abbreviated review of the salient features of the testimony, it at once becomes manifest that an irreconcilable conflict obtains; nor is it possible to adopt the testimony of either the one side or the other as accurately and faithfully portraying the facts, conditions, and environment. It, therefore, becomes necessary to proceed

from the things that are conceded or appear to be really established, and to judge of the others necessary to a decision of the controversy according as the inherent probabilities influence the understanding. *The City of Cleveland* (D. C.) 56 Fed. 729.

The point of collision is situate from 200 to 300 feet instream from the outer end of two fish traps noted upon the plat subjoined to the foregoing statement. These traps are located on the government's map, presumably accurately; yet it has not been made clear that the government has definitely or precisely located them, and it may be that they in reality stand, by a distance somewhat material to the controversy, above or below the position as indicated upon the map. The positions of the two lights—Waterford and Westport—are perhaps faithfully indicated. The fish traps extend into the stream 500 or 600 feet, thus fixing the point of the collision from 700 to 900 feet from the Oregon shore. The consensus of the evidence is to the effect that its locality is some 800 or 900 feet from the shore, and between 200 and 300 feet from the outer end of the traps, being nearly midway between the traps if extended. By laying a rule upon the map, which is drafted on a scale of 1 foot to 40,000 feet, it will be found that the place of the collision is 2.15 miles below the Waterford light. From the point where the tug and dredge began their navigation upstream to the point of collision is 3.75 miles, and Westport light is located about a mile and a quarter plus 300 feet below the place of collision. The course downstream that the pilots and ship navigators have adopted, after shutting in the Waterford light by the stern and heading for Westport light, passes to the northward of the point of collision from 900 to 1,000 feet; the former distance being probably more nearly exact. The distance of the wreck from this course is but slightly greater than from a course extended from a point 350 feet abreast of Waterford light direct to Westport. It would probably not be far from 100 feet. It will be remembered that this latter course is the one that Capt. Byrne, the master of the *Manzanita*, claims to have followed until he veered to port at about the time of signaling the *Columbia*. The average rate of speed of the *Columbia*, allowing that she left Coffee Island at 4 p. m. and brought up at the collision at 6:45—which data as to time is as nearly correct as can be ascertained—was 120 feet per minute. She increased her speed, owing to the slackening of the tide current as she pursued her voyage, and was probably making more than $1\frac{1}{2}$ miles per hour, or 132 feet per minute, at the time of the collision. If the *Manzanita* made 9 or 10 knots an hour up to within a quarter of a mile of the point of the collision and 3 knots thereafter, the time consumed would have been about 17 minutes from the time she was abreast of Waterford light. If she made 9 or 10 knots until within one-half mile of the place of collision and 3 knots thereafter, about 20 minutes' time would have been consumed. Now, within 17 minutes, the *Columbia*, at the rate of $1\frac{1}{2}$ miles per hour would cover the space of 2,244 feet, or 2,640 feet in the space of 20 minutes. If the *Columbia* pursued the course as delineated by Capt. Hayden, who was in charge of the tug *McCraken*, she must have crossed the course which Capt. Byrne says he followed, before Hayden first saw the *Columbia* from nearly abreast of Waterford

light, and possibly the entire line of pontoons would have gone by, so that Westport reach light would have shown clear astern of the tug and her entire tow. If the Columbia was pursuing the course which Capt. Byrne and second mate Nolan say she did, she in all probability had not, when first sighted, crossed or begun to cross the Manzanita's course, but she could not have been far from an intersection with such course. That Capt. Byrne and Nolan are clearly in error as to the position of the Columbia on the Manzanita's starboard is demonstrated beyond peradventure. They give her position when first sighted as two points on the Manzanita's starboard, which would carry the Columbia over to within 1,000 feet of the Cathlamet channel—a point being 11 degrees 15 minutes. Seven degrees would carry her to the north bank of the river, so that the Columbia could not have been more than two or three degrees at the uttermost to the starboard of the Manzanita at the time when sighted by the latter's officers, if the former had not then intersected the latter's course. Nor do I think the testimony of Capt. Hayden and Inspector Smith is any more reliable as to the course the Columbia pursued upon her voyage. Capt. Hayden testifies in effect that his course carried him to a point 400 or 600 to 1,000 feet below Westport light; that he ran within 200 or 300 feet of the Oregon shore, and swung out according as the fish traps were in his way. Mr. Smith says that the dredge approached the Oregon shore approximately $1\frac{3}{8}$ miles below Waterford light; then that the course was outside of the range of the fish traps, of which there were several, and was within perhaps 700 feet of the Oregon shore. Smith was in his room, which was on the dredge, a portion of the time, and a part of that time the lights on the dredge were burning. Some of his estimates as to distance pursued from the Oregon shore were made with relation to the time while occupying such room, and are certainly unreliable. To my mind, it is highly improbable that the Columbia ever advanced beyond the center of the water channel of the river prior to intersecting the ship's course between Waterford and Westport lights. I have two principal reasons for this statement, which are strengthened by the testimony of Nels Halvorson, the carpenter upon the dredge Columbia: First, the tug McCracken furnished but meager motive power for towing the Columbia upstream. It was expected before moving that another tug would come to the assistance of the McCracken, but, for reasons not appearing, an order was sooner given for entering upon the voyage. The cutter on the Columbia was lowered, and the pumps set to work for the express purpose of aiding the McCracken in her navigation of the Columbia by drawing water through the dredge pipe and discharging it aft, so that every expedient was resorted to in aid of the tug in conveying the tow upon her journey. Second, the current of the river, the tide being at ebb until nearly the time of the collision, was directly upon the course which Smith says the dredge pursued, and the course delineated by Captain Hayden carried the navigating crafts directly into the current somewhat below Westport light, and thence absolutely within such current on until the time of the collision. Hayden says, in effect, that he was trying to get into the current, as it was not of much force anyhow, the tide being nearly flood. But

Smith says the crafts were trying to avoid it. As a matter of fact, the tide had just turned to flood at the time of the collision, and there must have been a strong ebb tide at 4 o'clock. The most natural thing under the conditions prevailing, and the essential thing for the tug McCracken if she was going to make any progress at all, was to avoid the ebb current. The crafts were well to the north of the current when they started, and it would have been sheer folly to attempt to cross it at the outset, much more to stem the ebbing tide the entire distance they had gone at the time of the collision. It was a thing, by the strongest induction, the navigators did not do. Hayden and Smith might have candidly thought that the Columbia ran much nearer to the Oregon shore than she really did. They were voyaging without compass—that is, without definite course—and in the night-time principally, their paramount purpose being to make as much speed as possible, and for that very reason they were within the bounds of all probability avoiding the one thing that would impede their progress more than all others—the current of the river that was going out with the tide. The most natural and reasonable thing to do was to cross this current when the tide was just at flood, the exact condition that obtained as described by two or three of the witnesses when the collision occurred. There is a reason also for crossing the current near the place of the accident, as it there courses nearly the center of the stream, and farther up veers to within proximity to the northern bank, so that the slack water above the place of collision was to be found near the southern shore. Mr. Halvorson, when asked, "Do you know on what side of the river the McCracken and Columbia were proceeding at the time of the collision, and say for an hour before the collision?" answered, "Well, she was working over toward the Oregon shore." Couple this with his further statement that he stood on the port side of the dredge, and looking aft saw all the pontoons and the lights displayed thereon, and it shows that the dredge was changing its course at the time to port. Two interpretations can be made of the expression "She was working over toward the Oregon shore"; one that she was pursuing a course over near the Oregon shore, and the other that she was crossing to that side. The witness was manifestly guarded in his statement, considering both the question and his answer, and evidently intended to indicate that these crafts were then navigating toward the Oregon shore. This would probably put the Columbia across the ship's regular course within less than a half mile, or 2,640 feet, of the place of collision. I am impressed that the tug and tow did so actually cross the ship's course within less than that distance from the place of collision. Their course prior to that time cannot materially affect the situation. This probable converging course of the tug and tow with the ship's course finds support in the positive statement of Capt. Byrne and his second mate, to the effect that the Columbia had the appearance of being at anchor or at work, with the pontoons extending over toward the Puget Island or the Washington shore.

Turning now to the Manzanita, her course is not susceptible of clear definition or explanation. It is probable that the officers of the Manzanita sighted the Westport reach light across the bow of the Colum-

bia when she was first seen; but if the Manzanita kept on her course—that is, headed directly for Westport light—it must soon have become apparent that the Columbia was crossing that course, which would shut out Westport light. It cannot be, therefore, that the Manzanita followed a direct course from abreast Waterford to Westport light. I think it more probable that the Columbia, when sighted, was nearly in range with the Westport light, and believing, as the ship's captain and the mate say, that the dredge was at rest, the Manzanita was headed for the Columbia, and continued in that way, changing her course imperceptibly as the Columbia moved across her regular course, not taking particular note of other lights until the effort was made to go by the dredge. This view finds substantiation from three of the witnesses for respondent, including Smith, the government's inspector. They all concur in saying that the Manzanita approached the dredge directly, both running lights of the Manzanita being in full view from the time they first observed her presence until she changed her course. These witnesses vary in their estimates as to the distance the ship was away when first sighted from a quarter of a mile to two or three ship's lengths. The officers of the Manzanita say that her course was changed but once after heading for Westport light, which was from a quarter to less than a half mile from the dredge, so that here is evidence pertinent and strong that the Manzanita's course was headed for the dredge, and not for Westport light, as the master and second mate assert. It may have occurred that, at the time when the dredge was first sighted by the Manzanita, the former was even then crossing the line of the ship's course, and the master of the Manzanita mistook a light upon one of the fish traps for the Westport reach light, and directed the course of the Manzanita accordingly. It will be recalled that Nolan does not say that he remembers seeing the Westport light until about the time the Manzanita signaled the dredge, and it was then he saw that light clear in front of or across the bow of the dredge. This could only be so on the hypothesis that the Manzanita was off the ship's course, because it is a thing absolute that at that time the dredge had crossed the ship's course between the two lights, and also the course which Capt. Byrne insists that he followed. If Byrne did mistake a light upon one of the fish traps for the Westport light, and was heading therefor, even that course must have been intercepted at about the time the Manzanita's engines were stopped and her whistle blown, because, when seen from the dredge, she was then heading direct for the dredge, and a change in the course of the Manzanita was made to starboard, with a view to passing starboard to starboard with the dredge. It is a thing within the larger probability to my mind, however, that the dredge at the time when first sighted was about to intersect, or was even then intersecting, the regular ship's course, thus putting her lights almost, if not quite, in line with the Westport reach light, and that Captain Byrne, believing the dredge to be at anchor or at work, set his course for the dredge, and that, as the dredge slowly pursued her course across the ship's channel, the Manzanita's course was kept head on towards the Columbia's lights. The helmsman of the Manzanita was not here to testify. If he had been, more light might have been shed upon this immediate situation.

Most of the witnesses who say anything upon the subject testify that the vessels collided nearly at right angles with one another, but Halvorson, who watched the ship's approach from the port bow of the dredge, says they came together at an angle of about 45 degrees, and Frank Doherty says they came together diagonally. Smith's testimony would indicate that the Manzanita was moving almost straight across the channel of the river at the time, while the dredge was navigating nearly with the course of the stream. It seems impossible that such could be the case, when it is considered that the Manzanita sank nearly with the current, heading downstream, with the Westport light somewhat to her starboard. Her position in the water demonstrates the position in which she sank. The consensus of the witnesses seems to be also, that she sank nearly in the position in which she was found at the instant of collision. If this is so, Smith's idea as to the course of the Manzanita cannot be correct. If the Manzanita became fast to the cutter by the impact, it is natural that she should swing around to some extent, owing to her speed being greater than that of the dredge, but it could hardly have been so much as nearly the fourth part of the circle, or anywhere near that. It is narrated that the Manzanita hung upon the cutter about a minute; then slid off; and that it was after the contact was severed that the dredge swung around downstream until the spud was dropped, which operated to allow her to right herself again. A right-angled contact can only be accounted for on the theory that the dredge was making her way diagonally across the stream at the time, and that the veer of the Manzanita to port threw the boats in somewhat that relation, and the swing forced by the impact caused the Manzanita to sink with her head downstream. And yet it seems impossible then that she could have swung around sufficiently to put her in the position in which she sank. I am unable to believe that the angle of contact was nearly so great as at right angles. It could scarcely have been greater than 45 degrees; possibly somewhat in excess thereof. Such an angle of convergence corresponds with the position of the dredge two points to the starboard of the Manzanita, on the hypothesis that the course of the dredge was angling across the stream, and the course of the Manzanita just prior to the change of two points to port was head on towards the dredge, or rather her starboard quarter, as would seem to be the case from the testimony of Halvorson; and this hypothesis, supplemented with the change in the Manzanita's course, I am constrained to believe defines the true course in which the Manzanita was moving at the time of the collision.

Now, having determined the probable movements of the two crafts shortly before and up to the time of their contact, I will endeavor to determine, if possible, the responsibility for the casualty. The tug and tow were at the time of the collision crafts navigating in the nighttime. It was a duty imposed by the rules of admiralty that they should have been provided with running lights; that is to say, the colored starboard and port lights. The Eugene F. Moran (D. C.) 143 Fed. 187. The tug was so lighted, the tow not; but by reason of the greater height of the tow, the running lights of the former were obscured from all craft approaching from the Columbia's starboard, and there-

fore the condition was the same as if the navigating crafts had no running lights at all, so far as it affects the present controversy. This was a fault. Further, it is not shown that there was any lookout upon the Columbia while so navigating. Some of the witnesses speak of a lookout in connection with the running of the vessels, but none is shown to have been stationed upon the tow, or remained thereon during the time, and certainly no one has testified as to discovering the approaching vessel while at his post of duty. All the witnesses who at first noticed the Manzanita were casual persons about the Columbia, except Capt. Hayden, who really saw her port light up by the Waterford light; but he paid no further attention to her, nor saw her again until she crossed the bow of the Columbia. This was another fault of the tug and tow, in not keeping a lookout on the tow while under navigation.

Another fault is manifest in the fact that the Columbia was navigating by night, with her cutter lowered and under water, extending 30 feet beyond the bow. It is further shown that the tug sounded no whistle in answer to the signal from the Manzanita. Capt. Hayden says he did not hear the signal, but others on the Columbia did. If, hearing the signal, Capt. Hayden failed to respond, being then under way with his crafts, this was another fault. So that, at the outset, the tug and tow were at fault sufficient to fix entire responsibility for the collision, unless it be that the Manzanita was so grossly negligent as to conduce primarily to the casualty of which she complains, or was also at fault contributing to the accident.

The contention of the respondent is that "The Manzanita was not running upon the course prescribed by law, and was, moreover, so improperly, recklessly, and imprudently navigated as to bring about the collision in question." Article 25 of the pilot rules (Act June 7, 1897, c. 5, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) is invoked. It reads:

"In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the star-board side of such vessel."

I have no doubt the rule is applicable on the Columbia river in the vicinity of the collision, as it must there be considered to be a narrow stream. The Sydney; The William Worden (C. C.) 47 Fed. 260; The Acilia; The Crathorne (D. C.) 108 Fed. 975. The probable exigencies of the situation were, however, that when first sighted by the Manzanita, the tug and tow presented the appearance of being at anchor, with the pontoons extending toward Puget Island or the Washington shore, which closed up for navigation purposes the fairway to the north of the dredge. The course of the Manzanita was thenceforth dead on for the dredge, or for some light other than the Westport reach light, because as I have shown by a reference to the testimony of witnesses upon the dredge, she was heading, with both her running lights in view, shortly before the collision, for the dredge, and both the dredge and Manzanita were at that time entirely south of the regular ship's course some hundreds of feet. Even up to shortly before the collision, the dredge and its pontoons must have presented the ap-

pearance to the Manzanita of extending diagonally outward into the channel, so that it would seem to the navigators upon the Manzanita more expedient to pass to starboard than to attempt to pass around the long line of the pontoons aft. It is shown that there was ample fairway between the traps and the dredge for the Manzanita to have passed in safety to the starboard. Believing, as the Manzanita's officers say, that the dredge was at anchor, the Manzanita sounded two whistles, meaning thereby that she was going to starboard. The signal should have been promptly answered by the tug, but it was not, so that the tug still left the Manzanita in doubt as to whether she was a navigating craft, or anchored, and pursued her course unmindful of the Manzanita. The strong inference is that the signal of the Manzanita was heard by the tug, but, believing that the approaching vessel was another tug coming to the assistance of the McCracken, no attention was paid to it. This was a grievous fault on the part of Capt. Hayden. He saw the Manzanita abreast of Waterford light. He should have watched the vessel until she passed in safety, or had some one on the lookout to determine her course and identity until the fairway was clear of her presence.

Another excuse put forth by Capt. Hayden is that he supposed he was entirely south of the ship's course, and that it was not incumbent upon him to pay any attention to other navigating craft. However this may be, his course had been, and was then, by the greater probability angling across the channel, and it did not behoove him to disregard in any measure the rules of navigation while in the ship's channel. I am impressed that, had the tug answered the signal of the Manzanita so as to indicate that she was a navigating craft, or changed her course even slightly to port, there would have been no collision. Or had she, by the appropriate signal, declined the signal of the Manzanita to pass to starboard, the Manzanita might have prevented the collision by stopping and backing, if need be.

It must be considered that the Manzanita was not a deep seagoing craft, and it was not essential that she navigate upon the regular ship's course. It is explained by Nolan, the second mate, that, "as a matter of fact, the lighthouse tenders are seldom steered on a course." I think it was a fault, however, in the Manzanita that she did not steer on a course. If she had, she would have discovered that the Columbia was navigating, because she must have become aware, if holding direct for Westport light, that the Columbia was crossing her path, and thus she could have passed by the Columbia's stern and avoided the collision. Instead of doing this, she, in all probability, as I have before observed, approached the Columbia as a craft at anchor, intending to go by with reasonable facility when within proper range, being deceived by the fact that the Columbia was moving instead of being at rest.

Considerable testimony was offered with a view to establishing the existence of a custom with pilots and navigators as to signaling the dredge when at work. The witnesses are not in entire harmony relative to the subject, yet it may be said that such a custom prevailed. Groves describes the signal as one prolonged blast. Then, he says, if the

dredge does not answer, another blast is sounded. If, however, the dredge is under control so that it can haul out of the channel, it answers by a long whistle, which indicates that the way is clear. Willis testifies that coasters and big vessels blow one long whistle; that some of the river boats blow a blast, and some do not; that, as soon as the way is clear, the dredge answers with a whistle; that sometimes boats get lost, and blow two blasts or sometimes one, not knowing on which side to go, and then that the dredge would "blow them on the regular side." Capt. Pease says that it had always been his custom to blow one long whistle; that if the dredge did not then get out of the way he slowed down, and that if the dredge could not get out of the way she would blow some short whistles, which would cause him (the witness) to stop his vessel.

It will be seen from these brief references to the testimony, touching the custom as to signaling the dredge while at work or at rest, that the approaching vessel even then expects a reply from the dredge, and especially so if the dredge is out of the way so that there is channel way for the vessel to go by. But the dredge in the present instance, although it was navigating at the time, omitted to signal at all, and otherwise paid no attention to the Manzanita's approach. On the other hand, a more attentive observation on the part of the Manzanita, as previously observed, should have put her in possession of the knowledge that the tug and tow were moving craft, although their running lights were obscured. Being in possession of that knowledge, it would have been an easy matter to avoid collision. Being a craft, however, that was not required to pursue the regular ship's course, she was at greater liberty to direct her course anywhere in the channel affording ample depth of water for safe navigation, though she was bound to observe the rules of the roadstead in meeting and passing other craft, the same as they. I attribute, however, the primary cause of the collision to the faulty action of the tug and tow.

It is argued that the Manzanita did not soon enough change her course. I think, myself, that she did not. But from the standpoint of her navigators, she changed in time to avoid the dredge if the latter had been a stationary thing in the channel; but being a moving object, and continuing on her way without giving any signal by which to indicate her action, or issuing any note of warning whatever, hers became and was the proximate contributing cause of the accident.

The further question then arises as to whether there should not be a contribution of damages as between the dredge and the Manzanita. It was determined in the case of *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 216, 37 L. Ed. 84, that:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

Following this is the case of *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, where it is, in effect, held that, where the fault of the offending vessel is gross, any doubts respecting the management of

the opposing vessel or the contribution of her faults, if any, to the collision should be resolved in her favor. See, also, *The Victory and The Plymothian*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 155, 42 L. Ed. 519, where the court says:

"As between these vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."

To the same purpose are *The Ludvig Holberg*, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620, and *The Genevieve* (D. C.) 96 Fed. 859.

It is manifest that the fault of the tug and tow in attempting to navigate the river in the nighttime, without running lights and without constant lookouts upon the tow, with the cutter of the tow extending 30 feet in front of her, lowered beneath the surface of the water, and in utterly failing to recognize or reply in some way to the signal of the *Manzanita* so as to apprise her of their action and intentions, was very gross; and, the burden being imposed upon the respondent to show that the *Manzanita* was also a contributing factor to the casualty in order to an apportionment of damages, it is required to make out such a state of the case by clear and convincing proof. I cannot say that the respondent has done this, and therefore I conclude that it should be required to bear the entire burden of damages arising from the collision.

Having found the respondent liable, I tax the damages against it in the sum of \$12,670.90, in accordance with an itemized statement thereof, which I now file with the record in this cause.

The claim of \$2,000 for repairing the rent in the *Manzanita's* hull, I allow to the extent of \$1,327 only, adopting the testimony of I. N. Day as showing the reasonable cost thereof. The claim of \$2,000 for labor in cleaning, overhauling, and repairing wreck, I allow to the amount of \$1,653.60. I arrive at this estimate upon the testimony of Wilson, the engineer, who says that eight men were employed three months in cleaning and repairing the engine and the engine room and wreck. Three of these men received compensation of \$10 per month, three \$50 per month, one assistant engineer \$3 per day, and the engineer himself \$4 per day. And I allow for findings for the six men 20 cents each per day, and for the officers \$1 each per day. It seems to me that this fully covers the reasonable cost of such cleaning, overhauling, and repairing. I allow the item of \$1,635.55 for loss of clothing and personal effects of the seamen. I do this upon the authority of *The Minnie* (D. C.) 26 Fed. 860, and *Leonard et al. v. Whitwill* (D. C.) 19 Fed. 547. It is the policy and practice of the government to make appropriations to cover allowances for loss of personal effects through a wreck not occasioned by the officers or men themselves. In this very case it seems, from the testimony, that a bill was introduced covering the amount of the claim made by these men, with a view to reimbursing them for their loss. The government does this in justice to the men, they being in its employ. There is question whether I should allow the full amount of this claim, but the only objection made to the item was that no part of it is a proper item of damages

against the respondent; no question being made as to the amount. Of course, the men are getting new clothing and effects, whereas those lost must have been in some measure worn or deteriorated, but the amount of that deterioration is not shown anywhere in the testimony, and there is no basis upon which to determine the exact loss sustained. I therefore allow the whole item, without deduction for deterioration.

I disallow the items paid crew as per pay roll for the months of October, November, and December of 1905, and all items denoting amounts paid for subsistence of crew during the same months, as the government would have expended these sums notwithstanding the wreck of the *Manzanita*.

Libelant is entitled to interest upon the amount of damages found against the respondent at 6 per cent. per annum from the time of the wreck.

Ex parte LUNG WING WUN.

(District Court, W. D. Washington, N. D. May 1, 1908.)

No. 3,516.

1. ALIENS—CHINESE DEPORTATION PROCEEDINGS—FINDINGS OF EXECUTIVE OFFICERS—CONCLUSIVENESS.

The rule that the findings of immigration inspectors that a person apprehended for deportation is a Chinese person not entitled to enter the United States, when affirmed by the Secretary of Commerce and Labor, is final, does not prevent a citizen of the United States from invoking the protection of the courts to secure his right to live within the boundaries of his own country, guaranteed by the Constitution.

2. CONSTITUTIONAL LAW—CONSTITUTIONAL QUESTIONS—RIGHT TO RAISE.

An alien has no right to require the courts of the United States to adjudicate questions as to the constitutionality of laws enacted by Congress.

3. ALIENS—PRESUMPTIONS—EVIDENCE.

In Chinese deportation proceedings there is a natural presumption that a person of Mongolian race coming to the United States from China is an alien, to overcome which, and secure recognition of rights, privileges, and immunities pertaining to United States citizenship, convincing evidence is essential.

4. EVIDENCE—HEARSAY—PLACE OF BIRTH.

An individual's own testimony as to his place of birth is secondary evidence, and, being hearsay, is entitled to little credence, unless corroborated.

5. JUDGMENT—UNITED STATES COMMISSIONER'S DECISION—FINAL ADJUDICATION.

A decision of a United States commissioner confirming a Chinese person's asserted right to live in the United States and enjoy the privileges of a native-born citizen is not a final adjudication by a court of competent jurisdiction, free from collateral attack in a subsequent proceeding; such commissioners not being courts of the United States, ordained and established by Congress, in which the judicial power of the government can be vested.

[Ed. Note.—Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

6. ALIENS—DEPORTATION PROCEEDINGS—UNITED STATES COMMISSIONERS—JURISDICTION.

The powers and functions of United States commissioners in Chinese deportation proceedings are confined to the issuance of warrants for the apprehension of Chinese persons accused of being unlawfully within the United States, to the decision of questions whether such persons are unlawfully in the United States, to making orders directing those not privileged to remain to be deported, and discharging from arrest those who prove a present right to remain in the United States; such decisions being subject to review on appeal to the District Court of the proper district.

7. SAME—CITIZENSHIP—EVIDENCE.

Evidence *held* insufficient to establish that a Chinese person was a citizen of the United States.

Habeas Corpus. Application for a writ in behalf of a person of Chinese parentage, claiming to be a citizen of the United States whose right to return after a visit to the Empire of China has been denied by officers of the Immigration Bureau and by the Secretary of Commerce and Labor. Hearing on the merits. Case dismissed.

Elmer E. Todd, U. S. Dist. Atty.
McCafferty & Godfrey, for defendant.

HANFORD, District Judge. For convenience the individual in whose behalf this proceeding was initiated will be referred to in this opinion as "the contestant." He is a son of Chinese parents, and the question to be adjudicated is whether he is an alien or a citizen of the United States. This is necessarily preliminary to every other question to be considered, and its determination is also the ultimate object of the proceedings. It is preliminary, because the immigration inspectors have decided that he is a Chinese person not entitled to enter the United States. Their decision became final by the dismissal of his appeal to the Secretary of Commerce and Labor, and the courts are prohibited from interfering with the enforcement of the Chinese exclusion laws. The *Ju Toy* Case, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. These laws, however, cannot deprive a citizen of the United States of the right to invoke the protection of the courts in the right to enjoy liberty in his own country. *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; *Chin Yow v. United States*, 28 Sup. Ct. 201, 52 L. Ed. —. The Constitution of the United States is the paramount law of this country, and all who are lawfully within its boundaries may claim the guaranties of liberty which it contains, and require the courts to adjudicate controversies involving infringements of such rights; but aliens who have not yet gained a foothold upon the soil are in no position to require the courts to adjudicate questions as to the constitutionality of laws enacted by Congress. The *Chinese Exclusion Case*, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. Therefore, if the contestant is an alien, the question as to his right to enter the United States is extrajudicial.

There is a natural presumption that a person of the Mongolian race, coming to this country from China, is an alien; and to overcome that presumption, and secure recognition of the rights, privileges,

and immunities pertaining to citizenship, convincing evidence is essential, because, in any proceeding or inquiry having for its object the lawful determination of questions affecting a claim to citizenship asserted by such a person, he is himself an exhibit, his language, manners, and physical appearance must be considered as evidence tending to prove his alienage, and without evidence sufficient to create a belief that such a person is, notwithstanding his alien parentage, a citizen by birth, the natural presumption merges into a legal conclusion. No individual can by his own testimony give convincing evidence as to the place of his birth. The reasons for this are obvious. His testimony must necessarily be classed as secondary evidence, its truthfulness or falsity being entirely dependent upon the accuracy of information communicated to him by others; and, being hearsay, it is entitled to little credence, unless corroborated. In this case, leaving out of consideration the testimony of the contestant, there is no evidence to establish his claim, except a paper, purporting to be a certificate made by a former United States commissioner in the state of New York, to the effect that in a proceeding before him it was decided and adjudged that a certain Chinese person named Lung Wing Wun was not unlawfully in the United States, but entitled as a native-born citizen of the United States to remain in this country, which certificate was in the possession of this contestant at the time of his departure from the port of Port Townsend on a trip to China in the year 1906, and a copy of it was left with the immigration inspectors at Port Townsend. It appears that they obtained information to the effect that there was such a proceeding as indicated by the certificate at the time indicated before a commissioner of the same name in the state of New York, which proceeding was adverse to a Chinese person named Lung Wing Wun, and resulted in a decision affirming his status as a native-born citizen of the United States, but that, by comparison of the document purporting to be the original certificate in the possession of the contestant with the record, it appears to be spurious, and that the ex-commissioner denied that it was the certificate which he issued, and that the official seal affixed thereto was not the genuine seal of the commissioner. For these reasons it was assumed that the contestant is not the identical person to whom the genuine certificate was issued.

He complains of unfair treatment on the part of the immigration inspectors by reason of their acceptance of said information as evidence, the same being unsworn statements obtained when he was not present, and of the deprivation of a fair opportunity to obtain the depositions of the former commissioner referred to and the witness upon whose testimony the commissioner relied in making his decision. This contention avails nothing; for, if it be assumed that the inspectors improperly received and considered unsworn testimony obtained in an illegitimate manner, and on such evidence decided the certificate to be a forgery, and if it be further assumed that the certificate is not a forgery, but genuine, and that this man is the identical person to whom the genuine certificate was originally issued, he still appears before this court without any competent evidence to prove that he was born within the United States, which fact is essen-

tial to the exercise of jurisdiction by this court. By this I mean that a genuine certificate or the record made by a commissioner is not legal evidence of the facts on which the commissioner's decision was based and that it does not create an estoppel. The theory of the case is that a decision by a United States commissioner, confirming an asserted right of a Chinese person to live in the United States and enjoy the privileges of a native-born citizen, is a final adjudication by a court of competent jurisdiction not subject to a collateral attack in any subsequent proceeding; but I hold that this theory is entirely erroneous. United States commissioners are not courts of the United States, ordained and established by Congress, in which the judicial power of the government can be vested, consistently with the Constitution of the United States. Their powers and functions are defined by acts of Congress and rules prescribed by the courts, and are not to be enlarged by implications. The utmost extent of the power conferred upon them by the Chinese exclusion law is to issue warrants for the apprehension of Chinese persons accused of being unlawfully in the United States, upon hearings to decide questions whether such accused persons are unlawfully in the United States, to make orders directing those not privileged to remain to be deported to the country from whence they came, and to discharge from arrest those who prove a present right to remain in this country; the decisions being subject to review on appeal by the District Court of the proper district. Now, let it be assumed that the decision of a commissioner in such a case, if not appealed from, is a final adjudication of the question as to the existing right of the accused person to remain in the United States, still there is no ground for the broader assumption that a commissioner may in such a proceeding establish the status of the accused person as a citizen of the United States, entitled to all the rights, privileges, and immunities of a citizen, including the right, to be subsequently exercised, of returning to the United States after a voluntary departure therefrom. A decree, to have that effect, requires the exercise of judicial power expressly conferred by law, or the powers of a court of superior and general jurisdiction.

In this case there is not only a total failure to prove by competent evidence that the contestant is a citizen, but also a failure to make a showing that there is any competent evidence which can be produced; and for that reason it is directed that an order be entered discharging the writ of habeas corpus and remanding the contestant to the custody of the immigration inspectors to be deported according to law.

SUGAR BEETS PRODUCT CO. v. LYONS BEET SUGAR REFINING CO.

(Circuit Court, W. D. New York. April 28, 1908.)

No. 315.

1. SPECIFIC PERFORMANCE—NATURE OF CONTRACT—ADEQUATE REMEDY AT LAW—PAYMENT OF GOODS.

Complainant's assignor constructed and delivered to defendant a beet pulp drier under contract providing for payment of the price with dried pulp at \$12 per ton. It was also agreed that, after the price was paid, defendant should sell the dried pulp to complainant's assignor for \$13 a ton for three years, and that it should not sell to any other except farmers until the contract was performed; the ownership of the drier, until paid for, being reserved to complainant's assignor. A bill for specific performance alleged that defendant had sold pulp at higher prices than \$12 per ton to others during the contract period, and thus prevented complainant from fulfilling a contract with another for the sale of all the pulp manufactured at defendant's factory, and that defendant had failed to pay the price of the drier, claiming that it was structurally defective when the faults were due to defendant's improper operation thereof. *Held*, that such contract did not operate to transfer the title to the pulp until delivered to complainant thereunder and that, as complainant had an adequate remedy at law, it was therefore not entitled to specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 5-7.]

2. SAME.

An agreement to pay for an article in the products thereof is enforceable by the recovery of money, and not of such specific products.

3. SALES—CONDITIONAL SALES—BREACH OF CONTRACT BY BUYER—REMEDIES OF SELLER.

Where a contract was made to exchange a beet pulp drier for products to be manufactured thereby, defendant having subsequently refused to deliver such products to complainant, the latter, having retained title to the drier until paid for, was entitled to sue at law to recover possession thereof and damages for defendant's breach of contract, or for the balance of the price unpaid in money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1418-1438.]

4. DAMAGES—ELEMENTS—LOSS OF PROFITS.

Loss of anticipated profits is a proper element of damages for breach of contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 74-78.]

5. SPECIFIC PERFORMANCE—BILL—CONSTRUCTION.

Where, in a suit to enforce specific performance of a contract to purchase a pulp drier and to pay therefor in pulp at \$12 per ton, with leave to sell pulp to farmers, the bill alleged that all defendant's dried pulp was shipped on its own account direct to the L. Milling Co., and that defendant had refused to deliver pulp to complainant, it impliedly negated the claim that defendant sold pulp to farmers at \$13 a ton, for which complainant was entitled to an accounting.

6. DISCOVERY—EQUITY JURISDICTION.

Jurisdiction in equity was not sustainable, on the ground that complainant was entitled to a discovery, where any testimony under defendant's control which complainant might deem necessary to substantiate its cause of action was obtainable by an examination of defendant's officers, books, and records in a suit at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 27.]

In Equity. On demurrer to bill.

Bashford, Aylward & Spensley and Gibbons & Pottle, for complainant.

Lewis & Lewis and Charles P. Williams, for defendant.

HAZEL, District Judge. The bill is for specific performance of a written contract providing for the construction and delivery by complainant's assignor to the defendant of a pulp drier with a daily capacity to dry all pulp from 500 tons of beets in 24 hours, and for payment of the purchase price of \$34,500 with dried pulp at the price of \$12 per ton. It was agreed that after the purchase price was paid the defendant would sell the dried pulp to the complainant's assignor for \$13 per ton for a period of three years, and that it would not sell any dried pulp to any other person, except to farmers, until the contract was performed. The ownership of the drier until it was paid for by the defendant was reserved to complainant's assignor. The contract contained other provisions; but they are not of material importance, and need not be set forth. The bill alleges the performance of the agreement on the part of the complainant, but avers that the defendant, after complying with the terms of the contract to the extent of drying and delivering pulp under the contract amounting to \$7,412.84, has since failed of performance. It is further alleged that the defendant continues to use the drier, claims to own it, and has sold dried pulp at a higher price than \$12 per ton; that at the time of making the contract the complainant had entered into an agreement, of which the defendant had knowledge, with the Larrowe Milling Company for the sale to the latter of all dried pulp manufactured in the factory of the defendant, and as a reason for not fulfilling the contract the defendant pretends and fraudulently claims that the drier machine and appliances were materially defective, thereby preventing fulfillment of the conditions of the contract. The bill points out that the defendant neglected to properly operate its diffusion batteries, an appurtenance of the drier, and failed to supply necessary presses and allows its beets to decay; that the complainant has offered to make necessary repairs upon the drier, but the defendant refuses to permit it to do so, insisting that the drier is defectively constructed. An accounting is demanded, and that a receiver be appointed by the court to conduct the business during the pendency of the action, to the end that the defendant be compelled to deliver dried pulp to complainant at the price specified in the contract. The defendant demurred to the bill on the ground that it lacks equity, in that there exists a plain, adequate, and complete remedy at law.

Complainant's position is succinctly stated in its brief as follows:

"The defendant is in possession, and using for its own benefit the property of the complainant, converting a worthless by-product of its factory into a marketable commodity of great value. Through its own misconduct and fraud it has sought to prevent the successful operation of the drier during the experimental stage, and then sets up the consequence of its own wrongful acts as a justification for its refusal to make delivery of the dried pulp, after it has increased in value, in payment of the purchase price and for the ensuing three years. The defendant sustains toward the complainant a fiduciary re-

lation with respect to the drier and its operation, the product manufactured thereby, and the proceeds of the sale of the pulp. An action at law could not afford any adequate release if the remedy had not been surrounded by doubt and difficulty, by the wrongful acts of the defendant. The complainant has properly invoked the jurisdiction of a court of equity to protect and enforce its rights under the contract."

A careful persual of the bill satisfies me that the relations between the parties were not of a trust or fiduciary character, and in an action at law the complainant could obtain complete relief. Concededly the contract was made in the state of New York, where the defendant resides, and where it was to have been fully performed. The remedial rights, therefore, of the parties, are controlled by the common law of this state. Although the title of ownership to the machinery and appliances remained in Hapke, complainant's assignor, the title of the dried pulp in fact was not in the complainant. The agreement that the apparatus should be paid for "with dried pulp as fast as made, at a price of \$12 per ton, until the drier is paid for," did not as a matter of law, in my estimation, operate as a transfer of the title of the manufactured article. The parties to the contract did not become associated as partners in the business of drying pulp. Their relationship arose from the contract, on the one hand to construct a drier according to the specifications, and on the other to pay for the same in dried pulp at a specified price per ton. I think the complainant must look to the defendant for the money, instead of the specific article with which it was to have been paid. Authorities abound in this state upholding the principle that an agreement to pay in goods and chattels is enforceable by the recovery of money, and not of the specific article. *Pinney v. Gleason*, 5 Wend. 394, 21 Am. Dec. 223; *Thomas v. Murray*, 32 N. Y. 615; *New York News Pub. Co. v. The National Steamship Co.*, 148 N. Y. 39, 42 N. E. 514; 1 *Sedgwick on Damages* (8th Ed.) 280; *Blackmer v. Holmes*, 13 Wkly. Dig. 424, affirmed 98 N. Y. 622; *Herrick v. Carter*, 56 Barb. 41; *Fletcher v. Derrickson*, 3 Bosw. 181.

As to whether the plaintiff in an action at law would be entitled to recover the actual value of the dried pulp at the time it was to have been delivered, or the purchase price of the drier, is a question that need not be here decided. While not disputing the proposition that the specific performance of a contract relating to articles of merchandise may be enforced in equity, yet in my opinion the allegations of the bill do not indicate that any damages claimed to have been sustained by the complainant cannot with reasonable certainty be ascertained in an action at law to recover on breach of contract; nor is it apparent that there exists any insurmountable barrier or difficulty to giving the full measure of redress to which the complainant is legally entitled. It is not apparent that irreparable injury will result from the failure of the defendant to specifically perform the contract. It is not claimed that dried pulp cannot be obtained on the market and that the complainant is prevented from keeping its contract to supply others.

Concededly an action at law may be brought to recover possession of the drier, or for breach of contract, or for the balance of the pur-

chase price unpaid. That a rescission of the contract would be necessary before instituting the first-mentioned remedy, or that the amount paid to apply on the purchase price would have to be refunded, or that the right to future deliveries of dried pulp may be deemed uncertain, are not sufficient reasons, in the circumstances narrated in the bill, for invoking the power of a court of equity. It has frequently been held that the loss of anticipated profits is a proper element of damages for breach of contract (*Wakeman v. Wheeler & Wilson Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19); and, even assuming the damages recoverable to be uncertain or difficult of ascertainment, no sufficient reason is advanced in the light of the authorities to justify holding that the nature of the bill indicates inadequate or incomplete relief in an action at law.

It is suggested that, as the contract permitted the defendant to sell dried pulp to farmers at \$13 or more per ton until the purchase price of the drier was fully paid and at \$14 or more per ton thereafter, which said amounts were to inure to the complainant every month, an accounting in equity of such payments is the proper remedy. This contention, however, ignores the gist of the bill, which manifestly is to compel the defendant to perform a contract which it has elected to break. Moreover, as contended by the defendant, the bill impliedly negatives the assertion that any pulp was sold by the defendant to farmers at \$13 per ton; for it is therein alleged that all the dried pulp manufactured in the factory of the defendant was shipped on its own account direct to the Larrowe Milling Company.

I do not think the complainant is entitled to discovery. Any testimony under the control of the defendant which the complainant may deem necessary to substantiate its cause of action is obtainable by an examination of the officers of the defendant corporation, or its books and records, in the same manner as if the suit continued in equity. See *Colgate v. Compagnie Francaise du Telegraphe de Paris à N. Y.* (C. C.) 23 Fed. 82; sections 724, 862, 914, Rev. St. (U. S. Comp. St. 1901, pp. 583, 661, 684); *Cameron Lumber Co. v. Droney* (C. C.) 132 Fed. 304; *U. S. v. Bitter Root Development Co.*, 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550.

I have examined the averments of the bill regarding the asserted fraud of the defendant, or its pretense that the drier was defective for the purpose of wrongfully avoiding the contract; but, as hereinbefore stated, the action is brought primarily to compel the payment of the purchase price of the drier in pulp, and, following the principles of the adjudications hereinbefore cited, such an action, under the circumstances set forth in the bill, is not maintainable, and no basis for the exercise of equitable relief is shown.

The demurrer is sustained, with costs, with leave to the complainant to amend within 20 days.

SPERRY & HUTCHINSON CO. V. LOUIS WEBER & CO.

(Circuit Court, N. D. Illinois, E. D. April 22, 1908. On Rehearing, May 11, 1908.)

No. 28,938.

INJUNCTION—INTERFERING WITH CONTRACTS—TRADING STAMP BUSINESS.

Complainant issued trading stamps to merchants under contracts providing that they should be given out only to cash customers as premiums on purchases, and when presented by such customers in books would be redeemed by complainant in goods. They were nontransferable on their face, and the books were supplied by complainant, and contained advertisements of the merchant's business. *Held*, that the business and contracts were lawful, and that complainant was entitled to protection by injunction against a rival in the business, which sent out agents to purchase or exchange its own stamps for partly filled books containing complainant's stamps, some of which were again resold at a low price, materially interfering with complainant's business.

In Equity. On motion for preliminary injunction.

Peckham, Packard, Ap Madoc & Walsh (John Hall Jones, of counsel), for complainant.

Newman, Northrup, Levinson & Becker, for defendant.

KOHLSAAT, Circuit Judge. The bill herein is filed for an injunction, restraining the defendant and its representatives from "buying, selling, procuring, disposing of, or otherwise dealing or trafficking in the trading stamps issued by the Sperry & Hutchinson Company * * * and from advertising so to do." The cause is now before the court on a motion for a preliminary injunction, and for other relief. Complainant is engaged in the business of manufacturing and selling to its customers what are known as trading stamps. These are supplied under and subject to the terms of a written contract, which reads as follows, viz.:

"This agreement, made the ——— day of ———, 190—, by and between the Sperry & Hutchinson Company, a corporation of the state of New Jersey (hereinafter called the 'Company'), party of the first part, and ———, a ——— of ———, doing a general ——— business at ——— street, ———, state of ———, party of the second part, Witnesseth: That in consideration of the mutual promises and agreements hereinafter contained, said parties agree as follows: Said company agrees to advertise in the directory of its 'S. & H.' green trading stamp books distributed in the city or town of ———, the name, business, and aforesaid business address of the party of the second part; to deliver to the people of said city or town said books, and explain to them how to use the same; and to redeem said stamps with goods and merchandise when presented by the customers of its subscribers in said books in lots of nine hundred and ninety (990) stamps, and according to law, collected in the manner prescribed and subject to the conditions herein and in said books. Said company agrees to deliver, and the party of the second part agrees to order and receive from said company, its green trading stamps, in lots of not less than ——— pads per lot, each pad containing ——— thousand stamps, and to pay upon delivery thereof, the sum of ——— dollars per pad, for the use of said stamps as an advertising medium, and agrees to supply said stamps from the aforesaid business address only, as an inducement for cash trade to all persons who pay cash for purchases; to give out said stamps as follows, and not otherwise to dispose of the same without the prior consent in writing of said company, viz.: To give to each

customer for redemption only by said company one stamp for each and every ten cents represented in the retail price of merchandise, for which cash is paid by said customer. Said party of the second part also agrees to display signs furnished by said company, which read, 'We give S. & H. green trading stamps,' or otherwise in the windows and other prominent places about its stores, and agrees not to procure said stamps in any way except direct from said company, either during the term of this contract, or at any time, and also agrees to mention favorably the use of said stamps in all newspaper and other advertisements published by or for it; and not to use any other coupons, trading stamps, or similar device during the term of this contract, and not to join in any combination of merchants for the purpose of discontinuing the use of said company's trading stamps. It is mutually agreed between the parties hereto that the property in and title to said stamps and signs remain in the said company, and shall not in any event pass to the party of the second part, or any other person, firm, or corporation and that this agreement shall remain in force for one year from the date of its execution, and shall be considered renewed for an equal period from year to year, unless written notice to the contrary be given by either party to the other at least thirty (30) days prior to the yearly periods of expiration; and, provided such notice be given by said company, it may thereafter omit from its subsequently printed directory and advertisements the name of the party of the second part. It is mutually understood and agreed that this contract is made for the benefit of the subscriber's customers as well as of the parties hereto.

"In witness whereof, the parties hereto have executed the foregoing agreement the day and year above written.

"The Sperry & Hutchinson Company,

"By _____,

"N. B.—No agent has authority to alter the foregoing agreement in any way. No alteration therein shall be effective unless countersigned by an officer of the company at the home office, 320 Broadway, New York City."

Each stamp has printed on its reverse side the following, viz.:

"Property of the Sperry & Hutchinson Co. Not transferable except as provided in notice in trading stamp book."

On the cover of the book, in large letters, are the words:

"CAUTION. THIS PAD IS NOT TRANSFERABLE."

The method of transacting business is as follows, viz.: The stamps are delivered to merchant subscribers in pads or books of 1,000 or 5,000 each, for a certain consideration. Upon receiving the same the customer subscribes the following:

"Conditions Under Which 'S. & H.' Green Trading Stamps are Furnished: Solely for the advertising of the company's subscribers, and for redemption by their customers. The title to all Sperry & Hutchinson green trading stamps remains in the Sperry & Hutchinson Company; the subscribing merchant transfers only the right of redemption to his customers. Once issued by subscribers, the stamps cannot again be used for advertising purposes."

It is alleged by the complainant, and not disproven, that complainant and its predecessors originated this method of advertising, as it is termed in the bill, and that large sums of money and great labor have been expended in perfecting and popularizing it; so that at the time the bill was filed its green trading stamps had become widely known as a valuable medium for advertising. As a part of the benefit to its subscribers, complainant causes circulars to be distributed, house to house canvasses to be made, and the attention of customers to be attracted to the subscribers' business, thus taking the place, to a degree,

or supplementing ordinary advertisements. The subscriber is authorized to issue one stamp with every 10 cent cash sale. By this means, it is claimed, cash trade has been greatly improved, as well as sales generally. A trading stamp book is furnished by the complainant, in which purchasers who receive stamps may paste them. These hold, approximately, 1,000 or more stamps when filled. Complainant redeems the stamps at a rate not stated in the record. Whether or not there is a profit in the redemption to the complainant arising from the price paid for the stamp book by the subscriber, or whether it is expected that any considerable part of the stamps will never be presented for redemption, so that gain would arise from that source, is not shown.

It is the essence of complainant's business that its subscribers shall get the full benefit of its methods of advertising and assistance. Its stamps are not, in the full sense, property. Their nontransferability is an essential element of their value, both to complainant and its subscribers. It may be assumed that both parties are in the transaction for profit. It is not fair to say that complainant's only interest consists in the presentation of the stamps for redemption, if the means employed to that end result in killing the demand of subscribers for the stamps. The parties are entitled to carry on their affairs in such a way as to serve the business interests of each, so long as they are lawfully conducted. To create an unfair market for partly filled and nontransferable stamp books would have a tendency to keep purchasers from trading with subscribers until they were filled. This has been held in a number of cases instituted by complainant to protect its business. Among these are the Cases of Mechanics' Clothing Company (C. C.) 128 Fed. 800, 1013 (same in [C. C.] 135 Fed. 833), Brady (C. C.) 134 Fed. 691, Beal (C. C.) 145 Fed. 659, Asch (C. C.) 145 Fed. 659, and Temple (C. C.) 137 Fed. 922. In addition there are unpublished opinions and decisions to the same effect by Judge Morris of Baltimore, Judge McPherson, Eastern district of Pennsylvania, Judge Thomas, Eastern district of New York, and Judge Lacombe, Southern district of New York.

The defendant, in pursuit of its business advancement, entered upon a course of conduct logically calculated to injure complainant. It sent agents around to purchasers from complainant's subscribers, and by various representations sought to and did induce them to exchange their incomplete stamp books for defendant's trading stamps, taking three of complainant's, known as "Green Stamps," for one of its own. It does not appear what inducement was offered for the exchange, further than counsel's statement, to the effect that defendant offered a more desirable class of goods for redemption than the green stamps commanded, and fixed the purchasable value of its stamps. It is also asserted that defendant made endeavors to persuade complainant's subscribers to break their contracts, and offered inducement to that end. In fact, it is made to appear that defendant made the manipulations of complainant's stamps, and interference in its contracts and business, a special feature of its own business, so much so that, as the record now shows, it cannot be definitely determined whether or not such injury to complainant was not the controlling motive in the plan. And all this, notwithstanding the fact that these stamps were good only for re-

demption, and not transferable. Under the decision of the Supreme Court in *Angle v. C., St. P., etc., Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, this constitutes actionable wrong. It further appears that defendant was thus able to resell the stamps to complainant's subscribers at a much lower price than complainant could, though it does not seem to be established that this was actually done to any great extent. It does appear that defendant sold them to brokers, who took that course in some instances, and in others presented them for redemption in large lots. There does not seem to be any reason why the facts herein do not bring the case within the spirit of the decision in *Bitterman v. L. & N. R. R. Co.*, 28 Sup. Ct. 91, 52 L. Ed. —, decided by the Supreme Court in January, 1908. In this case the court cited, with approval, the case of the complainant against the Mechanics' Clothing Company, above mentioned. For reasons stated in the *Bitterman* Case there is jurisdiction in equity to take cognizance upon the facts hereof. Here is no mere competitive course of action. It was open to defendant to issue its stamps and induce cash sales, just as complainant did, through another or on its own account. There was no need for it to prey upon complainant's trade. Its course in this respect would seem to fall little short of malicious, and may be said to constitute a clear case of unfair competition. True, complainant was not bound under its contracts to redeem for any one but bona fide purchasers from its subscribers, but, as said by Judge Putnam, in *Sperry & Hutchinson Co. v. Temple*, supra:

"It would be impracticable for the complainant to discriminate between stamps properly issued by merchants with whom it deals and other stamps which come upon the market."

It is claimed for defendant that complainant had itself indulged in the practice of procuring the trading stamps of others, and that it does not come into court with clean hands. The evidence on this point shows that in some instances this has been done, but that no attempt has been made by complainant to place such stamps on the market or do anything else therewith. No fraudulent intent is shown, and there are decisions which seem to approve of it. No such action has, however, been pursued toward defendant herein, and it is not in position to press this point as a defense. *Camors-McConnell Co. v. McConnell* (C. C.) 140 Fed. 412; *Equitable Gas Light Co. v. Baltimore Coal-Tar & Mfg. Co.*, 65 Md. 73, 3 Atl. 108; *Foster v. Winchester*, 92 Ala. 497, 9 South. 83; *Mossler v. Jacobs*, 66 Ill. App. 571; *Pom. Eq. Jur.* (3d Ed.) § 399; *Beekman v. Marsters* (Mass.) 80 N. E. 817, 11 L. R. A. (N. S.) 201 (April, 1907). Even were the law not so, the facts in this case are not such as to justify the enforcement of the rule.

The whole case considered upon the present record, complainant is entitled to the temporary relief prayed for. I think any and all trafficking in these nontransferable trading stamps by it should be enjoined. Complainant may prepare a decree in accordance herewith.

On Rehearing.

The motion of complainant for a preliminary injunction having been argued orally before the court on the 11th day of February, 1908,

and written briefs having been thereafter submitted by both parties, and the court having considered the bill of complaint and the affidavits and exhibits filed therewith, and also the affidavits of Isaac Connart, James F. Gannon, Mrs. M. Karras, Marie Lucas, and Kennie Leroy, filed by the defendant on the 25th day of January, 1908, the affidavit of Jacob Weber, filed by the defendant on the 11th day of February, 1908, the affidavits of J. Edward Newberger, Isaac Connart, H. H. Kane, Samuel Steinberg, H. Sendram, W. A. Mott, M. E. Fowler, Mrs. T. Manning, George Hanlon, William Gleich, J. M. Whipple, S. T. Rush, M. Johnson, S. Salmon, H. F. Narhoefer, Nathan Foster, Mrs. L. Nyham, J. Knox, Edward Murray, James Grogan, Julius Waterman, David Teplitz, John Dunn, A. Baker, C. M. Dobbs, Charles Gregory, John Wilson, K. Rubenstein, Schuhman, Joseph Killpatrick, E. Anderson, David Liefly, and M. A. Connell, filed by the defendant on the 2d day of March, 1907, and the affidavits of Manuel Munoz, J. F. Gannon, Albert Wallace, Lawrence A. Jackson, Thomas H. Flather, Marcus B. Keyman, Lester Gordon, and Lionel E. Ogden, filed by said complainant on the 7th day of February, 1908, and the affidavit of James F. Gannon filed by said complainant on the 11th day of February, 1908, and the affidavits of Albert Wallace and James F. Gannon, filed by said complainant on the 6th day of March, 1906, as well as the various exhibits referred to in all said affidavits, and the court being fully advised in the premises, it is, on motion of Peckham, Packard, Ap Madoc & Walsh, solicitors for complainant, ordered, adjudged, and decreed that, upon complainant filing the usual injunction bond in the penalty of \$1,000, the said defendant, Louis Weber & Co., its servants, agents, attorneys, employes, and representatives, and each and every one of them, be and they hereby are enjoined and restrained, until the further order of this court, from buying, selling, or exchanging, and from offering to buy, sell, or exchange, and from trafficking in any manner in trading stamps which have been or shall be issued by complainant, the Sperry & Hutchinson Company.

ATLAS ENGINE WORKS v. PARKINSON.

(District Court, W. D. Wisconsin. April 17, 1908.)

1. CORPORATIONS—STATE STATUTE AFFECTING FOREIGN CORPORATIONS—CONTRACTS RELATING TO INTERSTATE COMMERCE.

A contract made by a manufacturing corporation of Indiana, by which it made another its agent to sell its products, made in Indiana, in certain territory in Wisconsin, and agreed to ship goods to the agent to be sold by it on commission, such goods to remain the property of the corporation until sold, is a factorage contract relating to interstate commerce, and not within the provisions of Sanborn's St. Supp. 1906 (Wis.) § 1770b relating to foreign corporations doing business in the state.

[Ed. Note.—Foreign corporations doing business in state, see notes to *Wagner v. J. & G. Meaken*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 622.]

2. SAME—IMPLIED CONTRACTS.

The bankrupt, which was a Wisconsin corporation, and was acting as agent for claimant, an Indiana corporation, for the sale of certain ma-

chinery made by claimant, entered into a contract with another Wisconsin corporation to construct for it an electric lighting plant, and in doing so furnished it with a boiler made by claimant, which had been shipped to the agent for delivery to another customer. On learning of such sale, claimant wrote the purchaser, stating that it was the owner of the property and claimed a lien thereon. It also filed a mechanic's lien, and after the bankruptcy of the agent commenced a suit to foreclose the same. The purchaser, which had retained the amount from the bankrupt, with its consent paid the same to its trustee, under a stipulation that the respective rights of claimant, and the trustee thereto should be determined by the bankruptcy court. *Held* that, conceding claimant to have been doing business in the state, without having complied with Sanborn's St. Supp. Wis. 1906, § 1770b, relating to foreign corporations, its right to the money did not arise from any contract made by it and made unenforceable by such statute, but from the obligation of the purchaser, implied by law and protected by the mechanic's lien statute, to pay claimant for the property, and that such right was not affected by the fact that in the lien suit claimant inadvertently described itself as the principal contractor; no objection having been made by the defendant on that ground.

On Review of Decision of Referee.

Robert M. Bashford, John A. Aylward, and M. B. Olbrich, for claimant.

Richmond, Jackman & Swansen, for trustee.

SANBORN, District Judge. Claimant is a foreign corporation, organized under the laws of Indiana. It filed its claim against the Platteville Foundry & Machine Company, bankrupt, for \$394.60, for the proceeds of a boiler belonging to claimant, sold by the bankrupt to the Empire Mining Company. In opposing the allowance of the claim the trustee answered, alleging, in substance, as the fact is, that the claimant is a foreign corporation, and has not complied with section 1770b of the Wisconsin Statutes (Sanborn's St. Supp. 1906), providing that foreign corporations doing business in this state shall file their charters with the Secretary of State, and make certain statements, pay license fees, etc.; and that if they fail so to do they shall pay a penalty. Those portions of the statute pertinent to the case are as follows:

"2. No corporation incorporated or organized otherwise than under the laws of this state, except * * * shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the Secretary of State a copy of its charter."

"3e. The corporation shall report the proportion of its capital stock represented in this state or its property located or to be acquired therein, or by its business to be transacted therein. In determining such proportion the property in this state or to be acquired therein, and the business transacted within and without the state within one year immediately preceding its filing the article shall be considered and controlling."

"7g. In case of foreign corporations who have already filed their charter or articles they shall report the proportion of their capital stock represented in this state or their property located and business transacted therein during the preceding year. Such foreign corporations shall pay fees amounting substantially to a dollar a thousand of their capital stock."

"10. All foreign corporations and the officers and agents thereof doing business in this state shall be subjected to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers. Every contract made by or on behalf of any such foreign corporation, affect-

ing the personal liability thereof, or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them.

"11. The failure to comply with the provisions of this section shall, for such violation subject the corporation or any agent, officer or person acting for it in this state, to a penalty of five thousand dollars. * * *

It is alleged that the claim depends on a contract made by a foreign corporation doing business in the state without complying with the statute relating to property within this state, and hence the contract is void on behalf of the claimant. The claim depends in part upon a contract not made with the claimant, but between the bankrupt and the Empire Mining Company, hence it does not expressly fall within the class of contracts made void by the statute. But it is urged that it is, in effect, covered by the statute, under the facts of the case, which appear from the record as follows:

On October 18, 1904, prior to the bankruptcy, the bankrupt made a contract with the Empire Mining Company to erect an electric lighting outfit, and furnish an Atlas automatic engine, a Stillwell heater, a boiler, etc., for a certain lump sum. In performance of the contract the bankrupt furnished a boiler belonging to the claimant, which had been shipped by it directly to Cuba City, Wis., under the contract of November 12, 1903, mentioned later, designed to be installed at the plant of the American Lead & Zinc Company. On November 19, 1904, the claimant, having learned that the engine had been delivered to the Empire Company, notified the latter that it claimed a lien on the boiler. Upon this the Empire Company requested the Platteville Company to state the amount owing for the material and machinery, subject to lien, and in reply the company furnished a list amounting to \$1,122.29, which included the \$394.60 here in question. Thereupon the mining company paid to the Platteville Company a balance on the contract between them, over the amount shown on the statement. In December, 1904, the claimant filed a mechanic's lien for the amount here claimed, by mistake claiming as a principal contractor instead of a subcontractor; and in October, 1905, it commenced suit in the state court to enforce the lien, still claiming as principal contractor. Meanwhile, in February, 1905, the Platteville Company was adjudged bankrupt, and its trustee was brought into the lien suit. A stipulation was made that the mining company might pay the amount claimed to the trustee, to be held by him subject to the rights of claimant and himself as trustee, to be determined by proper proceedings in the bankruptcy case. It was among other things stipulated as follows:

"Now, therefore, it is hereby stipulated, by said E. S. Parkinson as such trustee, and the Atlas Engine Works by their respective attorneys, that said Empire Mining Company may pay the amount of said indebtedness to said E. S. Parkinson, trustee in the above-entitled matter, to be by him held subject to the rights of the Atlas Engine Works and himself as trustee of the Platteville Foundry & Machine Company, to be determined by the proper proceeding in the above-entitled matter to the same effect as if the suit commenced in the circuit court for Grant county, Wis., had been prosecuted, and the said E. S. Parkinson, as trustee, been made a party thereto; that upon the payment of said sum by the Empire Mining Company to the said E. S. Parkinson as trustee, either of the parties hereto may file a petition in said court, in said bankruptcy proceedings, to determine the right to said

fund, and that upon an answer being filed to said petition by the other party the matter shall proceed to a hearing before Hon. H. M. Lewis as referee, upon proofs to be submitted by the respective parties orally or by deposition, subject to review by petition or appeal by said court or by the Circuit Court of Appeals if either party shall feel aggrieved by any decision that may be rendered in said matter by said referee or said court; the purpose of this stipulation being to reach a speedy determination of the rights of the parties without the delay attendant upon a trial in the state court."

The money was paid accordingly, whereupon the Atlas Company claimed the whole of it, and brought a petition for it before the referee, who decided that the trustee was entitled to retain the whole fund, upon the ground that the claimant was doing business in the state without complying with the statute, and claimed the money by virtue of a contract relating to property in the state which was made void by the statute.

The other contract is one made between the Atlas Company and the bankrupt, and was made in the state of Indiana, November 12, 1903, and covered the period from its date to December 31, 1904. The Empire Company was not a party to it. The bankrupt was made the agent of the claimant to sell its engines and boilers on commission in part of Wisconsin, Iowa, and Illinois, to receive and hold strictly on consignment all machinery shipped by it, to make monthly reports of all merchandise on hand unsold, pay freights, store and keep in good order without charge, pay taxes, keep the goods insured, hold unsold machinery subject to the orders of the claimant, ship it as directed, and pay charges, claimant to refund freights, also to guarantee payment for machinery sold. At the expiration of two years from the date of a shipment unsold goods to be bought and paid for in cash at claimant's option, or loaded on cars as claimant might direct, the bankrupt to pay freights. The bankrupt was also authorized to contract that the claimant would replace defective parts of the machinery, and would guarantee the payment of all accounts; and the bankrupt was to have the benefit of all sales made in its territory as fixed by the contract. The referee decided that this contract created an agency in this state for the sale of engines and other goods of the claimant; that it was a contract relating to property in the state, and was void because claimant did not file its corporate articles; that the claimant depends on this contract, and falls with it. The opinion of the referee is elaborate, and contains a thorough discussion of the questions involved.

Assuming that the agency contract does not relate to interstate commerce, and therefore is invalid if the claimant was doing business in Wisconsin, that question arises. The proper construction of section 1770b is thus presented: Foreign corporations doing business in the state are made to all intents and purposes domestic corporations. Whatever powers their home charters may give them, the statute in question confers upon them the powers of like domestic corporations, and no other. Paragraph 10 of section 1770b was taken verbatim from Illinois, and before its enactment here was there construed to be intended "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character, and bring them all under the same law." *Stevens v. Pratt*, 101 Ill. 206; *Santa Clara Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am.

Rep. 776. Of course this construction was adopted along with the statute itself.

Being thus made domestic corporations so far as any business in this state is concerned, they are required to pay a franchise tax on the same basis. By paragraph 3e of section 1770b a foreign corporation is required, under the penalties provided in paragraph 10, to file a statement of the proportion of the capital stock represented in this state by its property here located or to be acquired, and by its business to be transacted here (in case of a corporation intending to do future business), or of the proportion of property and business here for the preceding year (in case of a corporation already doing business). And it is required to pay for filing its articles in the first instance \$25, and \$1 a thousand upon all the capital employed or to be employed in this state in excess of \$25,000, and, in case an additional use of capital is shown in any subsequent report, a like payment of \$1 a thousand is to be made on such excess.

In order to secure the payment of this tax and to bring the foreign corporation doing business here within the reach of local process, contracts affecting the liability of the corporation are denied enforcement by it, but left fully enforceable against it, and a pecuniary fine is also imposed. Contracts relating to its rights or privileges are not affected, unless they relate to its property in this state. This distinction was made to leave foreign loan or other like companies free to make unilateral contracts, like bills and notes, beneficial to themselves in this state without being held to do business here, or subjected to penalty. But if the corporation has property in the state, and does business here, it cannot enforce, but is bound by the obligation of contracts relating to such property. *Catlin & Powell Co. v. Schuppert*, 130 Wis. 642, 649, 110 N. W. 818.

The intent of this legislation is clear, whatever may be the difficulty in applying it. When a corporation employs part of its capital (or all of it) in this state, it should pay accordingly. This is illustrated by the case of a company manufacturing engines and boilers, like the Atlas Company, incorporated in Indiana, and selling its products in a number of states. If instead of doing all its business in its home state, it employs part of its capital in Wisconsin by establishing one or more agencies there, or in any way prosecuting such a definite part of its business there that the amount of capital there employed can be reasonably and substantially estimated, it must file its articles there, and make its annual reports; and if it fails to do so, certain of its contracts are made void so far that it cannot enforce them. *Cone v. Tuscaloosa Mfg. Co. (C. C.)* 76 Fed. 891.

On the other hand, so long as it confines its business to interstate commerce, it is not affected by local restrictive legislation. It may freely sell through traveling agents, or by correspondence. Even though it maintains a warehouse for the storage of its property pending sale, and until the property loses its character as interstate commerce, and becomes part of the general mass of property in the state, the local statute has no application. *Greek Am. Sponge Co. v. Richardson*, 124 Wis. 469, 475, 102 N. W. 888, 109 Am. St. Rep. 961; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Nor-*

folk & Western R. Co. v. Sims, 191 U. S. 441, 447, 450, 24 Sup. Ct. 151, 48 L. Ed. 254.

Single or occasional acts of a corporation in another state, such as making a sale or taking a security, where the transactions are not continuous or of a permanent character, are not within such statutes as section 1770b, because the scope of the foreign business cannot be measured or fairly estimated, and because such occasional acts cannot be properly said to be doing business within the spirit or intent of such statutes, whose object is to subject foreign corporations actually putting themselves within the protection of its laws; and taking the benefit thereof, to the process of its courts, and also to compel them to bear their proper share of taxation. By a single or occasional act within the state, done only as incidental to business elsewhere transacted, no tangible part of their capital is actually protected by the laws of the foreign state, or can properly said to be employed therein. To tax the corporation under such circumstances, or penalize it, is not the purpose of such statutes; and, being highly penal in their character, they should be given a reasonably strict construction. See the discussion by Judge Adams in *Ammons v. Brunswick-Balke-Collender Co.*, 141 Fed. 570, 72 C. C. A. 614, and the cases there cited. See, also, the point fully discussed by Judge Sanborn of the Court of Appeals of the Eighth Circuit in *Dunlop v. Mercer*, 156 Fed. 545.

But the test of local employment of capital, made by the statute for the purpose of taxation, is not conclusive on the question of doing business in the state, for a foreign corporation may employ a considerable part of its capital here without coming within section 1770b. Thus it may solicit and fill orders by mail, as do Sears, Roebuck & Co. and Montgomery Ward, and employ nine-tenths of its capital in states other than that of its creation, without "doing business" in any other state. It may likewise do a loan business, and conduct a correspondence school, and many other sorts of business which include the employment of capital in other states, and which do not amount to interstate commerce, without doing business in any other state so as to come within statutes like section 1770b. *Chattanooga Bldg. Ass'n v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870.

Tested by these rules, and assuming the business not to be interstate commerce, was the claimant doing business in this state at the time the boiler was delivered to the Empire Company? Certainly it cannot be denied that it was employing part of its capital in this state. The agency contract gave the bankrupt a county in this state as its exclusive territory for the sale of its engines and boilers. A definite and readily ascertainable portion of its capital was thus here employed, so that its tax or license fee was entirely computable. It is therefore clear that, if the employment of capital were the only test, it must be concluded that the claimant was doing business in this state.

Notwithstanding this, does the case fall within the excepted class above mentioned, where a foreign corporation may employ capital without doing business in the state? Claimant's business is the manufacture and sale of engines, etc. It employed the bankrupt for a year, as its agent, to make sale of its machinery in a Wisconsin county. Substantially all the selling it did in that county was done by such

agent. A definite part of its business was done by it through such agent, done for it and in its name. By the rule established in the Supreme Court of the United States and the Supreme Court of Wisconsin claimant was, at the time of the sale of the boiler in question, clearly doing business in this state. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *International Text-Book Co. v. Peterson*, post.

But it is urged that the agency contract is not within the statute, because it affects only the right and not the liability of the claimant, because it was made in Indiana, and does not relate to property in this state, since at the time it was made claimant had no property here, and the property referred to in the contract was in Indiana. The case of *Chickering-Chase Bros. Co. v. White*, 127 Wis. 83, 106 N. W. 797, is relied on. That case holds that a chattel mortgage of property in Wisconsin, made in Illinois before the corporation did any business in this state, is valid. It is further argued that section 1770b must be strictly construed, and cannot include a contract made in Indiana, relating to property in Indiana. The contract in question related wholly to business to be done in Wisconsin, and to property to be sold in that state. This fact brings the case within *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 331, where the contract was made before section 1770b took effect, and where the contract was held not enforceable by the foreign corporation under that section. The contract made by claimant was made with reference to the Wisconsin law, and under that law, apart from the question of interstate commerce, claimant cannot enforce it.

2. That the agency contract relates to interstate commerce seems quite clear. It does not purport to sell anything. No vendor or vendee is mentioned. It was a bailment for sale by a factor under a *del credere* commission. In *re Columbus Buggy Co.*, 143 Fed. 859, 74 C. C. A. 611; *Butler Bros. Shoe Co. v. U. S. Rubber Co. (C. C. A.)* 156 Fed. 1, 5. The contract is squarely within the cases of *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336, and *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, supra; and as it provides for the carrying on of commerce between the states, it is not within the provisions of section 1770b of the Wisconsin statutes (*Sanborn's St. Supp.* 1906), and therefore entirely valid and enforceable by the foreign corporation. The only decision of the Supreme Court of Wisconsin which is cited as holding a contrary rule is *International Text-Book Co. v. Peterson (Wis.)* 113 N. W. 730. This was a case of teaching by correspondence. An agent of the International Correspondence Schools, of Scranton, Pa., such agent having the power to solicit pupils and submit contracts for correspondence study in Wisconsin, procured a contract from the defendant, who was to take the stipulated course, mail recitations, and pay a certain price for the tuition and certain text-books. He refused to pay for the text-books, and suit was brought to recover their price. There was no question of the fact that the International Correspondence Schools were doing business in Wisconsin, since it maintained a soliciting

agency there. The only question was whether the giving of lessons by mail, furnishing books, etc., was interstate commerce. The court, in a very interesting and forcible opinion, held that the case fell within the distinction made by the Supreme Court of the United States in deciding that insurance between citizens of different states is not interstate commerce. There is nothing in the Wisconsin case which affects, in the slightest degree, the case of a factor's contract for sale in this state of articles made in another. The case of *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989, is opposed to the conclusion reached in the case now under consideration, but its reasoning is not satisfactory. Inasmuch as the alleged invalidity of the factor contract is the only reason for a disallowance of the claim, the latter must be held valid.

It is urged, however, that since the boiler in question had been sold by the bankrupt under the agency contract to the American Lead & Zinc Company, and was afterwards taken by the bankrupt and resold to the Empire Mining Company, in carrying out the building contract of the bankrupt with that company, the boiler in question had ceased to be the subject of interstate commerce. This contention is undoubtedly sound, but immaterial; for the real question is whether section 1770b could prohibit the importation of the boiler, and annul the contract under which the importation was made. That question having been answered in the negative, and the contract sustained, it is of no consequence that the boiler, before its sale to the mining company, had become part of the common property of the state. But even though the conclusion that the contract relates to interstate commerce should be held differently, yet I think the claim depends on an implied contract of the Empire Mining Company not within the provisions of section 1770b of the Wisconsin Statutes. The Empire Company purchased the boiler from the bankrupt as the principal contractor. This transaction was between two domestic corporations, and so entirely lawful. The mere fact that it had been originally ordered by the bankrupt from the claimant for the American Zinc & Lead Company, under the factor contract, and had lain six weeks at Cuba City, does not bring the case within the terms of section 1770b. When the Empire Company took it, and was notified by the claimant that the boiler was its property, followed by the lien suit, an obligation in the form of a quasi contract arose, binding the Empire Company to pay for it to the claimant, instead of the bankrupt, with which it had contracted. No contract was made, but the law, in the interests of justice, raised an obligation on the part of the mining company, protected by the mechanic's lien statute. This obligation or quasi contract was not within section 1770b, although claimant was then doing business in this state without having filed its corporate articles. That an implied contract does not fall within statutes like section 1770b, see *Powder River Cattle Co. v. Custer County*, 9 Mont. 145, 22 Pac. 383, holding that a foreign corporation not having filed its

articles may recover back illegal taxes paid under protest. A similar decision was made in *U. S. Express Co. v. Lucas*, 36 Ind. 361, where an action for money had and received was sustained, although no suit on the express contract would lie. See, also, the reasoning of the court in *Delaware River Quarry Co. v. Bethlehem, etc., Co.*, 204 Pa. 22, 53 Atl. 533.

It is true that the claimant, in bringing its lien suit in the state court, by mistake claimed as a principal contractor when it should have claimed as a subcontractor. But the Empire Company did not raise any such objection. It agreed to pay the claim, and made a stipulation that it should do so, and allow the trustee and claimant to test the question in this court; and it has paid over the money under this stipulation. The only person who could raise the question of principal or subcontractor, or object to the allowance of an amendment of the lien claim or complaint in the lien suit, has been dismissed out of court by its own request. The argument of Mr. Olbrich, counsel for the claimant, on this point is thoroughly satisfactory. This situation gives the claimant a standing as a lien claimant, but does not compel it to claim under any express contract between it and the Empire Company, since the latter never made any contract with it. The most that can be said is that the Empire Company, having come into the possession of the claimant's boiler, ought to pay for it, either to the claimant or the bankrupt; and the latter has consented that the payment may be made to the claimant. The claimant also has enabled the Empire Company to make the payment to it by enforcing a lien, to the form of which the Empire Company waives all objection. Claimant may therefore insist on its right to the money, even though the factor contract be void, since it is not compelled to claim through that contract.

An order will be entered directing the trustee to pay the claimant the \$394.60 in question.

IN RE SCHMIDT.

(District Court, S. D. New York. February 5, 1908.)

ALIENS—NATURALIZATION—SON OF ALIEN PARENTS—DECLARATION OF INTENTION—STATUTES.

Rev. St. § 2168 [U. S. Comp. St. 1901, p. 1332], provides that, when any alien who had complied with the first condition specified in section 2165 died before he had been actually naturalized, his children should be considered as citizens and entitled to all rights and privileges as such on taking the oath prescribed by law; section 2172 [page 1334] provided that the children of persons who had been duly naturalized, or who previous to the passing of any law on that subject by the United States had become citizens of any one of the states, being under 21 at the time of the naturalization of their parents, if dwelling in the United States, should be considered as citizens; and Naturalization Act June 29, 1906, § 4, subd. 6, 34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1907, p. 422], declares that, when an alien who has declared his intention to become a

citizen dies before he is actually naturalized, the widow and minor children of such alien may by complying with the other provisions of the act be naturalized without making any declaration of intention. *Held*, that where petitioner's father declared his intention to become a citizen in 1895, when sections 2168, 2172, were in force, but died before he obtained his final papers, petitioner was entitled to naturalization on complying with the other provisions of the law, without making a declaration of intention.

Hugh Govern, Jr., Asst. U. S. Atty., for the United States.

ADAMS, District Judge. On the 5th day of August, 1907, the petitioner made an application to be admitted to citizenship in the United States. He alleged, *inter alia*:

"My father declared his intention to become a citizen of the United States on the 3rd day of June, anno Domini 1895. He died at N. Y. City N. Y. Feb. 11, 1906, when I was twenty years of age."

The question presented is whether an alien whose father declared his intention of becoming a citizen, but died before being naturalized, and during the minority of the child, may acquire naturalization under Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 422] upon complying with the other provisions of the act, without making a declaration of intention.

Subdivision 6 of section 4 of the act of 1906 provides:

"When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention."

Section 2168, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1332], provided:

"Widow and children of declarants.

When any alien, who has complied with the first condition specified in section twenty-one hundred and sixty-five, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

And section 2172 of the same [U. S. Comp. St. 1901, p. 1334] provided:

"Children of persons naturalized under certain laws to be citizens.

The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof. * * *

In the case of *Boyd v. Thayer*, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103, it was sought to oust Boyd from the office of Governor of the state of Nebraska on the ground that he had not become a citizen. It appeared there that he was born in Ireland in 1834 of Irish parents. His father emigrated to the United States in 1844 with all his family and settled in Ohio in which state he had resided continuously. In

1849 the father declared his intention to become a citizen but there was no record of his having completed his naturalization by taking out his certificate after the expiration of five years. The son, on attaining majority, voted in Ohio, under the belief that his father had become a citizen. In 1856 he removed to Nebraska, was elected Governor there and entered upon the discharge of his duties. His predecessor, Thayer, as relator, filed an information in the Supreme Court of Nebraska, in which he claimed that Boyd never having been naturalized was ineligible to hold his office. The matter was taken to the Supreme Court of the United States, where it was held that Boyd was a citizen because even if his father did not complete his naturalization before the son attained majority, the son did not lose the inchoate status which he had acquired through the father's declaration of intention. The sections above quoted, were then under consideration by the court and it was held (177) that they conferred the rights of citizenship upon the minor children of the declarant, when the proper oaths under the act should be taken.

The act of 1906, makes it plain that the minor children of a deceased declarant are not required to make any declaration of intention and relates back to those whose fathers died prior to September 26, 1906. The right now claimed apparently existed under the old law and there is nothing in the new law to take it away. Therefore I think it should be construed to permit this applicant, upon complying with the other provisions of the law, to obtain his naturalization.

RUDOLPH et al. v. BRYAN.

(District Court, S. D. New York. February 4, 1908.)

SHIPPING—SUPPLIES FURNISHED TO YACHT—LIABILITY OF OWNER.

Libelants furnished certain supplies to a yacht owned by respondent, preparatory to her going into commission under a charter. The supplies were ordered by the master, who was engaged by a broker, in whose hands respondent had placed the yacht for sale under an agreement between the broker and respondent that the latter should be at no expense in outfitting the vessel. By the terms of the charter the charterer was to pay for the supplies used, but after trial he refused to accept the yacht because of her unseaworthy condition. Libelants had no notice of the arrangement for a charter, but charged the supplies to the yacht and respondent, as owner. *Held*, that they were entitled to recover for the same from respondent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 323-325.]

In Admiralty.

Hyland & Zabriskie, for libellants.

Nicoll, Anable & Lindsay and Archibald R. Watson, for respondent.

ADAMS, District Judge. This action was brought by William H. Rudolph and others associated with him in business, to recover from Charles S. Bryan amounts claimed to be due for certain supplies furnished to the steam yacht *Czarina* in July and August, 1906, as follows:

July 28th, 1906; towing yacht from Mariner's Harbor, Staten Island, N. Y., to Tietjen & Lang Dry Dock, Hoboken, N. J.....	\$ 50 00
August 7th, 1906; furnished 30 tons of coal to said yacht Czarina at \$5.50 per ton.....	165 00
August 7th, 1906; furnished 20 tons of coal to said yacht Czarina at \$5.20 per ton.....	104 00
August 11, 1906, furnished 4,000 gallons of water to said steam-yacht Czarina, at 1/2¢ per gallon.....	20 00
August 27, 1906, furnished 50 tons egg coal to said yacht Czarina at \$5.85 per ton.....	292 50
	<hr/> \$631 50

The answer was a general denial but on the trial it was amended as follows:

"For a further and separate and distinct defense the respondent avers, on information and belief, that at the time the supplies in the libel and complaint were furnished the said yacht Czarina was under charter to Mr. Samuel Untermeyer and Dr. Seward Webb; and that said supplies were not ordered or received by respondent or used by him, nor by any one authorized to represent him."

It appears that the libellants were engaged in business in Erie Basin, Brooklyn, in towing and furnishing supplies, of the nature indicated, to vessels, and that on or about the dates mentioned, they delivered to the yacht the items of the account set forth above. It also appears that the respondent had no personal connection with the ordering of them but it was done through the master and Mr. Cox, of Cox & Stevens, yacht brokers in New York, who had been employed by the respondent to effect a sale of the yacht, which had been lying unemployed at Mariner's Harbor, Staten Island, until she was towed, July 28th, to the Tietjen & Lang Dry Dock in Hoboken, New Jersey. She had been in Cox & Stevens' hands for a year or more prior to this time for the purpose of sale but no success had been attained although the brokers had been urged by the respondent to make special efforts to bring it about. Mr. Cox in the spring of 1906, advised the respondent that it would be a good thing to have the yacht put into commission because it would facilitate a sale. The respondent agreed with this, provided he should be at no expense, and Mr. Cox engaged the master for the boat, who selected the crew.

About this time, there was a prospect of chartering the yacht to Mr. Samuel Untermeyer. Some oral understanding was reached between him and the respondent through Mr. Cox, which subsequently, August 3d, was put in writing, as follows:

"Agreement of charter made and entered into between Charles S. Bryan, of the City and State of New York, Owner of the steam yacht Czarina, hereinafter called the Owner, party of the one part, and Samuel Untermeyer, of the City and State of New York, hereinafter called the Charterer, party of the other part.

(1) Whereby the said Owner agrees to let, and the said Charterer agrees to hire, the said yacht, from noon on the twenty-eighth day of July, to noon on the first day of October, 1906, for the consideration hereinafter named.

(2) The owner agrees to turn over the vessel to the charterer in the water in the harbor of New York as she stands, with all the gear, equipment, furniture and belongings, usual suitable and necessary for a vessel of her size and class.

* * * * *

(4) The Charterer agrees to take over the vessel for the purpose of putting her in commission in the harbor of New York, at noon on the twenty-eighth day of July, and to re-deliver her on or before noon on the first day of October, 1906, in New York harbor in as good condition as he received her except to the extent to which the owner is to insure her reasonable wear and tear only excepted.

(5) The Charterer also agrees to pay all running expenses of the yacht except as to losses assured against, from the date of actual delivery on Aug. 10th, and hereby warrants that she shall be redelivered free and clear of all liens whatsoever incurred by him during such period and further agrees to indemnify and save harmless the Owner from and against all such claims.

* * * * *

(9) As the sole and full compensation to the owner for said charter and in full payment and satisfaction of all claims therefor, the charterer is to pay the expense of putting the boat in commission, not exceeding however the amount agreed upon with Messrs. Cox & Stevens, and the owner is to have no other claim or demand whatever upon the charterer hereunder.

(10) If for any reason the boat is not delivered to the charterer in full commission at noon on the 10th day of August, 1906, this agreement may at his option be declared null and void."

The amount referred to in § 9 of said agreement was \$3,000. Mr. Untermeyer paid some \$950. of this amount, \$500. prior to August 11th and \$450. subsequent thereto.

There was no actual delivery of the yacht to Mr. Untermeyer until the 11th of August, when he accepted her conditionally upon her being seaworthy. She was under the contract to have been delivered on the 10th but was not then in condition for service, owing to a defective boiler, which was still leaking on the 11th when Mr. Untermeyer went aboard for a provisional trial. The *Czarina* (D. C.) 152 Fed. 297, 299. She proved to be unsatisfactory and in a few days was rejected by him and returned to the owner, who, when advised of it by Mr. Cox said, that "he wasn't surprised, in a way."

The libellants had no notice of these arrangements respecting the chartering. They delivered the supplies in the ordinary course of business, charging them to the yacht and owner. They knew nothing of the charterer's connection with the boat and, as far as appears, nothing occurred by which they were acquainted in any way with the fact that the boat was being repaired under a contract which, if carried out, might have made the charterer liable for these supplies. The contract, however, was not carried out because the yacht was unseaworthy and it is very doubtful, under the circumstances, if there could be any recovery from the charterer. The respondent's proctor, in moving to dismiss, said, evidently referring to the charterer:

"I move to dismiss the libel on the ground that the libellants' proof has failed to make out a case against Mr. Bryan. It has shown that the supplies were ordered by persons having no representative connection with Mr. Bryan; it shows that they went on board at a time when Mr. Bryan had divested himself of the use and control of the boat, and I will add, by way of suggestion, that the persons who are responsible and to whose responsibility the evidence points are entirely responsible, so that the libellants need suffer no hardship by this decision. I want to say in conclusion that I have stated to counsel for libellants that he was after the wrong man, and that Mr. Bryan was not liable, for reasons which have been made clearly to appear to your Honor in the evidence, and I respectfully ask that the libel be dismissed."

If it be true, as I have suggested, that there could be no recovery against the charterer, what remedy would the libellants have for the value of these supplies? I think it is clear that they have a claim against the owner for which he must respond, notwithstanding any agreement he may have had with Mr. Cox that he should not be liable for the expense of putting the vessel in commission.

Decree for the libellants, with an order of reference.

SWAN et al. v. WILEY, HARKER & CAMP CO.

(District Court, S. D. New York. February 5, 1908.)

ADMIRALTY—COSTS—DOCKET FEE AND DISBURSEMENTS ON ACCEPTED OFFER OF JUDGMENT.

Where an offer of judgment made by a respondent under admiralty rule 36 of the Southern district of New York is accepted, and there is no hearing by the court upon the merits of the case, the libellant is not entitled to tax a docket fee, but is entitled to tax disbursements necessarily made in order to avail himself of the offer.

In Admiralty. On exceptions to clerk's taxation of costs.

Wing, Putnam & Burlingham, for libellants.

Hyland & Zabriskie, for respondent.

ADAMS, District Judge. This is an appeal from the clerk's taxation allowing the recovery by the libellants of a docket fee and certain disbursements made subsequent to an offer of judgment which was duly excepted to by the respondent.

With respect to the docket fee, the action was to recover certain demurrage. The respondent filed an answer denying that any demurrage was due. Later the respondent served upon the libellants' proctors, under Admiralty Rule 36, an offer to allow judgment for the sum of \$120, with interest and costs to the date of the offer. This offer was duly accepted and now in entering judgment thereupon the libellants seek to recover a docket fee, citing *Hayford v. Griffith*, Fed. Cas. No. 6,264, 3 Blatchf. 79 and *The Alert* (D. C.) 15 Fed. 620. These decisions would seemingly determine the controversy in their favor, but more recently a stricter construction has been given to the act, which provides for the allowance of a docket fee as follows:

"On a trial before a jury * * * or on a final hearing in Equity and Admiralty."

The absence of a final hearing has been held to exclude a docket fee where it appears that the court has not in any way passed upon the merits of the controversy involved in the action. *Ryan v. Gould* (C. C.) 32 Fed. 754; *Kaempfer v. Taylor* (C. C.) 78 Fed. 795; *The Mount Eden* (D. C.) 87 Fed. 483; *De Roux v. Girard* (C. C.) 92 Fed. 948; *Merritt & Chapman Derrick & Wrecking Co. v. Catskill & N. Y. Steamboat Co.* (D. C.) 112 Fed. 442; and *the Claverburn* (D. C.) 148 Fed. 139. I think that this case falls within the spirit of those cited and must therefore hold that the allowance of this fee was wrong.

Exception sustained.

The disbursements in dispute were as follows: Filing acceptance of offer 10c., taxing costs \$1.10, final decree \$1.50. It is urged by the exceptant that there is nothing in the rule which would entitle the libellants to anything more than the disbursements incurred prior to the time the offer was made.

The rule, No. 36, provides:

"At any time * * * the respondent * * * may serve upon the libellant's proctor a written offer to allow a decree to be taken against him for the sum of money therein specified, with costs to the date of the offer to be taxed. * * *"

Nothing appears in the rule which prevents the recovery of items necessarily paid by the libellant in order to avail himself of the offer. He is obliged to file the acceptance, tax the costs, and enter a final decree.

Exception overruled.

In re SCHATZ.

(Circuit Court, D. Oregon. April 7, 1908.)

ALIENS—NATURALIZATION PROCEEDINGS—WITNESSES.

The two witnesses required to be produced by an alien in support of his petition for admission to citizenship by Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420), need not be the same persons who verified his petition, nor need they necessarily be the persons noticed as such as required by section 5 (34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 423]), but if a reasonable showing be made to the court that the applicant is unable to secure the attendance of such witnesses, he may produce or summon others in the ordinary way.

Petition for Naturalization.

John McCourt, U. S. Atty.

WOLVERTON, District Judge. The petitioner, having heretofore filed his application to become a citizen of the United States, at this time applies to the court for his final admission. The question to be determined is whether other witnesses can be substituted at the hearing for those named in the notice which is required to be posted for 90 days prior to the admission of the applicant. The statute (Act Cong. June 29, 1906, c. 3592, § 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 420]) requires: (1) That the applicant shall make his declaration of intention to become a citizen. (2) That not less than two years nor more than seven years after he has made such declaration, he shall make and file his application to be permanently admitted to citizenship. Especial provision is made as to what shall be stated in his application. It is further required that the petition shall be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his peti-

tion; that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States. (3) That the petitioner shall, before he is admitted to citizenship, declare on oath, in open court, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, etc. (4) That it shall be made to appear to the satisfaction of the court admitting any alien to citizenship that, immediately preceding the date of his application, he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution is required—the name, place of residence, and occupation of each witness to be set forth in the record.

By section 5 of the act it is required:

"That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned."

By this statute the court is constituted the trier of the applicant's fitness to be admitted to citizenship. It determines the facts at issue upon the oath of the applicant and the testimony of at least two other witnesses, citizens of the United States. There is no specific requirement that these witnesses shall be the same as the witnesses verifying the petition; nor do I think that such is the intendment of Congress. Of necessity, when the provisions of the statute relative to the verification of the petition are read in connection with the form of affidavit prescribed, the name, place of residence, and occupation of each of the verifying witnesses are set forth in the record by an observance of the procedure; and if it was intended that they should also constitute the additional witnesses to be produced at the final hearing, why require that the same matter as it respects such witnesses be again set forth in the record? Furthermore, if it was desired that the same witnesses should perform both functions, namely, verifying the petition and establishing the appropriate facts at the final hearing, it would have been an easy matter for Congress to have said so in short order. But this it has not done. So it seems to me clear that it is not the purpose of the act that the witnesses to be produced at the final hearing shall be the same as those verifying the petition. They may be the same, if convenient, but it is not required that they shall be.

Now, proceeding another step, the statute directs that the clerk shall

give notice of the filing of the petition, by posting, under appropriate heading, certain matter descriptive of the applicant, and the names of the witnesses whom the applicant expects to summon in his behalf on the final hearing of the petition. The purpose of this provision is, it seems to me, to insure publicity of the proceeding, and, among other things, to inform the public as to the names of the witnesses by whom the applicant expects to establish his right to be admitted to citizenship, and of course the act contemplates that, in the usual course, such witnesses shall be called at the final hearing. The law, however, has anticipated that it may happen, as it often does in judicial investigations, that the witnesses desired cannot be produced, in which event it has provided that other witnesses may be summoned. In the ordinary course, the fact that the witnesses noticed could not be produced would not be developed until after the posting of the notice, and probably until shortly before, or at the day of trial. In such event, the inquiry is, in what manner shall the other witnesses be summoned—in the regular way, and if need be by aid of subpoena, or by posting the names for 90 days, and then compelling attendance? It must be admitted that if the latter procedure were designed, it would be very cumbersome, and might result in defeating the applications of worthy persons for citizenship, and I do not think that such is the intendment of the law; but that, when it is made to appear by reasonable showing that the applicant is unable to secure the attendance at the final hearing of the witnesses noticed, he may then summon other witnesses in the ordinary way, by securing their attendance through request, or requiring them to appear by the aid of a subpoena, that he may establish his cause. I do not see how the government can be prejudiced by such a practice, and it is clearly in consonance with the plainest and simplest interpretation of the statute. I do not overlook the fact that the law has been otherwise construed (In the Matter of the Petition of Joseph O'Dea for Admission to Citizenship, 158 Fed. 703, decided in the Southern district of New York); but, from a careful survey of the whole act, I am unable to concur in the view there expressed. The applicant, however, should make every reasonable effort to produce the witnesses noticed; and it is only in the event of having failed of his purpose after making such reasonable effort, that he will be permitted to summon other witnesses. The record should be made to show the facts in such an exigency.

The petitioner will be admitted to citizenship.

ROBERTS v. GREAT NORTHERN RY. CO.

(Circuit Court, D. Washington, N. D. July 22, 1904.)

No. 1,148.

DEATH—ACTION FOR WRONGFUL DEATH—CONSTRUCTION OF STATUTE.

The Washington statute, giving a right of action to recover damages for wrongful death for the benefit of the widow and children of the deceased, cannot be made the basis of an action where the widow and children are aliens not within the state nor inhabitants thereof.

On Demurrer to Answer.

George Saulsberry, for plaintiff.

L. C. Gilman, for defendant.

HANFORD, District Judge. By the demurrer to the second affirmative defense of the defendant's answer, the question is fairly raised whether the statutes of this state create a legal liability to render compensation in damages for a wrongful or negligent act causing the death of an alien, where the wrongful or negligent act and the death occur within this state, and where the wife and children of the deceased are aliens not domiciled within the state nor inhabitants thereof. It is my opinion that the plaintiff as administrator of the estate of the deceased is a competent party to maintain the action for the benefit of the wife and children of the deceased, if a right of action exists; and that the court is bound by the decisions of the Supreme Court of the United States to hold that there is no common-law right of action for an injury causing the death of a person. Therefore, the arguments made in behalf of the plaintiff relating to the capacity of the plaintiff to sue, and to the competency of a federal court to render a judgment for the benefit of an alien, where a right of action exists, do not meet the issue raised by the demurrer.

We have a statute which gives a right of action in broad and comprehensive terms, but which has been construed by the decisions of the Supreme Court of the state to be applicable only to cases in which a surviving widow or children may claim its benefits, and the question now to be decided is whether, by the legislative intent the statute is further restricted in its application, so that its benefits may be claimed only by citizens and inhabitants of the state and sojourners therein. The defendant does not contend that an alien widow residing within the state or temporarily present within the state may not claim the protection of the law, but does contend that the general rule for the construction of statutes which confines the force of legislative enactments within the territorial boundaries of the commonwealth, so that only those who owe allegiance to the local government and are entitled to claim its protection and obligated to yield obedience, also restricts beneficial laws in like manner, so that only citizens and inhabitants and temporary sojourners to whom the local government owes protection in return for obedience are entitled to claim benefits. There is a conflict of authorities upon this subject, but my attention has not been directed to any decision by the Supreme Court of this state, or of the courts having appellate jurisdiction to review the decisions of this court which authoritatively determines the question for this court. I believe that the true doctrine has been ably and luminously stated in a well-considered decision by the Supreme Court of the state of Wisconsin, in the case of *McMillan v. Spider Lake S. & L. Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947, and for the reasons set forth in the opinion in that case, I hold that the defendant's contention is correct.

Demurrer overruled.

CASCADEN v. WIMBISH.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1908.)

No. 1,502.

1. MINES AND MINERALS—MECHANICS' LIENS—ALASKA CODE—WORK DONE FOR LESSEE OF MINING CLAIM.

Civ. Code Alaska, §§ 262, 263, and 265, provide, *inter alia*, for a laborer's lien for work done on a mine at the instance of the owner or his agent; that any person having charge of the work shall be deemed his agent; that in case the work is done for a lessee without the lessor's knowledge, the lien shall extend only to the leasehold interest, but the owner's interest shall be subject to a lien for any work done thereon with his knowledge, unless he shall give notice that he will not be responsible within three days after he obtains such knowledge. *Held*, that the lien given by such sections, construed together, extends to and binds the interest of the owner of a mining claim for improvements made thereon under direction of a lessee with the owner's knowledge and in the absence of any disclaimer of responsibility by him.

2. SAME—SUIT TO FORECLOSE LIEN—PARTIES.

In a suit against the owner of a mining claim to establish a laborer's lien thereon for work done at the instance of lessees, such lessees are not necessary parties, and it was within the discretion of the court to refuse to permit the filing of an amended answer setting up their nonjoinder as a defense, after the case was ready for trial, and after such lessees had left the jurisdiction of the court.

3. MECHANICS' LIENS—ALLOWANCE OF ATTORNEY'S FEES—CONSTITUTIONALITY OF STATUTE.

The provision of Civ. Code Alaska, § 270, authorizing the court to allow the plaintiff a reasonable attorney's fee on entry of judgment foreclosing a mechanic's or laborer's lien, is constitutional and valid.

4. MINES AND MINERALS—PERSONS ENTITLED TO LIEN—NATURE OF WORK.

Where men were hired to work in making improvements on a mining claim at a certain sum per day and their board, one who devoted a part of his time to cooking for himself and the others is entitled equally with the others to a mechanic's lien for his wages.

5. SAME—WORK ON MINING CLAIM—"LABOR DONE UPON CLAIM."

Work done in cleaning up and washing gold taken from a mining claim is "labor done upon the claim," for which the workmen are entitled to a lien under Civ. Code Alaska, § 262.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska.

The appellee brought a suit to foreclose laborers' liens on side claim No. 13A, below Discovery on Cleary creek, in the Fairbanks recording district, Alaska. One of the liens was for work done by the appellee. The others were liens assigned to him by men who were engaged in the same work. The mining claim belonged to the appellant. On October 21, 1904, he leased to Robert McMillan and others that portion of the claim commencing at a point 900 feet below the upper center stake, and extending thence the full width of the claim. The lessees were to pay him 40 per cent. of the gross output of all gold extracted. The lease was never recorded. Upon May 16, 1905, McMillan sublet to Clyne, Runner, Lungvich, and Saltz the lower 458 feet of the premises leased to him by the appellant. The sublessees were to pay McMillan 40 per cent. of the gross output. The appellant, while not mentioned in the body of the lease, joined with McMillan in its execution and acknowledgment. The sublease was not filed for record until August 15, 1905, about two months after the first lien claimant, Keith, had begun work under the employment of Saltz. The appellee, together with the other lien

claimants, were collaborators, employed in the first instance by Saitz, the sublessee who was in charge of the work. They afterwards continued working under the superintendency of one Andrich, who then had charge of the work. These laborers, when they entered into the employment of the sublessees, were told nothing as to the lease under which Saitz and the others were working. They first knew that their employers were laymen after Saitz left the claim on August 29, 1904. They continued to work under Andrich, who had acquired the interests of Clyne and Lungvich. The work which they did was to construct a 1,400-foot ditch and flume and to timber shafts and to make tunnels and cross-drifts. During all the time while the appellee and his collaborators were engaged in working on the claim, the appellant was in and about the property and saw them working. He gave them no notice or intimation that he disclaimed responsibility for any liens that might arise under the law. The appellant attempted to show that the appellee and his assignors had entered into an arrangement with the appellant and Andrich to take a lease with the latter, and in consideration thereof to release all claims against the property; but the weight of the evidence is that no lease was given to the lien claimants, but that when they told him they had no money the appellant urged them to go on and get something out of the ground, if they could before it froze, in order to pay their wages. This they did, and they succeeded in having two cleanups within four or five days before the freezeup, in which they realized some \$55 apiece. Of the amount they had taken out, \$100 was paid to the appellant, who claimed it as a royalty; but, when the men denied his right to royalty, he informed them that he was going to use it to pay one of the men who worked there. This occurred about September 24th or 25th, after which the laborers abandoned the claim, and filed their liens, crediting the \$55 as paid to each thereon. There was a conflict in the evidence on the question of working the ground after Saitz left, but the court found that the appellee and his assignors worked for the sublessees under the superintendence of Saitz, with the assent and knowledge of the appellant after Saitz and Andrich had assumed control. A decree was entered sustaining and foreclosing the liens.

The provisions of the Civil Code of Alaska applicable to the case are the following:

"Sec. 262. Every mechanic, artisan, machinist, builder contractor, lumber merchant, laborer, teamster, drayman, and other persons performing labor upon or furnishing material, of any kind to be used in the construction, development, alteration or repair, either in whole or in part, of any building, wharf, bridge, flume, mine, tunnel, fence, machinery, or aqueduct, or any structure or superstructure shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration or repair, in whole or in part, of any building or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this Code.

"Sec. 263. The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the court at the time of the foreclosure of such lien), and the mine on which the labor was performed or for which the material was furnished shall also be subject to the liens created by this Code if, at the time the work was commenced or the materials for the same had been commenced to be furnished, the land belonged to the person who caused the building or other improvement to be constructed, altered, or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien; and in case such interest shall be a leasehold interest, and the holder thereof shall have forfeited his rights thereto, the purchaser of such building or improvement and leasehold term, or so much thereof as remains unexpired at any sale under the provisions of this Code, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay the lessor all arrears of rent or other money and costs due under the lease, unless the lessor shall have

regained possession of the land and property, or obtained judgment for the possession thereof, prior to the commencement of the construction, alteration, or repair of the building or other improvement thereof; in which event the purchaser shall have the right only to remove the building or other improvement within thirty days after he shall have purchased the same; and the owner of the land shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal."

"Sec. 265. Every building or other improvement mentioned in section two hundred and sixty-two, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein; and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this Code, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the land, or upon the building or other improvement situated thereon."

T. C. West, Fernand de Journal, and H. J. Miller, for appellant.
John L. McGinn, Martin L. Sullivan, Campbell, Metson, Drew, Oatman & McKenzie, and E. H. Ryan, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The principal question here presented is whether a laborer's lien created by the Alaskan Code extends to and binds the interest of the owner of a mining claim for improvements made thereon under the direction of a lessee with the owner's knowledge, and in the absence of a disclaimer of responsibility by the latter. By section 262, it is provided that one who performs labor or furnishes material for construction or development of a building, mine, etc., shall have a lien thereon for work done or material furnished at the instance of the owner of the building or other improvement, and that every contractor, subcontractor, architect, builder, or other person having charge of such construction shall be held to be the agent of the owner. The object of section 263 is to declare to what land the lien shall extend, and it provides for a lien on a leasehold interest in cases where the lessee causes the work to be done, and the lessor has no knowledge that it is being done. Section 265 relates to cases where the owner, having such knowledge, fails to give notice that he will not be responsible therefor, and it applies as well to property under lease to another as to property not leased. It refers by its terms to section 262, and declares that there shall be a lien on the mine or improvement therein referred to if the owner, being aware of the work, fails to notify the laborer that he will not be responsible. In other words, these three sections, construed together, mean that the person in charge of the work shall *prima facie* be deemed to be the agent of the owner, and the property of the latter shall be charged with the lien under the express provisions of section 262; that, if the person in charge is not in fact such agent, the interest of the owner shall, nevertheless, be liable for the improvement if it is constructed with his knowledge, and he fails to post the required notice disclaiming

responsibility; and that, if the work is done for a lessee of the property, liability is confined to the leasehold estate, if the owner had not knowledge of the construction of the improvement, or if, having such knowledge, he gave notice that he would not be responsible. Such a construction gives effect to all the provisions of the law, and is the construction given to similar statutes in California, Nevada, and Oregon. *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Title Guarantee & Trust Co. v. Wrenn*, 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 454; *Cross v. Tscharnig*, 27 Or. 49, 39 Pac. 540; *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30.

It is assigned as error that the court refused to permit the appellant to amend his answer by adding thereto the allegation that Clyne, Runner, Lungvich, and Saitz were necessary parties to the final determination of the suit. This application was made when the cause came on for trial on November 8, 1906. The appellee objected to the amendment for the reason that it had not been suggested when the pleadings were made up, and for the further reason that the additional parties so named in the application were then out of the jurisdiction of the court and could not be served. The complaint had been filed on February 21, 1906, and the answer had been interposed on August 16th. While the persons so named in the application would have been proper parties to the suit, they were not necessary parties to the determination of the primary question involved therein, which was whether the interest of the appellant in the mining claim should be charged with the liens. There was no abuse of the discretion lodged in the trial court, therefore, in denying the application made so late and after the additional parties so suggested had left the jurisdiction of the court and could not be served.

Error is assigned to the allowance of attorney's fees to the appellee in the judgment in the court below. Section 270 of the Civil Code of Alaska (Act Cong. June 6, 1900, c. 786, 31 Stat. 536) provides that, in all suits to enforce such liens, the court, on entering judgment for the plaintiff, shall allow as part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees. It is contended that this provision for attorney's fees is unconstitutional. Counsel for the appellant cite the recent decision of the Supreme Court of California in *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, in which that court held a similar provision of the statutes of California violative of the state Constitution, as well as of the fourteenth amendment to the federal Constitution, which guaranties to every person the equal protection of the laws. But in the present case the fourteenth amendment has no application for its prohibitions are addressed to the states only. No state shall deny to "any person within its jurisdiction" the equal protection of the laws. The only obligation resting on the United States is to see that the states do not deny that right. *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

That such a statute is violative of state Constitutions has also been held in *Randolph v. Supply Co.*, 106 Ala. 501, 17 South. 721, *Davidson v. Jennings*, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. Rep.

49, and Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006. But, the reverse has been held in Dell v. Marvin, 41 Fla. 221, 26 South. 188, 45 L. R. A. 201, 79 Am. St. Rep. 171, Duckwall v. Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797, Robertson v. Moore, 10 Idaho, 115, 77 Pac. 218, Littell v. Saulsberry, 40 Wash. 550, 82 Pac. 909, Ivall v. Willis, 17 Wash. 645, 50 Pac. 467, Title Guarantee & Trust Co. v. Wrenn, 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 454, Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280, and Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491. In Gulf, Colorado & Santa Fé Ry. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, the Supreme Court held unconstitutional a state statute allowing attorney's fees in certain cases of suits for personal services rendered to railroad companies, or for damages for overcharges on freight or claims for stock killed or injured by any railroad company, on the ground that such a statute operates to deny the railroad company the equal protection of the law, in that it requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. But in the opinion in that case the court had in mind the policy of state legislation for the protection of laborers' liens, and to distinguish the case under consideration from such a case said:

"Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency."

It is the purpose of the lien law to secure "priority of payment of the price and value of work performed and materials furnished in erecting and repairing a building or other structure." Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 136, 12 Sup. Ct. 181, 35 L. Ed. 961. In harmony with this purpose and with the above-quoted utterance of the Supreme Court in Gulf, Colorado & Santa Fé Ry. v. Ellis, Congress has provided for the protection of the lien claimant by authorizing the court to allow him a reasonable attorney's fee in case the payment of his lien is unsuccessfully resisted. We find no ground for saying that such a law is unconstitutional.

It is contended that a portion of the work for which the liens were claimed was work for which no lien attaches under the law. It appeared that all of the men were hired at the usual rate of employment, which was \$5 a day and board. One of them devoted a portion of his time to cooking for himself and the others, and the remainder of his time to work on the shafts and tunnels. It is urged, under the authority of McCormick v. Los Angeles City Water Co. et al., 40 Cal. 185, that for the time so devoted to cooking there could be no lien on the mining claim. We think the facts in the present case distinguish it from the case so cited. In that case, the cook was employed by one who had a contract to do a specific work for an agreed sum, and there was ground for holding that the expense of the cooking was not chargeable against the property. In the present

case, men were hired to work on the premises for a fixed price and their board. If they had been obliged to employ another to do their cooking, it is evident that it would have been necessary to increase their wages by the amount of the expense so incurred. The mining property received the benefit therefore of all the work done by all the men, and, in the theory of the lien law, the value of the mining property was enhanced by the whole thereof. In *Young v. French*, 35 Wis. 111, and *Winslow et al. v. Urquhart*, 39 Wis. 261, it was held that one who cooks for the men at work on logs, under a logging contract, is entitled to a lien for his wages under a statute which gives to every person who shall furnish any supplies or do or perform any labor or services, in cutting, felling, or hauling logs or timber, a lien on them for the amount due therefor. In *Lybrandt v. Eberly*, 36 Pa. 347, it was held that, if a mechanic engages hands at a certain sum per diem and their board, he may include in his lien the boarding of the workmen, and the same was held in *Bangs v. Berg*, 82 Iowa, 350, 48 N. W. 90, where it was a part of the contract that the owner of the property to be improved should board the hands and team engaged in the work.

Without merit, also, is the contention that the lien claimants should have no lien for the time and labor devoted to cleaning up and washing the gold taken out of the mine. This was labor done upon the mine within the meaning of section 262.

The decree is affirmed.

In re McCREA.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 204.

1. BANKRUPTCY—GROUNDS FOR REFUSING DISCHARGE—FAILURE TO KEEP BOOKS.

When a bankrupt was an employé and not engaged in any business of his own, his failure to keep books showing his financial condition does not indicate a fraudulent intent which justifies the refusal of his discharge.

2. SAME—MAKING FALSE OATH.

The fact alone that a bankrupt failed to schedule an interest in the estate of his deceased father is not necessarily attributable to a fraudulent intent, so as to justify the refusal of a discharge on the ground of his making a false oath in verifying his schedules, when by the will of his father the property was left in trust; and the question whether or not the bankrupt had an interest therein which was transferable was involved, and he, moreover, claimed to have transferred all of his interest in the estate to his wife while solvent.

3. SAME.

A bankrupt is not guilty of making a false oath because he omits from his sworn schedule securities which are worthless.

Appeal from the District Court of the United States for the Northern District of New York.

Appeal from an order of the District Court, denying the application of a bankrupt for his discharge.

John R. Keeler, for appellant.
George B. Draper, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. Augustine L. McCrea, having been adjudicated a bankrupt, applied in due season for his discharge. A creditor objected upon the following grounds: (1) That the bankrupt had committed an offense punishable by imprisonment under the bankruptcy law in knowingly and fraudulently making a false oath. (2) That he had fraudulently destroyed, concealed, and failed to keep records or books of account. (3) That he had failed to obey a lawful order of the referee for the production of books and papers. The District Court referred the matter to a special master, who reported that the creditor had failed to sustain his objections, and that the bankrupt was entitled to his discharge. The court, however, declined to confirm this report, sustained the creditor's objections, and denied the discharge. The bankrupt was entitled to his discharge as a matter of right, unless debarred upon one of the statutory grounds specified by the creditor. We will consider these grounds in their inverse order.

It is charged that the bankrupt disobeyed an order of the referee requiring him to produce certain books and papers. He produced some papers, and explained that others were lost or had been destroyed in a fire. He was not proceeded against for contempt, and the special master, who was also the referee issuing the order, was apparently satisfied that his explanation was correct, and found that he did not disobey the order. Upon an examination of the record we reach no different conclusion. While the attitude of the bankrupt upon his examination was the opposite of that of a frank witness, a finding that he intentionally violated the referee's order would be unwarranted.

The next objection to the discharge was that the bankrupt fraudulently concealed and failed to keep books of account showing his financial condition. There was no evidence that the bankrupt concealed any books for it did not appear that he kept any. He was the superintendent of a mine. His personal business did not require the keeping of books. His failure to keep them indicated no fraudulent intent.

The real question in the case, then, is raised by the first objection—whether the bankrupt was guilty of an offense under the bankruptcy law. The offense charged was that of making a false oath with respect to his property. The objecting creditor claimed that he knowingly and fraudulently withheld from his schedule of assets two items: (1) His interest in his father's estate. (2) His stock in the Standard Pyrites Company. The father of the bankrupt died in 1898, leaving a will in which he left his property in trust during the lives of the trustees. After providing for certain payments from the income to the testator's wife and daughter, the will directed the division of the remaining income among his children, including the bankrupt. Upon the death of either the wife or daughter during the existence of the trust the remainder income is increased. The will further provides that, upon the termination of the trust, the principal estate shall be divided among the children then living and the issue of deceased children. There was no evidence concerning the value of the estate or,

the income thereof, except that the bankrupt's wife had received in the aggregate \$172 therefrom. The real estate described in the will was situated in New York. The inquiry, then, is whether this interest of the bankrupt was property which passed to the trustee in bankruptcy and which should have been included in the schedule of assets, if not previously conveyed away.

With respect to the principal estate there is ground for two contentions: (1) It may be urged that the right of the bankrupt to take was wholly dependent upon the contingency that he outlive the surviving trustee—that it cannot be determined until the death of the trustee who the remaindermen will be. Such an interest in many jurisdictions would be held to be a mere contingent remainder and not "property," the title of which vested in the bankrupt, within the meaning of the bankruptcy law. See *In re Twaddell* (D. C.) 110 Fed. 147; *In re Wetmore*, 108 Fed. 523, 47 C. C. A. 477. (2) It may be contended that a devise of this character constitutes a vested and alienable remainder subject to be defeated by the contingency that the bankrupt may not outlive the trustees. The New York decisions are controlling with respect to the title to said real estate, and, although by no means uniform, seem to support the second contention. See *Re Hoadley* (D. C.) 101 Fed. 233. Moreover, in applying these decisions, we are met by the further inquiry whether the provisions of the will constituted a gift or a direction to divide. It is unnecessary for us to decide these questions. For the purposes of this case it is sufficient to point out their involved character.

The bankrupt's interest in the income is of a less uncertain nature. This interest seems to be vested and alienable. If not conveyed away, it undoubtedly should have been included in the bankrupt's schedule. The bankrupt, however, claims that some years before the bankruptcy proceedings, and before the creation of the debt due the objecting creditor, he conveyed all his interest in his father's estate to his wife in consideration of love and affection. He failed to produce the conveyance, and his testimony was insufficient to establish the due execution and delivery of a legal conveyance. But, if certain interests in the estate of the bankrupt's father should have been included in the schedule of assets, it does not necessarily follow that the bankrupt knowingly and fraudulently made a false oath when he verified the schedule which did not mention them. It was not obvious what interests belonged to the bankrupt or that they were transferable. Moreover, as we have pointed out, the bankrupt claims that he did not own those interests. Informality in the conveyance and its delivery might have rendered it illegal, and still not affect the bankrupt's good faith. That but very little income had ever been received did not affect the character of the interests as property, but did have a bearing upon the bankrupt's fraudulent intent. Taking into consideration all the testimony and all the circumstances, we cannot say that the creditor has clearly shown that the bankrupt fraudulently and knowingly made a false oath in not referring in his schedule to his interest in his father's estate.

The following language quoted with approval by the Circuit Court of Appeals of the Third Circuit in *Woods v. Little*, 134 Fed. 232, 67 C. C. A. 160, seems applicable here:

"Without discussing in detail the particular facts and circumstances of this case, we are of opinion the failure of the bankrupt to return in his schedule the interest complained of is not necessarily attributable to a fraudulent purpose. Indeed, the question of whether he had such an interest as passed under the bankrupt law was not easy to solution. The question of his right to discharge is a close one, but, on the whole, we incline to the opinion a discharge should be granted."

And as said in *Re Wetmore* (D. C.) 99 Fed. 703:

"The burden is upon the exceptant to prove the allegation of fraud to the satisfaction of the court, and this burden she has not sustained. The best that can be said about the testimony is that the existence of a fraudulent intent to conceal may be in doubt. But, considering the technical nature of the arguments in support of the propositions that the interest of the bankrupt under his father's will was a vested interest, and that he now derives his title to the fund from that instrument and not from the will of his mother, the bankrupt can hardly be charged with fraudulent concealment of his interest because he may not have understood its true legal paternity. Merely to omit property from his schedule of assets would rarely be enough to prove a fraudulent intent on the part of the bankrupt."

The further contention of the objecting creditor that the bankrupt made a false oath by verifying his schedule without including his shares in the Standard Pyrites Company requires little consideration. While it appears that this stock stands in the name of the bankrupt, it also appears that it is pledged as collateral, and that the property of the corporation has been disposed of upon the foreclosure of a chattel mortgage. There is nothing to show that this stock—and much more the bankrupt's equity in it—is of the slightest value. A bankrupt is not guilty of making a false oath when he omits from his sworn schedule securities which are absolutely worthless. The language of Judge Coxe in *Re Eaton* (D. C.) 110 Fed. 733, applies:

"There is nothing to show the value of the stock * * * when the schedules were filed. It may have become utterly worthless at that time. It had been transferred to a trustee who was authorized to sell it to satisfy unpaid assessments. A receiver had been appointed of all the bankrupt's property, including the stock. * * * In these circumstances a perfectly honest man might have thought that the stock was of no value and have forgotten to mention it in his schedules."

See, also, *Matter of Pearce*, 21 Vt. 611, Fed. Cas. No. 10,873.

We conclude, therefore, that the report of the special master who heard the witnesses and found that the creditor had failed to sustain his objections should have been confirmed by the court, and that the bankrupt should have received his discharge.

Only the matter of costs remains to be considered. As already stated, the bankrupt was not a frank witness. If discharges were granted only as rewards to bankrupts who freely furnish information to their creditors, this bankrupt would be pre-eminently not entitled to one. Undoubtedly this attitude brought upon him the action of the District Court; and, while we think the bankrupt entitled of right to his discharge and consequently set aside the action of the District Court, we are not inclined to require the objecting creditor to pay the costs of this appeal.

The order of the District Court is reversed, without costs.

ELLIOTT v. CANADIAN PACIFIC RY. CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 197.

1. MASTER AND SERVANT—RAILROADS—DEATH OF CAR REPAIRER—CONTRIBUTORY NEGLIGENCE.

Recovery for the death of a car repairer knocked down and killed by cars being shunted against a car while he was testing part of its coupler is precluded on the ground of contributory negligence, where, when the accident occurred, he was violating a rule that, when cars were being shunted, work should not be done upon cars without first obtaining permission of the foreman of the yard to put up a flag to indicate the workman's presence under or about the car; decedent having known that shunting was being done, and it not appearing that the rule had been previously violated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 759-775.]

2. APPEAL—REVIEW—INSUFFICIENT BILL OF EXCEPTIONS.

Whenever a litigant proposes to ask an appellate court to review the testimony and to determine whether there was any evidence to warrant a recovery or to support a particular defense, he should cause a statement to be inserted in the bill of exceptions showing affirmatively that it contains all the testimony that was heard or produced at the trial. In the absence of such a showing, an appellate court must presume, in aid of the verdict, that there was testimony to support it, and that it would so appear if all the evidence had been incorporated into the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2916, 2917.]

In Error to the Circuit Court of the United States for the District of Vermont.

See 129 Fed. 163.

This cause comes here upon a writ of error to review a judgment of the Circuit Court in favor of defendant in error, who was defendant below. The action was brought to recover for the death of plaintiff's intestate, a car repairer in the service of defendant, who was run over and killed by a car which he was inspecting at Richford Station, Vt. It is charged that the accident was caused by defendant's negligence. At the close of defendant's evidence the defendant moved the court to direct a verdict in its favor upon 10 separate grounds, which were set forth in a written notice. The court granted the motion and directed a verdict in favor of defendant upon the ground that plaintiff's intestate was acting at the time of the injury complained of in disobedience of the rules and instructions of the defendant, which disobedience directly contributed to the injury complained of, to which ruling plaintiff duly excepted.

Max L. Powell, for plaintiff in error.

F. E. Alfred and W. B. C. Stickney, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This cause was before this court (Canadian Pacific R. W. v. Elliott, 137 Fed. 904, 70 C. C. A. 242) on a writ of error to review a former judgment in favor of the plaintiff, and the facts relevant to the questions now before us may be best set forth in excerpts from our former opinion:

"Besides the main line there are at Richford several sidings numbered, respectively, 1, 2, etc. A few minutes prior to the accident a through freight

train from Montreal had pulled into the yard. It was necessary to cut some cars out of it. Two cars which had been in the middle of the freight train were first sent down siding No. 1 in charge of one Sears as rear brakeman. After they were brought to a standstill, he returned to the train, and five cars located just in front of the caboose were cut out and kicked back on the same siding. Sears rode those also, and they came with great force against the other two cars, driving them back a considerable distance. Deceased and a car inspector, Green, had been examining a freight train which had drawn into the yard on the next siding, No. 2. They had finished that job, and were on their way back to the station to await the next job, when they drew near to the rear of two cars on siding No. 1. Elliott (the deceased) suggested that they should test the 'knuckle'—a part of the coupling—of the rear car. Both of the men thereupon stepped in behind the car, where they would be hidden from the view of any one 'riding down' any cars moving towards them on siding No. 1. The testing of the knuckle is an operation very quickly performed, but before they had finished it the five cars struck the two, and, as the latter moved backward under the impact, deceased was knocked down, run over, and killed."

It was contended by plaintiff that the accident was caused by Sears' improper handling of the five cars; that he was not a proper, efficient, and competent brakeman; and that defendant was negligent in intrusting such an operation to so incompetent a man. Upon the former appeal the case was disposed of on that branch of it which dealt with contentions of defendant that Elliott was himself guilty of negligence which caused the accident. It appeared that for a considerable time prior to August 10, 1901, the company's book of rules and regulations for the guidance of its employes contained rule 14, which provided that, when it was necessary "for car inspectors to work under a car," they must protect themselves by attaching to the car a red flag by day or a red light by night. This rule was on August 10, 1901, superseded by a new one which was substituted for it in a revised book of rules and which read as follows:

"Rule 26. A blue flag by day and a blue light by night, displayed at one or both ends of a car, engine, or train indicate that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen."

No subsequent change was made in the rule prior to the accident which happened August 7, 1902. Upon the occasion in question when Green and Elliott stepped in behind the car and proceeded to test the knuckle no flag was put upon the car. The survivor, Green, when asked, on this trial, why this was, replied that he "couldn't tell why he didn't put up a flag."

Upon the former trial plaintiff undertook to prove that this rule had been so frequently and continuously disregarded, when merely the inspection of a knuckle was involved, as to make it a dead letter and disobedience of it no ground for imputing contributory negligence. The court on the former trial left that question to the jury upon all the evidence and the judgment in favor of plaintiff was reversed, because of error in the admission of evidence on that branch of the case. It will be observed that under the earlier rule the display of a signal was required only when car inspectors were at work under a car, while under the latter rule (26) such signals were called for when

workmen "are under or about it [the car]." The trial judge had admitted a very great deal of testimony showing the practice in this yard for a time long anterior, not only to the accident, but also to the amendment of the rule, and had sent it to the jury without any instructions or caution that so much of it only was relevant as indicated the practical construction put upon the amended rule. The judgment was reversed because "in our opinion there was not sufficient testimony to take the case to the jury on any theory that rule 26 had been waived by the company, or had been so frequently disobeyed, without effort to enforce it, as to have become a dead letter which the deceased could disregard without assuming the risk resulting from his disobedience of its provisions."

Upon the trial now under review the testimony on this branch of the case came in differently; and it is assigned as error that the court did not leave the question as to waiver of the rule to the jury. It is also contended that the rule should not be construed to cover knuckle testing; and error is also charged in the exclusion of testimony showing the practice in the yard subsequent to the accident. The bill of exceptions contains excerpts from the testimony accompanied with the statement that they "comprise all the testimony on this point, and are not qualified by anything else in the evidence." "This point" is "as to a custom in the yard of testing knuckles without putting up a flag before the adoption of rule 26." Although this statement as to the evidence would seem to warrant an inquiry by this court touching such assignments of error as are concerned with rule 26, it would be profitless to enter into it, because the direction of the verdict was not based solely upon the violation of rule 26, but was based also upon the "violation of one rule that there isn't the slightest evidence tending to show was ever violated in this yard," as the trial judge expressed it.

The bill of exceptions contains this statement:

"It appeared from the plaintiff's evidence, and was uncontradicted, that it was an established rule of the company that, when the shunting crew were at work shunting cars, no work should be done or attempted upon any of the cars without first obtaining permission of the foreman of the yard to put up the flag, and this rule applied to the two cars on siding No. 1 by the movement of which the plaintiff's intestate lost his life. There was no evidence that this rule had ever been violated, except on the occasion of the accident to Elliott."

In so much of the evidence as has been included in the bill of exceptions there is testimony warranting the conclusion, expressed by the judge in disposing of the case, that "the shunting crew was out there and both these men [Elliott and Green] knew it." Upon this state of facts the direction of a verdict for the defendant was not error.

Plaintiff in her brief—referring to the above quotation from the bill of exceptions as to uncontradicted evidence of an established rule of the company forbidding any work on a car when the shunting crew was at work—quotes the statement of one witness that it was not customary in the yard for inspectors, when about to test a knuckle, to go to the yard foreman and ask leave to put up a flag. But there are no excerpts of testimony bearing on this shunting rule, or custom, and no statement that all the testimony on this point of the case is contained in the record. Moreover, an examination of the whole bill of excep-

tions shows that it does not contain all the evidence. In which respect this case differs from *Gunnison Co. v. Rollins*, 173 U. S. 262, 19 Sup. Ct. 390, 43 L. Ed. 689. The rule is well settled that:

"Whenever a litigant proposes to ask an appellate court to review the testimony and to determine whether there was any evidence to warrant a recovery or to support a particular defense, he should cause a statement to be inserted in the bill of exceptions showing affirmatively that it contains all the testimony that was heard or produced at the trial. In the absence of such a showing an appellate court must presume, in aid of the verdict, that there was testimony to support it, and that it would so appear if all the evidence had been incorporated into the record." *Taylor-Craig Corp. v. Hage*, 69 Fed. 581, 16 C. C. A. 339; *U. S. Mutual Acc. Co. v. Robinson*, 36 U. S. App. 690, 74 Fed. 10, 20 C. C. A. 262.

Without all the testimony on those points before us, we cannot tell whether or not the trial judge erred in holding that the deceased met his death by reason of his failure to obey a rule, which forbade him to manipulate the knuckles of cars with which a shunting crew was at work, which rule had never been violated before this accident, and that deceased knew the crew was at work when he disobeyed the rule. If he did not err in so holding, his conclusion that the accident happened through contributory negligence of the deceased is fully warranted.

All other exceptions relate to admission or rejection of testimony bearing on the defendant's negligence and need not be discussed. The judgment is affirmed.

SULLIVAN v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 8, 1908.)

No. 729.

1. PERJURY—TRIAL—EVIDENCE.

On the trial of a defendant, charged with false swearing in a proceeding for the naturalization of an alien, in giving false testimony as to the length of time the applicant had been in the United States, the ship's manifest, showing the date of his entry, is admissible in evidence to establish such fact, on proper proof of identity.

2. SAME—SUFFICIENCY OF EVIDENCE—DOCUMENTARY EVIDENCE.

On the trial of a defendant for perjury in falsely testifying that he had known an applicant for naturalization for five years prior to the hearing, during which time he had been a resident of the United States, a ship's manifest, showing that the applicant arrived in this country as an alien less than five years prior to the proceeding, and that in answer to a question propounded by the ship's officers at the port of emigration he stated, not under oath, that he had never been in the United States, is insufficient alone to warrant a conviction.

Lowell, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Massachusetts.

Harvey H. Pratt (James E. Cotter and Joseph P. Fagan, on the brief), for plaintiff in error.

William H. Lewis, Asst. U. S. Atty., and Asa P. French, U. S. Atty. Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. The plaintiff in error, herein called the defendant, was convicted under Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653), of false swearing in a proceeding for the naturalization of one Molloy. The false swearing charged in the indictment consisted of the defendant's testimony that he had known Molloy for over five years next preceding the hearing in Molloy's case, during which time Molloy had resided at Boston. To certain rulings of the court below the defendant excepted, and he has prosecuted a writ of error to this court.

The defendant's motion to quash was overruled by the Circuit Court, and the defendant excepted. In *Betts v. United States*, 132 Fed. 228, 231, 65 C. C. A. 452, 455, this court said:

"The law is settled that, with exceptional cases, where the federal courts have conformed themselves to the ancient local practice, error does not lie to the overruling of such a motion."

Passing by the question, however, whether this motion to quash could be properly raised by the bill of exceptions, we think the motion was rightly overruled.

The defendant's exceptions to the introduction of evidence must also be overruled. There was no evidence of his duress, such as to exclude what he said to O'Neil, Waters, and Burke. The manifest of alien passengers was admissible. *McInerney v. United States*, 143 Fed. 729, 74 C. C. A. 655. There was evidence of the identity of Molloy, the passenger, with Molloy, the applicant for naturalization. No objection was made to the foundation laid by the government for the testimony of Burke concerning the certificate of naturalization seen by him in Molloy's possession. Had objection been taken, the defect, if any existed, might have been cured.

The only substantial question in the case is presented by the defendant's first and sixth requests for instruction, viz.:

"(1) Upon all the evidence in the case the defendant is entitled to an acquittal."

"(6) It is not enough to convict the defendant if the jury believe the statements in the manifest to be true. The government must present another witness or satisfactory corroborative evidence to the effect that the evidence given by the defendant in the naturalization proceedings was false."

The court refused to give these instructions, and the defendant duly excepted to the refusal, which he has assigned in his ninth assignment of errors.

The real question here presented is whether, under the rule of evidence in perjury cases, the manifest of itself was sufficient evidence to warrant the jury in finding a conviction of perjury.

Concerning the rule of evidence in perjury cases, and the reason upon which the rule is based, it is said:

"Presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it till disproved. Therefore, to convict a man of perjury, a probable or credible evidence is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else it is only oath against oath." *Vin.* 16 (K) 328; *The Queen v. Muscot*, 10 Mod. 193; *United States v. Wood*, 14 Pet. 430, 438, 10 L. Ed. 527; *Roscoe's Criminal Evidence* (12th Ed.) p. 735; *Regina v. Yates*, Car. & Mar. 132.

The essence of the rule is that strong and clear proof is required to disprove the defendant's oath. The courts have always recognized the justice of the rule. The Supreme Court says:

"It is a right rule, founded upon that principle of natural justice, which will not permit one of two persons, both speaking under the sanction of an oath, and presumptively entitled to the same credit, to convict the other of false swearing, particularly when punishment is to follow." *United States v. Wood*, *supra*.

Under the rule, the proof sufficient to warrant conviction in a perjury case must be either (1) the testimony of two witnesses contradicting the defendant's oath, or (2) the testimony of one witness and corroborating circumstances, or (3) documentary proof which is equally strong and convincing.

In *United States v. Wood* the court considered that the documentary proofs in the form of the defendant's letters were proofs "equivalent to the end intended to be accomplished by the rule," and that the rule should not be so applied as to "exclude all other testimony as strong and conclusive as that which the rule requires."

In cases where oral testimony is offered to prove the perjury, corroborative evidence is required. In cases where documentary evidence is offered to prove the perjury, corroborative evidence is not required; but the documentary evidence must be as strong and convincing as where oral testimony is relied upon.

In the case at bar the documentary evidence offered to contradict the defendant's oath was the manifest.

Respecting this manifest Benjamin F. Maricle, a statistician employed in the inspector's department of the Immigration Bureau, testified as follows:

"The lists or manifests were made up by various employés of the steamship company at the point of embarkation from information furnished them by the emigrants. These manifests are delivered to the inspector at the port of arrival, and are taken by him or his deputy, who examines the immigrant. If the answers of the immigrant correspond substantially to the information given by him to the officers of the steamship company at the port of departure, and recorded by this official there, the alien is permitted to land. The result of this examination is checked on the manifest in red ink, and any change or discrepancies noted in the same manner. These manifests are then bound and kept in the office of the immigration officials at Boston. These manifests are the only records of the landing of aliens in our office. During the voyage the steamship's purser checks off the names appearing on the list while making an examination for the purpose of seeing if the persons named in the manifest are on board. After this is completed the master of the ship makes oath to the fact that he has a given number of aliens on board, this oath being recorded on the manifest. The ship's surgeon also certifies to the condition of health of the alien passengers."

The manifest contains 22 questions which are asked each immigrant. These questions relate to name, age, and calling, nationality, etc. Question 15 reads as follows: "Whether ever before in the United States; and, if so, when and where?" To this question, as appears by the manifest, Molloy answered, "No."

The false swearing charged in the indictment, as we have already stated, consisted of the defendant's testimony that he had known Molloy for over five years next preceding the hearing in Molloy's

naturalization case, during which time Molloy had resided in Boston; and the only evidence in contradiction of the defendant's oath is the answer made by Molloy in the manifest to the question whether he was ever before in the United States. An answer by a third party, not under oath, in a document of this kind, is manifestly insufficient under the rule to warrant a conviction of perjury.

And here again we may refer to *United States v. Wood*:

"It must be conceded no case has yet occurred in our own or in the English courts where a conviction for perjury has been had without a witness speaking to the *corpus delicti* of the defendant, except in a case of contradictory oaths by the same person; but it is exactly in the principle of the exception, which is by every one admitted to be sound law, that this court has found its way to the conclusion that cases may occur when the evidence comes so directly from the defendant that the perjury may be proved without the aid of a living witness."

"In what cases may a living witness to the *corpus delicti* of a defendant be dispensed with, and documentary or written testimony be relied upon to convict? We answer: To all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent, in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only being proved to have been taken; in cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to; or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing evidence of the fact recited in it."

We do not think that the above examples from *United States v. Wood* were intended to be exclusive, but are given rather as illustrations. The whole spirit and reasoning of the opinion in that case is simply to the effect that when documentary evidence is relied upon in perjury cases it must be of a strong and convincing character, such as is required where the proof is by oral testimony.

The judgment of the District Court and the verdict therein are set aside, and the case is remanded to that court for further proceedings in conformity with this opinion.

LOWELL, Circuit Judge (dissenting). If the court had set aside the verdict of guilty because a majority of the judges deemed the evidence in this case insufficient to warrant the verdict under the rules applicable generally to criminal trials, I should have acquiesced in that judgment upon a simple question of fact. But the opinion of the majority is based upon a rule of law applicable only to trials for perjury and the like offenses. Our difference, therefore, appears to me important enough to justify an expressed dissent.

A rule which requires for conviction of perjury an artificial weight of testimony has strong authority. Ordinarily a jury may convict a defendant if the admissible evidence satisfies all the jurors of his guilt beyond a reasonable doubt. Upon an indictment for perjury, the unsupported oral testimony of one witness has been deemed insufficient, however completely it may convince the jury. This perjury rule, as it may be called, is not based upon an exceptional danger of unjust conviction. It is not analogous to the rule which requires the corrob-

oration of an accomplice because of the suspicion which properly attaches to an accomplice's testimony. The defendant accused of perjury is protected, not because of the inherent weakness of the testimony against him, but because of the artificial sanctity attached under the circumstances to his own oath. In other cases the jurors may accept the oath of a single witness against the defendant, or against the defendant's oath, if they believe the former is telling the truth.

The historical origin of the perjury rule is set out in Wigmore's Evidence, §§ 2032, 2040. It was borrowed, perhaps unwittingly, from the civil and ecclesiastical law as practiced in the Court of Star Chamber. The numerical estimation of testimony prevailed generally in those systems of law upon which the Star Chamber modeled its practice. To convict an accused in that court by oral testimony alone, there must be two witnesses testifying against him. The two-witness rule applied to all trials in which oral testimony was relied upon. When an advancing civilization brought the accused to trial before a trained judge, instead of a popular gathering, the formulary trials of primitive law—the ordeal, the duel, the compurgation—were naturally replaced by a system which graded the value of presumptions and of human testimony according to a scale based upon supposed reason and observation. The system was elaborate, even attaching to the witness' rank in society a graded credibility. The system was inherent in the nature of the tribunal. The expert judge, according to civil or ecclesiastical law, determined issues both of law and fact. His decisions concerning the former must be reconcilable with each other, and he sought to explain his judgments, written or oral, according to rules of general application. To formulate these rules was part of his duty. By analogy he did the like concerning issues of fact. In the search for general rules applicable here, the trained civilian and canonist judges elaborated a Theory of Proofs by which they were enabled to decide issues of fact without the formation of a plain man's opinion thereupon in each case, but solely by weighing presumptions and testimony according to an artificial standard. Esmein, Hist. Proc. Crim. 260.

How complicated the standard became the treatises show. So difficult is it to convict a guilty man according to any Theory of Proofs that the courts resorted to confession induced by torture. See St. 28 Hen. VIII, c. 15. The Star Chamber, by the like necessity, followed their example. Even in the Court of Chancery, where the judge for the most part decides issues of fact like a common-law jury—i. e., according to his actual belief derived from the testimony given in each case—yet there survive from the ecclesiastical procedure certain presumptions and artificial rules of evidence. 52 Am. Law Reg. 537; McCullough v. Barr, 145 Pa. 459, 22 Atl. 962.

The system of jury trials, as practiced at common law, is the opposite of all this. When a defendant put himself upon the country, instead of staking his case upon one of the formulary modes of trial, he took the judgment of the plain men of his neighborhood concerning his guilt or innocence. If they believed him guilty, they convicted him; otherwise, they acquitted him. Before them torture was impossible. They justified their verdict by no statement of their rea-

sons. In determining the issues of fact, they themselves were once the witnesses. While they may not now determine an issue without the evidence of others given thereupon, yet in reaching their decision they follow the methods of judgment which they use in reaching the decisions needed in their everyday lives. They are not required invariably to prefer one kind of evidence to another, nor are they bound to accept or reject evidence according to the number of witnesses who unite in it. In theory, at least, the jurors accept or reject the testimony submitted to them only because they believe or disbelieve it. See the French Code of Brumaire, art. 342; Esmein, 545. If, as is not improbable, some jurors resort in practice to the numerical system of weighing testimony, the method of jury trials prevents this occasional resort from hardening into a rule. Statutes have been passed which require some application of the numerical system in certain cases; but they are not numerous, and are now unlikely to increase.

The original requirement of two witnesses for a conviction of perjury has been so modified in the courts of common law that a conviction may now be had if the oral testimony of one witness can find any material and extraneous support. Though these modifications have rendered the perjury rule the more anomalous, yet the insufficiency of the oral testimony of a single witness is too firmly established for this court to support a conviction thereupon. In the case at bar the defendant seeks to extend the perjury rule to the contradiction of the defendant by documentary evidence. That a conviction may be sustained by purely documentary evidence was settled in *United States v. Wood*. The qualifications stated in the opinion in that case, as is said by the majority of this court, were not intended to be exclusive, but were given rather as illustrations. An example will suffice to show that this is true. Let us suppose that a witness, being required to give secondary evidence of the contents of a written instrument, has testified that the instrument contained certain expressions. On his trial for perjury he is contradicted by the document itself, which is without the expressions to which he has testified. The case is not within the qualifications of *United States v. Wood*; but the single piece of documentary evidence affords a contradiction of the defendant so strong and clear as to be absolutely conclusive. Its corroboration would be impertinent.

The majority of the court say that:

"The only evidence in contradiction of the defendant's oath is the answer made by Molloy in the manifest to the question whether he was ever before in the United States. An answer by a third party, not under oath, in a document of this kind, is manifestly insufficient under the rule to warrant a conviction of perjury."

With due deference, I am of opinion that the manifest is much more than the answer of a third party not under oath. The defendant's oath to be contradicted was:

"That he had known Molloy for over five years next preceding the hearing in Molloy's case, during which time Molloy resided in Boston."

The manifest shows, not merely that Molloy stated that he came first to Boston less than five years before the defendant's oath, but it

shows, further, that the proper officer prepared the manifest with Molloy present before him at some place outside the United States, and under circumstances which made it nearly or quite impossible that Molloy should have lived in Boston throughout the five years which the defendant had sworn to. That the manifest was admissible in evidence this court decided in *McInerney v. United States*, 143 Fed. 729, 74 C. C. A. 655. I think its weight was for the jury.

The introduction of an artificial standard of evidence into a jury trial is a cause of much practical difficulty. The practical limitations of a jury trial should always be kept in mind. A system wherein a definite and different quantitative effect is attached to the several classes of presumptions and evidence, a system wherein "strong circumstances" is a term of art, defined as precisely as robbery or a fee simple, may well require "strong circumstances" to warrant a conviction of crime. Under our system of jury trials the case is far different. In a trial for arson, for example, the jury may have been instructed that the evidence will not warrant a verdict of guilty unless it satisfies them all of the defendant's guilt beyond a reasonable doubt. In a subsequent trial they are instructed that in perjury, as distinguished from arson, "strong and clear evidence" is required for conviction. What meaning can they attach to the words quoted? Is the "strong and clear evidence" required in perjury stronger or weaker than the evidence which was sufficient to convict of arson? Does weak and doubtful evidence warrant a conviction of any crime? Is not confusion of mind the necessary result of a standard like that proposed? To introduce it is to confound trial by jury upon the testimony of witnesses with that antiquarian curiosity, trial by witnesses. 3 Bl. 336.

Considering that the artificial requirement of corroboration has been introduced into jury trials from the two-witness rule of the Star Chamber, contrary to the spirit of the jury system; considering, further, that the two-witness rule in the courts from which it was derived was there without application where the proof offered was documentary, and not oral—I think that the court is not bound to extend the perjury rule so as to cover a case in which it was not originally applicable under the Star Chamber practice. No case binding upon us requires us to disregard the considerations above stated. Difficult as it is to establish a quantitative measure of oral testimony, the difficulty is greater where the oath of the accused is weighed against the evidence of documents. To find a common measure which is quantitative here, recourse must be had to the subtleties of the Roman or of the ecclesiastical law. We depart less from the method of jury trial by holding that the requirement of corroboration in the case of perjury extends only to the corroboration of oral testimony, and that, if the contradiction of the oath of the accused be furnished by a document, it is for the jurors to say, as in other criminal trials, whether the admissible evidence thus furnished satisfies them of the defendant's guilt beyond a reasonable doubt.

In re FRIEDMAN et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 211.

1. APPEAL—RECORD—SUFFICIENCY.

A record on appeal is defective where it fails to give the filing date of several orders contained in it.

2. BANKRUPTCY—RIGHTS OF THIRD PERSONS—SUMMARY PROCEEDINGS—JURISDICTION OF DISTRICT COURT.

The District Court had jurisdiction in a bankruptcy proceeding to make a summary order directing third persons to pay over to the temporary receiver sums of money which they claimed they did not have or which they claimed were their own property.

3. SAME.

Persons summarily ordered in a bankruptcy proceeding to turn money over to the temporary receiver as belonging to the bankrupt may not complain that they were given no opportunity to call witnesses in their own behalf or cross-examine those testifying against them, where they presented their own affidavits and might have presented as many other affidavits as they pleased, where the testimony against them was in part their own; giving them as full opportunity to explain it under oath as if their own counsel were cross-examining them orally; where they made no request to cross-examine other witnesses against them nor that they be examined or cross-examined; and where, after being advised by the order to show cause of the claim made against them, they had every opportunity to make their own presentation of the facts, and to make any objection to the testimony referred to in such order to show cause.

4. SAME—REVIEW—OBJECTION NOT MADE BELOW.

On petition to review an order directing petitioners to pay money to a temporary receiver in bankruptcy, they may not complain for the first time that a copy of the testimony taken under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), providing for the examination of persons respecting acts of a bankrupt, was not served with the order to show cause why the order directing the payment should not be made. The objection should have been made at or before the argument in the District Court.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

For opinion below, see 153 Fed. 939.

This cause comes here upon petition to review an order of the District Court, dated April 13, 1907, directing petitioners to pay over to the temporary receiver certain sums of money.

Emanuel Herz, for petitioners.

William Lesser, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. On March 22, 1907, an involuntary petition in bankruptcy was filed against Abraham Friedman, and a temporary receiver was appointed. The record submitted on this appeal is defective, in that it fails to give the filing dates of several of the orders contained in it, but it is apparent that receiver was appointed promptly probably on the day petition was filed. Adjudication of bankruptcy followed on April 4, 1907.

An order was obtained under Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), for the examination of various persons, including these petitioners Celia Friedman, Max Levinson, and Samuel Wiltchik, who attended and were examined on March 26th, 27th, 28th, and 29th. It developed that on the night of March 17, 1907, the bankrupt, a shoe dealer, sold his entire stock, receiving therefor \$3,850. His wife was present, and it is not disputed that at one time, while counting it, she had the money in her possession. For a further statement of the facts reference may be had to *In re Friedman* (D. C.) 153 Fed. 939.

On March 27th an order was made requiring Celia Friedman to show cause why an order should not be made requiring her to turn over forthwith to the temporary receiver the sum of \$3,850. On March 28th a like order was made requiring the Jenkins Trust Company, Max Levinson, and Samuel Wiltchik to turn over to the receiver the proceeds alleged to be in their possession of the sales made by the bankrupt. These orders to show cause were upon the testimony taken as aforesaid of Celia Friedman, of Max Levinson, her brother, William Herrman, a notary public, and Harris Perlmutter, an auctioneer. After an adjournment the motion came on for a hearing on April 8th, petitioners appearing by counsel and filing each an affidavit in opposition. On April 13th the District Court made and entered the order now sought to be reviewed. Pending proceedings to review new counsel have been substituted for petitioners.

It is contended that the District Court had no power to make a summary order directing third parties to pay over to the temporary receiver sums of money which they insisted they did not have or were their own property. There is no indication anywhere in the record that these petitioners raised any objection to the jurisdiction of the bankruptcy court to determine the question whether the several sums of money were or were not the property of the bankrupt, nor objected that the question could not be determined summarily. Many cases are cited on the briefs; but it is unnecessary to discuss them. Whatever might have been our own views on the general exercise of summary proceedings to seize hold of property which, before the petition in bankruptcy was filed, was in the actual possession of third persons who assert that they own it (*In re Baudouine*, 101 Fed. 574, 41 C. C. A. 318), we are concluded by the language of the Supreme Court in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In that case money which the bankrupt had collected a short time before bankruptcy was in the hands of his son, and the bankruptcy court made a summary order directing him to turn it over. The son did not make any specific claim of title to the property, merely insisting that he should not be called upon thus summarily to give it up, when he had it in his individual possession before bankruptcy. The court said:

"But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had power to ascertain whether any basis for such claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted with-

in its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review."

Much is made in argument of the proposition that petitioners were given no opportunity to call witnesses in their own behalf or to cross-examine such witnesses as testified against them. The facts do not warrant such argument. Petitioners presented their own affidavits, and might have presented the affidavits of as many other persons as they pleased. The testimony against them was in part their own, which they had as full opportunity to explain under oath as if their own counsel were cross-examining them orally. As to the testimony of the notary public and the auctioneer, no request to be allowed to cross-examine them was made. It must be assumed that such a reasonable request would have been granted by the District Court had it been made. The case differs fundamentally from *In re Rosser*, 4 Am. Bankr. Rep. 153, 101 Fed. 562, 41 C. C. A. 497, where the bankrupt never had any opportunity to show cause why he should not be ordered to turn over certain money. It was stated on the argument, and not denied, that the petitioners were personally in court on the return of the order to show cause and on the argument, but no request was made to the court to examine or cross-examine them or to refer the matter for further examination. After being advised by the order to show cause of the claim made against them, they had every opportunity to make their own presentation of the facts, and to make any objection they might be advised to the testimony referred to in such order to show cause. The objection now made that a copy of the testimony taken under section 21a was not served with the order to show cause comes too late. It should have been made at or before the argument in the District Court.

We have examined the testimony and affidavits, and may state that, if the issues of fact were properly before us, we would be inclined to decide them as the District Court has.

The order is affirmed, but, as this petition to review was heard in *forma pauperis*, without costs.

GRAHAM v. OREGON R. & NAV. CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 123.

1. EVIDENCE—COMMUNICATIONS BETWEEN AGENTS.

In an action for breach of a contract, communications between respondent's agents were inadmissible to affect libellant.

2. CONTRACTS—EXECUTION—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that libellant and respondent made an agreement for an exclusive interchange of traffic for three years between libellant's steamships and respondent's railroad.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 145 Fed. 718.

Thomas D. Rambaut and J. Parker Kirlin, for appellant.
Maxwell Evarts, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The question in this case is whether the libelant and the respondent made an agreement for an exclusive interchange of traffic for the term of three years between the libelant's line of steamships, running between Portland, Or., and the Orient, and the respondent's railroad, running to Portland. The libelant did establish such a line, and there was an interchange of traffic between it and the railroad from September, 1900, to March or April, 1901, when the respondent put its own line of steamships on the service. The district judge dismissed the libel.

We agree with the libelant that the letter of the respondent's traffic manager, Campbell, dated November 12, 1900, to Judge Cotton, the respondent's general attorney, and the telegrams between Campbell and Miller, respondent's freight agent, dated December 3 and 4, 1900, should have been excluded as transactions between respondent's agents not affecting the libelant in any way. But, excluding these documents from consideration, we still come to the same conclusion as did the district judge. The fair inference to be drawn from the testimony is that the libelant, while contemplating the establishment of his line, was confirmed in his purpose by the confident belief that he could make an exclusive three year traffic agreement with the respondent. Oral negotiations during which each party is thinking principally of the things most important to his own needs and nearest to his own wishes are apt to result in different accounts of what was said. Many, though not all, of the inconsistencies in the testimony may be explained in this way, and in the case of the libelant it is likely that long brooding over his disappointment and loss has disturbed his recollection of the conversations with the respondent's agents.

The conduct of the respondent upon which the libelant greatly relies as a ratification of the contract, even if made without authority by Campbell, throws no light upon the disputed question, because this ratification is just as applicable to a temporary arrangement as to a contract for three years.

Because of the very able and earnest argument made on behalf of the libelant, we will indicate briefly the considerations which lead us to the conclusion that no such contract as the libelant alleges was made. (1) The libelant went to Portland with a view to establishing a line of steamships, and had been encouraged by Mr. Wilcox, president of a flour mills company able to furnish nearly full cargoes, at whose suggestion he approached the respondent. (2) The respondent was at the time negotiating for steamships to replace the Dodwell Line. (3) Campbell, the respondent's traffic manager, with whom the libelant negotiated is not shown to have had authority to make such a contract as is alleged. (4) No contract or memorandum was signed either by the libelant or by Campbell. (5) It is admitted that the signature of the respondent's president must be had to the contract. (6) If a contract had actually been made like the Dodwell contract, originally drawn up by Campbell, which had been in force three years, it would

not have been necessary to consult the law department. (7) If it was necessary to consult the law department, it is fair to presume that the minds of the parties had not fully met. (8) The libelant made no protest against the expression contained in the telegrams inclosed in respondent's letter of November 28, 1900, describing the arrangement as "a proposed agreement." (9) In the elaborate correspondence between March 1st and 15th resulting in a termination of all relations, no reference whatever was made to an existing contract for three years. (10) The libelant made no protest against the respondent's conduct as a breach of a concluded contract nor any demand founded upon such a contract until long after. (11) On the contrary, he suggested selling or chartering his steamships to the respondent or retiring from the field as a competitor for a consideration.

The decree is affirmed, with costs.

DEMAREST v. DUNTON LUMBER CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 179.

1. ASSIGNMENTS—PERSONAL CONTRACT—ASSIGNABILITY.

A contract by which defendant lumber company sold to K. & Co. its entire cut of white pine lumber for 1901, except so much as it should need for its retail trade in a certain city, agreeing to retain only an average grade for the same, payment to be made within 10 days from date of invoice, and K. & Co. to take some lumber shorter than 12 feet and some longer than 16 feet, involved matters of personal confidence between defendant and K. & Co., and therefore was not assignable, under the rule that a contract personal in its nature cannot be assigned by one party without the consent of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 28-31.]

2. SAME—CONSENT TO ASSIGNMENT—EVIDENCE.

Evidence held insufficient to establish the ratification by the seller of an assignment of a contract for the sale of lumber.

In Error to the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 151 Fed. 508.

McKelvey & Mattocks (John J. McKelvey, of counsel), for plaintiff in error.

Rounds, Hatch, Dillingham & Debevoise (Ralph S. Rounds, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The plaintiff sues as assignee of a contract dated December 11, 1900, between W. E. Kelley & Co. and the Dunton Lumber Company, and complains that the defendant has failed and refused to deliver to him lumber covered by the contract. Under the contract the lumber company sold to Kelly & Co. the entire cut of white pine lumber for 1901, except so much as it should need for its retail trade in the city of Rumford Falls, agreeing to retain, not the best

of the lumber, but only an average grade for that trade. Delivery was to be f. o. b. cars at Rumford Falls, Kelly & Co. to pay within 10 days from date of invoice. The logs were to be cut in lengths of 12, 14, and 16 feet; but Kelly & Co. agreed to accept some lumber shorter than 12 feet, not less than 8 feet, and some longer than 16 feet. The trial judge held that this contract was not assignable, and that, therefore, the plaintiff had no right of action.

While the authorities do not differ as to the principle that a contract personal in its nature cannot be assigned by one party without the consent of the other, they differ in the application of the principle; the question in each case being whether the contract is personal or not. The law on the subject for the federal courts has been laid down by the Supreme Court in *Arkansas Smelting Company v. Belding Mining Company*, 127 U. S. 379, 387, 8 Sup. Ct. 1308, 32 L. Ed. 246, in which Mr. Justice Gray said:

"At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman: 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305, 93 Am. Dec. 93; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 120, 43 Am. Rep. 13; *Lansden v. McCarthy*, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred, if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' *Pollock on Contracts*, 425."

The contract under consideration is not merely for the sale of personal property for cash, but implies confidence in Kelly & Co., because they were to have 10 days' credit after title to the lumber passed to them, and because the amount of lumber shorter or longer than the lengths provided for in the contract which they were to accept was not fixed. So, also, the amount of lumber the lumber company needed for its retail trade was not fixed, and that amount, as well as the grade of lumber retained, were subjects which the lumber company might have been willing to leave open with Kelly & Co., but not with their assigns. The rights of Kelly & Co. were coupled with liabilities and involved personal confidence. See, also, *Snow v. Nelson* (C. C.) 113 Fed. 353.

The plaintiff did not rely upon the assignability of the contract alone, but alleged in the complaint that it was assigned, and Van Horn (plaintiff's assignor) substituted in place of Kelly & Co. with the approval and consent in writing of the lumber company. The evidence relied on to sustain these allegations is all documentary, and we agree with the trial judge that it fails to do so. Some of the letters, taken alone, indicate a consent; but, read all together, the conclusion that the lumber company never assented to the assignment, and that Kelly

& Co. acquiesced in its refusal to do so, is irresistible. In the letter of March 21, 1903, written to the lumber company after it had refused to make further deliveries, Kelly & Co. say, among other things:

"We have a contract with you under date of the 11th day of December, 1900, whereby you agreed to furnish us a specific amount of lumber during the year 1901. * * * We hold that you have no right to nominate the party with whom you will or will not do business as our representative, and we now say to you that we will hold you for any damages that may arise or have arisen from the fact of your not having furnished this lumber to us in the time in which you agreed to furnish it. * * * We state again all we want is that you shall fill your contract with us and we will do the same with you, and if you refuse to do it you may as well understand first as last that we will endeavor to make you pay damages as well as fill the contract. We trust you will see the matter as we do, but if you do not care to consider it in a reasonable manner, you may begin action, or we will, and the sooner the better."

The judgment is affirmed.

SOUTHERN RY. CO. v. HOPKINS.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1908.)

No. 1,665.

1. TRIAL—TAKING QUESTION FROM JURY—SUFFICIENCY OF EVIDENCE.

Where there is any positive evidence tending to establish a material fact in issue, the court is not justified in withdrawing such issue from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 338.]

2. MASTER AND SERVANT—INJURY TO SERVANT—RULES OF RAILROAD COMPANY.

Where, in an action against a railroad company to recover for the death of an employé, alleged to have resulted from a defect in the car upon which he was riding, the defendant relies upon its printed rules as imposing the duty of inspection upon the deceased under the circumstances, such rules must be strictly construed against the company when their language leaves the matter in doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 288.]

3. SAME—DEFECTIVE CARS—CONTRIBUTORY NEGLIGENCE.

A custom of a railroad company, known to its employés, to inspect cars only in its yards, will not relieve it from liability for an injury to a conductor in its employ caused by a defect in a car which he was sent at night to bring to the yards from a manufacturing plant, unless the defect was so obvious that the failure of the conductor to observe it constituted contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 710-722.]

4. TRIAL—INSTRUCTIONS—CHARGING UPON QUESTIONS OF FACT.

In an action against a railroad company to recover for the death of a conductor alleged to have resulted from a defect in a car from which he undertook to dismount while it was moving, an instruction that, in the absence of any proof to the contrary it would be presumed that he attempted to dismount for some reason essential to the performance of his duty, was erroneous as invading the province of the jury; the question of contributory negligence being one of fact for their determination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-435.]

Shelby, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

Jos. B. Cumming and Bryan Cumming, for plaintiff in error.

C. Henry Cohen and Archibald Blackshear, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

BURNS, District Judge. This suit, commenced in a state court, was removed by defendant to the Circuit Court of the United States for the Southern District of Georgia. The object of the action was for damages for personal injuries to plaintiff's husband, resulting in death, whilst engaged as a conductor in the yards of the defendant at Augusta. The pleadings of plaintiff allege that the deceased came to his death in the yards of the company at night while attempting to dismount from a moving car; that defendant was guilty of negligence, in this: The car upon which deceased was sitting was defective by reason of a plank slightly elevated (about one-half inch) above the flooring and a nail which projected from the end thereof; that the pants of deceased caught upon the end of said plank and upon said nail, causing deceased to lose his balance and to be thrown in front of the car, one wheel of which passed over his body, resulting in instant death. The defendant denied each material allegation, and contended that the deceased was negligent in attempting to dismount while the car was in motion; that the same was a violation of the rules established by the company, and, further, that it was the duty of the deceased to inspect the car and discover the defects, if any; that failure so to do was negligence. The plaintiff obtained a verdict and judgment for \$7,500, and the defendant assigns the following errors:

First. The refusal of the trial court to direct a verdict for the defendant. It is frequently said that the servant must establish three propositions to entitle him to recover from the master for any injury received in the master's business: (1) That the appliance is defective; (2) that the master has notice thereof, or knowledge, or ought to have had; (3) that the servant did not know of the defect, and had not equal means of knowing with the master (Wood on M. & S. § 414). In the event the danger (in this case the defect) was as obvious and apparent to the employé as the master, he is not entitled to recover. The evidence discloses that the deceased was directed to go to an industrial plant, known as the Buckeye Cotton Oil Company, connected by spur track with line of defendant, and bring in certain cars. This order was given between 4 and 5 o'clock the evening of the accident. The evidence fails to show at what time this order was executed, but it does appear that the accident occurred at about 7:35 p. m. upon the conductor's return to what is known as the "Fenwick street yard." The car upon which the conductor was seated was in front of the engine, said car being an oil car containing a tank filled with oil at said plant. The city ordinances of Augusta limit the speed of the trains to five miles per hour, and a flagman was preceding the train by walking ahead so as to signal in the event of danger to any person about to cross the track. The train consisted of engine and three cars, two in

the rear of the engine and one in front, upon the northeast corner of which the conductor was seated. Said train was moving east along Washington street, and, when about opposite Fenwick street, the conductor attempted to dismount, and, in the language of John Jones, the only witness offered upon the trial who claims to have witnessed the accident:

"At the time Capt. Hopkins was killed, I was standing between Fenwick and Washington streets. He was sitting on the right-hand side, right at the end of the train. It was going at the rate of $1\frac{1}{2}$ to 2 miles an hour. I saw him take his lantern and put it on his arm. He put his hand down and got up, swung, hung, and fell over. He hung by a nail which hung on his pants. I saw what occurred from where I was standing. It was night. I was the length of this room away from him. I saw his trousers catch on the nail. After he fell, I went up there, but did not see the nail. I would consider it about 30 yards across this courtroom; that is about the distance I was away from Mr. Hopkins. I could see his pants hung. There was nothing else for him to be hung on. The nail stuck out from the right side of the car, right at its top. There was an electric arc light on the other side of him. The car had not quite reached the electric light."

Blount, chief inspector, and his assistant, Hood, were called a few minutes after the accident, and reached the scene before the car had been moved. They detail the character of inspection made, and both testify that they carefully examined the plank and end of the car upon which deceased was sitting, and from which he fell, and there was no defect and no nail. Blackston, at that time yard foreman, and still in the service of the company, stated upon direct examination that he examined the car and found the nail. Upon cross-examination he admitted that he examined the car shortly after the accident with a lantern and failed to discover any nail, but that he examined the car again the next day in the Hamburg yards, across the Savannah river, and found the nail. The car was photographed about 20 days after the accident. The witness Blackston testified that the car had undergone no change since his examination. Three photographs accompany the record, showing the car, and particularly the northeast corner thereof, and by the use of a magnifying glass the nail may be observed in one of the pictures, but it is not discoverable in the others. The testimony of the inspectors is to the effect that the nail would be regarded as a defect or obstruction. The only other evidence tending to support the nail theory is that the pants disclosed a rent in the rear, reaching nearly to the waist band, but the evidence shows that the body of the deceased was dragged by the brake beam, and this may as readily account for the rent as the protruding nail. The fact that the nail was present the day after the accident is not material, and but a slight circumstance to indicate its presence at the time of the accident. The witness Blackston is perhaps not too zealous in aiding the administration of the justice of the case, but the suggestion occurs that, in the event a witness could plainly see the nail when only the head of it was exposed to his vision a distance of "thirty yards," this witness who was making examination for the sole purpose of locating the defect ought to have made the discovery of that which was so patent to the main witness. The result is one witness, Jones, claims to have seen the nail whilst standing across the street. Blackston, the yard

foreman, examined the car with his lantern and failed to find it. Two witnesses, Blount and Hood, looking for the defect in the board upon which deceased was sitting, positively declare there was no nail. We are of the opinion that the preponderance of the testimony establishes the absence of the nail at the time of the accident, but under the holding obtaining here and elsewhere the trial court would not be justified in withdrawing the case from the jury, though it is difficult to appreciate, under the facts of this case, that the burden of proof resting upon the plaintiff to establish the defect has been fully discharged. Matters of this kind in most jurisdictions are committed to the sound discretion of the trial court in determining whether or not the verdict shall stand as the judgment of that court, and, where there is any positive evidence tending to establish a material fact, we are not at liberty to sustain an assignment based upon the refusal to direct a verdict for the defendant.

The next contention of the defendant is that the verdict should have been directed for the defendant by reason of the fact that under the rules and custom obtaining with this company, and well known to the deceased, it was his duty to make the inspection of the car at the mill of the cotton oil company, and that his failure constitutes negligence, and upon the further ground that the deceased, well knew that the custom had long obtained upon the part of the company not to inspect any cars at industrial plants, and, by reason of this custom and the failure upon his part to make the inspection, he was guilty of negligence and not entitled to recover. In answer to the suggestion as to the printed rules of the company, as offered in evidence, a copy of which had been furnished the deceased (his receipt therefor being introduced by defendant), it is difficult to say that the rule relied upon places the duty of inspection, at such places, upon the conductor. Evidence was introduced to the effect that the rule in question only charged conductors with the duty of inspection while operating trains upon the road, and courts will not give a larger intendment to the rule than the language thereof clearly permits; the rationale being to limit, and not to extend, such instruments. The construction should be strict, rather than latitudinous. Upon the proposition that the custom long obtaining and well known to the deceased, that this defendant only made inspection of cars in its yards, and not elsewhere, operated to preclude the deceased from relying upon inspection at any other place or point, it is deemed sufficient to say that, in the absence of a rule plainly governing a like situation, the deceased was not called upon to perform a duty resting upon the master to see that the car was in a reasonably safe condition. This is a legal requirement upon the part of the master which he cannot escape, and it follows as a matter of law that the train employé will not be denied a recovery for failing to detect a dangerous defect in a car, unless it be such danger or defect, as is patent and obvious. We cannot, therefore, consent to the adoption of the view that the verdict should have been directed for the defendant upon the ground that the facts of this case make an exception to the general rule. It does not conclusively appear that the defect was so patent and open to observation as to preclude plaintiff's right

to submit the question to the jury. For the reasons stated, the assignment is not sustained.

In this connection it may not be improper to observe, however, that the charge of the court submits to the jury the question of negligence upon the part of the defendant in permitting the raised board to remain upon the car. This is not assigned as error, but clearly the case should not have gone to the jury on this issue for the reason that this was a foreign car, and while the duty is the same in regard to inspection as if it were a domestic car—that is, the property of the company—the plank in question was an integral part thereof, and, if defective the law would charge a knowledge thereof to the man who sat upon it from the time the car was placed in motion until he went to his death. Besides the whole testimony as to the cause of the accident, that of the witness Jones affirmatively discloses that the plank had no connection with the injury. To charge upon an issue not supported by evidence is uniformly condemned, and under the facts of this case, if assigned, would operate as a reversal.

The next assignment complains of that part of the charge which instructs the jury that:

"In the absence, however, of any proof to the contrary, it will be presumed that he [the conductor] attempted to dismount from the car for some reason essential to the performance of his duty."

We are of the opinion that the charge is erroneous, in that it invades the province of the jury. The only question for the jury to determine bearing upon the act of the conductor in attempting to dismount from a moving train is whether or not he was guilty of negligence which contributed to the accident. The jury may have readily understood that, if the act itself was induced by a desire and necessity to perform a service due the master, the act and effort to serve the master would not be negligent. The holding is uniform that questions of fact are for the jury, and that a charge which assumes to determine a material fact is an invasion of the province of the jury. This proposition is supported by the following authorities: *Railway Co. v. Jones*, 130 Ala. 456, 30 South. 586; *Railway Co. v. George*, 94 Ala. 199, 10 South. 145; *Carroll v. Railway Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; *Railway Co. v. Roach*, 64 Ga. 635; *Railway Co. v. Wangelin*, 152 Ill. 138, 38 N. E. 760; *Railway Co. v. Warner*, 123 Ill. 38, 14 N. E. 206; *Railway Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Dolphin v. Plumley*, 175 Mass. 304, 56 N. E. 281; *Avilla v. Nash*, 117 Mass. 318; *McGrath v. Railway*, 76 Minn. 146, 78 N. W. 972; *Blue-dorn v. Railway*, 121 Mo. 258, 25 S. W. 943; *Marcus v. Loane*, 133 N. C. 54, 45 S. E. 354; *Bodie v. Railway*, 66 S. C. 302, 44 S. E. 943; *Railway v. Smith* (Tex. Civ. App.) 82 S. W. 787; *Railway v. Burns* (Tex. Civ. App.) 63 S. W. 1035; *Railway v. Waller* (Tex. Civ. App.) 62 S. W. 554; *Railway v. Baker* (Tex. Civ. App.) 58 S. W. 964; *Railway v. Smith* (Tex. Civ. App.) 51 S. W. 506; *Railway v. Zapp* (Tex. Civ. App.) 49 S. W. 673; *Railway v. Gaither* (Tex. Civ. App.) 35 S. W. 179; *McKelvey v. Railway*, 35 W. Va. 500, 14 S. E. 261; *Railway v. Camp*, 105 Fed. 212, 44 C. C. A. 451; *Railway v. McClintock*, 91 Fed. 223, 33 C. C. A. 466.

Having reached a disposition of the case, it is not deemed essential that the two remaining assignments should be discussed. By reason of giving the charge complained of, the judgment of the Circuit Court should be reversed, and the cause remanded with instructions to grant a new trial; and it is so ordered.

SHELBY, Circuit Judge (dissenting). I am constrained to dissent from the opinion just read. A short excerpt from the elaborate and well-considered charge of the trial judge is selected on which to base the judgment of reversal. Construing the language decided to be erroneous with the evidence and the context of the charge, I am of opinion that it does not constitute such error as makes it proper to reverse the judgment.

The cars were moving very slowly, at the rate of $1\frac{1}{2}$ or 2 miles an hour, when the deceased got off. It was proved to be the custom of the conductors to get off the trains when running even faster than the one in question. This custom was known to the officers of the railway company. It was shown that no conductor could have kept his place who waited till the train came to a standstill before he would get off. As to the circumstances under which the deceased attempted to alight when he was killed, a witness testified:

"It was a matter of his duty to get off, because his time had run out. That was his terminal, and he was to be relieved by his night relief. He was supposed to be relieved about 7:30, and this happened about 7:35. The car had almost come to a stop as to where they would back into the Fenwick street yards, still moving toward the yard. It would have to be backed in. The engine was in the middle of two cars—one in front and one behind. It would have been his duty for him to have gotten off and selected his track to back his train in. He was supposed to be relieved there by his night relief. Whether he got off for his relief or to back his train in I am unable to say. They relieve each other sometimes when the train never stops, and they proceed right on to destination as possibly a man might be going to Hamburg. He would climb up on his train and take his papers, and proceed on to Hamburg without the train ever stopping. I don't know of my own knowledge why he got down. The track he was on was running north. You have to pass beyond Fenwick street to the north, and you would then back into the yard on Washington street. It branches off into the Fenwick street yard; that is located between Fenwick and Washington streets. Where he fell from the car is right opposite to the Washington street yard. I found the relieving crew there. He had not been moved. It was about 15 minutes after the accident."

As bearing on this question, the judge charged the jury as follows:

"When a point on the track was reached opposite the freight office of the company, where, according to the testimony of one of the witnesses, it was necessary to stop the car and back into the yard, while the train was slowly moving, Hopkins attempted to get off the car. Whether he did this to surrender the train to a new crew which was waiting for him there, or whether to take his position on the other end of the train, which was now backing into the yards of the company, or whether to walk back and select a track in the yard on which his train was to be placed, is not made clear by the evidence. *In the absence, however, of any proof to the contrary, it will be presumed that he attempted to dismount from the car for some reason essential to the performance of his duty.* A witness who was standing a short distance away testified that, as Hopkins proceeded to get down from the car, he, the witness, saw his trousers catch by a nail, that he swung under the car forward of the front wheel, which passed over him, crushing him to death. This witness, a negro named John Jones, testified that there was a large electric light there, and that, although it was night, he saw the occurrence plainly."

I have designated by italics that part of the charge which the court has found to be reversible error. If it be assumed that the judge was in error in stating what the presumption would be in the absence of proof, it would be a perfectly harmless error, because the proof shows that the car had arrived at a place where it was the duty of the deceased to alight, and that it was going at a speed when, in the absence of the defect in the car complained of, the deceased could have left the car in safety.

I do not think the sentence of the charge quoted in the opinion is error justifying the reversal of the judgment.

NOTE.—The following is the charge to the jury by SPEER, District Judge in the Circuit Court:

"The controversy on trial presents for your consideration and determination two issues of fact. The first is: Was the defendant company guilty of negligence resulting in the death of W. L. Hopkins, as charged? The second is: Did W. L. Hopkins, an employé of the company, by any negligence on his part contribute to the casualty which occasioned this result? The burden of proof is on the plaintiff to show to your moral and reasonable satisfaction that the charges of negligence, or a charge of negligence, set forth in the declaration are true. The proof must preponderate in the plaintiff's favor to show this fact in order to support her claim. In case you find from the evidence that the plaintiff was negligent in view of the defense that plaintiff's husband was an employé of the company and contributed by his own negligence to cause his death, the burden of proof will be on the defendant company to show this latter contention, and the evidence relating thereto must preponderate in its favor on that issue before you would be justified in holding the contention to be true.

"It appears from the pleadings, and to a degree from the evidence, that on the 27th day of October, 1904, W. L. Hopkins was a yard conductor of the Southern Railway at Augusta, Ga. His duties as such were to conduct cars or trains of cars to and from connecting lines in the city of Augusta, and to superintend such general switching as might be incident thereto. On the date mentioned in the declaration he was ordered to proceed to the Buckeye Cotton Oil Company to do some necessary switching, and to bring back to the yard of the defendant in the city a certain tank car of the firm of Proctor & Gamble. It appears that he made up his train at the Buckeye Cotton Oil Mills. The engine was in the middle pushing a tank car and pulling a freight car. It is not in fair dispute that the conductor's place while in charge of a train going over the railroad tracks within the corporate limits of Augusta was some point on his cars where he could see both the locomotive engineer and the flagman, who was compelled to precede the train for the purpose of preventing injury to people crossing the tracks. The trains on the tracks traversing the streets of the city are required to go at a very low rate of speed, not to exceed five (stated by defendant's counsel answering question of court) miles an hour. The engineer of the locomotive moving the train in question was, as usual, on the right-hand side of the locomotive. The large oil tank on the car in front of the engine on which Hopkins was precluded him from keeping in view the flagman walking in front, and the engineer behind him, unless he also should occupy a position on the right of the tank car. He might possibly have seen both from a point on that car nearer the engine, but the testimony was positive, and not contradicted, that in view of the course that the train was pursuing, a proper position for him was on the northeast corner of the front car. He was sitting immediately above the right-hand end of the front transverse beam. When a point on the track was reached opposite the freight office of the company, where, according to the testimony of one of the witnesses it was necessary to stop the car and back into the yard, while the train was slowly moving, Hopkins attempted to get off the car. Whether he did this to surrender the train to a new crew which was waiting for him there, or whether to take his position on the other end

of the train, which was now backing into the yards of the company, or whether to walk back and select a track in the yard on which his train was to be placed, is not made clear by the evidence. In the absence, however, of any proof to the contrary, it will be presumed that he attempted to dismount from the car for some reason essential to the performance of his duty. A witness who was standing a short distance away testified that, as Hopkins proceeded to get down from the car, he, the witness, saw his trousers catch by a nail, that he swung under the car forward of the front wheel, which passed over him, crushing him to death. This witness, a negro named John Jones, testified that there was a large electric light there, and that, although it was night, he saw the occurrence plainly. The defendant put in the evidence the report of the accident, date October 27, 1904, time 7:32 p. m., but probably written shortly thereafter. It was signed by H. F. Blackston, who was the yardmaster of the Southern Railway. This witness was on the scene a short time after Hopkins was killed. This report was required by the company. In reply to the question, 'State fully how it occurred?' he answered, 'While riding on front end of tank car, it is supposed that, when he went to get off, floor of car caught his trousers, and threw him on rails.' This is reiterated and slightly elaborated in the remarks appended to that report as follows: 'While coming from Buckeye Cotton Oil Mill with one car ahead and two cars behind engine, Conductor Hopkins, who was riding on front of the head car, which was a tank car, sitting on floor of car, it is supposed that, when he attempted to get off the moving car, some of his clothing caught on car and threw him across rails. One wheel passed over his body, killing him at once.' From the same report it appears that the engineer of this train was W. T. Burckhalter, the fireman was James Way, the front brakeman Joe Addison, the brakeman Benjamin Weston. None of those witnesses were produced or sworn. In response to the question, 'Name and address of all eyewitnesses of the injury, employes and others,' the name John Jones, colored, Augusta, Ga., is given in the same report. Blackston, then yardmaster, is now the yardmaster of the defendant company at Columbia, S. C. He was produced as a witness for the plaintiff. He says that he saw the car that night, and the next day in his report, which he says he did not write—it was typewritten—but which he signed, in answer to the question, 'If defective, number and initials of car or engine,' the word 'None' is written. Blackston, however, testified that he did not see the nail in the end of the beam that night, but he did see it the next day. He also described the condition of the floor of the car where Hopkins was sitting. This was likewise made plain by the photographs which the defendant company had taken, and which the plaintiff introduced. This makes it obvious that the front of the car on which Hopkins was sitting had been noticeably worn or damaged. You will have the photographs before you, and can determine to what extent this had been done. First on the floor of the car in the direction in which it was proceeding was a new plank. This appears intact. It is noticeably higher than the worn and battered plank which is behind it. This the witnesses testify and this also appears as will be seen from the photographs. Blackston testified that the nail projected at a point beneath that on which Hopkins was sitting from a quarter to three-eighths of an inch. It was 10 or 20 penny nail he said. Two car inspectors testified, one for the plaintiff and one for the defendant, that such nails when found by the inspectors were regarded as dangerous to the train hands, and were driven in. There is no contradiction as to these statements that such projecting nails on the cars were dangerous to the safety of the men who worked on the trains. The trousers worn by the unfortunate conductor were introduced in evidence. There was a long rent in the seat, extending toward the waist band, which it is insisted for the plaintiff was occasioned by the nail, which it is alleged caught in the cloth as the conductor attempted to jump or slide off the train. There is no contradiction in evidence whatever as to the manner in which Hopkins came to his death, except that afforded by the testimony of two inspectors for the company, who examined the car that night and the next day, and testified that there was no nail there. There was also evidence to the effect that the new plank, projecting above the battered plank behind it, was dangerous to safety. It is true, however, that Blount, inspector for the company, testified that he carefully examined this

car, and that it would not have been condemned. The evidence is in conflict upon this subject. If the trousers hung either from the protruding nail, or from the irregularity or uplift in the floor caused by the new plank, and if the jury find that Hopkins' body was for a moment suspended in the air as testified, and because of such suspension he lost his balance and the control of his person, and because of his inability to extricate himself was thrown either feet foremost or head foremost across the track and under the car, then the presence of the nail or the irregularity which caught his trousers may be by them regarded as the cause of his death. If the jury find from the evidence that neither of these alleged grounds of negligence was the cause of the death of the plaintiff's husband, there is an end of the case, and the verdict must be for the defendant. If you are satisfied, however, that the evidence preponderates in favor of the plaintiff on either of these issues, your next inquiry will be: Did the particular object, which it is contended caused Hopkins to fall under the forward overhand of the platform car and in front of the first wheel, constitute such a defect in the condition of the car as will support the charge of negligence?

"Now the determination of negligence is entirely a question for the jury. It is presumed by the law to be a matter of that character which 12 practical men can, better than the court, determine in accordance with the truth and the principles of right and justice. You have heard the evidence on that subject, and the question of negligence is submitted exclusively for your consideration. I may add that all I have said with regard to the evidence is submitted, as I have the right to do under the practice of these courts in summing up, merely to assist, and not to control, you. Our practice is quite different from that of the state courts, where the evidence may not be discussed. In these courts, adopting the old common-law practice, the judges have the power to refresh the minds of the jury as to the salient features of the evidence, to arrange it, and collocate it so as to assist them, but the final duty with regard to finding the facts is exclusively for the jury. All I have done, or may do, has been done merely for the purpose of assisting you, and not for the purpose of controlling your independent judgment, which must determine the issues of fact in this case.

"There are, however, certain principles of law which you must consider as aiding you in the determination of this question of negligence. Perhaps the rule upon this subject cannot be better expressed than in the language of the Supreme Court of Massachusetts, cited with approval by the Supreme Court of the United States. It is as follows: 'The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment including the negligence of his fellow servants does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect.' In this case you will understand that the defendant company occupies the attitude of the master. 'The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them even when the same person renders service by turns in each, as the convenience of the employer may require.' In a subsequent portion of the same opinion, the court said: 'The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe condition.'

"In the light of this decision the tank car or flat car, as it is indifferently called during the progress of the trial, may be regarded as machinery. The obligation of the railway company to furnish and to keep it in safe condition is indisputable. It follows that if a conductor, or other employé whose duty is not to furnish but to operate machinery, should be injured by defects, for the absence of which the company can properly, in view of all the facts,

be held culpable, the latter would be liable for injuries which may result. I am speaking generally now of such freight cars, and not of this particular freight car. The application to this freight car will be subsequently made. The duty of keeping the cars passing over its lines in safe condition implies the duty on the part of the company of inspecting them. This does not require an unreasonable inspection, but it should be made with ordinary care and diligence. A railroad employé, of course, pursues a dangerous and hazardous occupation. In a sense he may be said to take his life in his own hands when he engages to work with ponderous trains and machinery and cars, moving with different degrees of rapidity, and if this—or any other accident—however lamentable the result, was brought about by the ordinary risks or dangers of that service, there ought to be, and can properly be, no recovery against the defendant company. But at the same time, if, for want of proper inspection, there was a dangerous defect left in the car, and an ordinary or proper movement was made by Hopkins in the performance of his duty without negligence on his part—which otherwise would have resulted in no injury whatever—and these became the proximate cause of his death, the jury may, if they think proper, regard the presence of such defect as negligence. But, as I say, the question of negligence is entirely for them.

“Nor does it matter if the defect is in the cars of another railroad company, or other person, firm, or corporation, operated on the lines of the company where the injury was sustained. It does not matter to an employé whether he is hurt by a defect in the car of the company employing him or the car of another company. The injury to him, or his family, is the same. It follows that a railway company is responsible for such defects as would be disclosed by ordinary inspection; that is, by ordinary care and diligence. When cars come to it which have defects, visible or discoverable by such inspection, it must either remedy such defects or refuse to take such cars. This much is due to its employés. Whether there was such a defect in the car which killed the plaintiff's husband, and, if there was, whether it could have been disclosed and discovered by ordinary care and diligence in inspection, and whether because of this defect he was actually killed, are questions for the jury.

“At the request of defendant's counsel, I charge you that ‘in a case of this character the plaintiff cannot recover, unless her husband could have recovered in the event he had merely received personal injuries instead of having met with his death.’ Also at the same request: ‘If the deceased immediately or remotely, directly or indirectly, caused the injury or any part of it, or contributed to it at all, his wife could not recover.’ ‘His wife’ by which the counsel means the widow, could not recover. I also give you the additional instruction asked by the defendant's counsel: ‘Before an employé can recover from a railroad company, he must be free from fault, and, if he is killed while in disobedience of a rule of the company, his widow cannot recover, unless it appear that such disobedience did not directly or indirectly contribute to any degree to the injury.’ To this general principle I feel obliged, however, to add that if it shall satisfactorily appear to the jury by a preponderance of the evidence that the very exigencies of the business of the company, and the requirements of the defendant company's officers, obliged defendant's employés to disregard the written or printed rule, and if this was universally known to be true, and if such violation was constantly made, and the evidence discloses no attempt on the part of the company to stop it, other than the rule, the printed or written rule prohibiting such action cannot be regarded as relieving the company from the results of alert and active conduct on the part of its employés, which was necessary and proper, and of which it continually enjoyed the benefit.

“The next request to charge by the defendant's counsel is cognate, and is also given. ‘When an employé of a railroad company has his choice of two ways in which to perform a duty, the one safe and the other dangerous, though convenient, he is bound to select the safe method, and, if he does not and is killed, cannot recover.’ This rule, while correct as a general principle, in view of the issues here involved requires brief elaboration. If it is clear from the evidence that the business of the defendant company required that the more dangerous way should be adopted, that the movement of passengers

and freight in modern intercommunication and commerce required constant activity and alertness on the part of its own employes and swift movement and swift dismounting from cars when they were not proceeding at an unreasonable rate of speed, and beyond a rate of speed permitted by the law, and if the rule of the company either expressly or impliedly required such alertness and activity of its employes, even though a method may be more dangerous than slower and more cautious methods, it is true that a company cannot be exonerated from the consequences of such alertness and activity as it actually demands from its employes, although it may be apparently obnoxious to its written or printed rules, published some time before.

"At the request of the defendant's counsel, I charge you that 'a corporation acts only through its agents. A corporation's inspection of cars is necessarily done through its agents. It may, if it sees proper, delegate that duty to inspect to one set of employes under certain circumstances, and to another employe or set of employes under other circumstances. If the employe to whom the duty of inspection is delegated under certain circumstances fails in that duty, it is his own negligence and there can be no recovery by his widow if he is killed as a result of his own failure in the matter of inspection.' This is a correct statement of the general rule. It should always have a reasonable construction in view of the facts. It will be for the jury to determine if the failure of Hopkins to discover the defects in the cars, if there were any such defects, contributed in any degree to cause his death. The jury will look to the evidence to ascertain if this is true. As I recall the evidence, which you must remember, after nightfall Hopkins was sent to an industrial line over which the Southern Railway had control to bring therefrom the car of a private corporation. His primary duty was that of a conductor. If there were no inspectors at Augusta, it would be his duty under the rules of the company to inspect the cars which he moved. If, moreover, it appears that this car was moved here from the line of the Southern, was placed by the same company on the industrial line, was it negligence on the part of the conductor, who was sent for it in the night, to fail to discover the defects, if any, which existed, and did this failure directly or indirectly contribute in any manner to his death? In so far as the questions of fact are involved, these are matters for the determination of the jury. It appears from the evidence that the Southern has a large corps of inspectors at this place. The head inspector for the defendant company testified that he had 28 men under his orders, and that he could discharge any one of them if he failed to perform his duty.

"If, gentlemen, you find that the company was not negligent as charged in the declaration, you must find for the defendant. If you find that the deceased, the husband of the plaintiff, by negligence contributed in any manner, directly or indirectly to his own death, you must also find for the defendant. In either event your verdict will be, 'We the jury, find for the defendant.'

"If, however, you find that the defendant was negligent as charged, and that such negligence caused the death of the plaintiff's husband, and that he did not by negligence in any manner contribute thereto, your verdict must be for the plaintiff, and in that event you will proceed to ascertain the amount you should find for damages.

"In volume 70, I believe, of the reports of the Supreme Court of Georgia, certain tables are to be found which are in evidence before you, and which that court has held to be admissible in evidence for the purposes for which they were designed. It is also admissible here for the same purpose. They are not, however, binding upon you, and you may use them or not as you see fit. They are admitted in evidence solely to aid you in reaching certain reasonable and proper conclusions, because they show the result of certain observations and calculations which may be of assistance to you in your consideration of this case.

"On page 845 appears what is called the Carlisle Mortality Table, and from it can be obtained the probable expectancy of life under ordinary conditions remaining to persons of various ages. If it is proven before you that the husband of the plaintiff in this case was 39 years of age at the time of his death, by consulting this table we may ascertain that the average person

of that age may reasonably expect to live about $28\frac{1}{4}$ years longer, barring any unusual contingencies. If, then, you discover from the evidence the average yearly earning capacity of the deceased, the use of this table by indicating the probable expectancy of life may assist you in reaching a conclusion as to the aggregate value of the earnings of the deceased during the remainder of his lifetime had he lived out his expectancy, of course, taking into consideration any probable increase or diminution in his earning capacity during the remainder of such expectancy. You will, however, conclude for yourselves from all the facts proven in the case, the condition of health, the nature of occupation, and the general surroundings of the deceased what his reasonable expectancy would have been. When you arrive in your own minds at the probable aggregate earnings of the deceased for the remainder of his life, had he lived out his expectancy, your next duty will be to reduce this amount to its present cash value, or such sum as paid at one time, would be equivalent, in your judgment, to such aggregate earnings spread over quite a long period of years. For this the court can, of course, give you no definite rule, and you will have to determine such sum for yourselves. I repeat that this table is not binding upon you. You may use it if you think proper. You may reach your conclusion as to damages, if you decide the defendant is liable, according to the method I have given you, or according to the method you may adopt.

"On page 947 of the volume referred to you will find another table, by which the value of annuities on the lives of persons may be calculated. This table of annuities is designed to show the actual present cash value of annuities, or aggregate yearly cash earnings, figured at \$1 per year, for persons of various ages. If it has been proven before you that the deceased, was 39 years old at the time of his death, by referring to the table you might reasonably conclude that at \$1 per year for each year during the reasonable expectancy of life of a person 39 years old that the present actual cash value of such an annuity or yearly income, figured at 7 per cent. the legal rate in this state, would be \$10.939. You would then fix the probable reasonable yearly income of the deceased had he lived from all the facts and circumstances in the case, and, if you should determine that amount to be \$900 a year, which is at the rate of \$75 a month, you would then multiply such sum by 10.939, the value of the annuity at \$1 per year, and thus obtain \$9,845.10 as the actual present cash value of his life.

"This annuity table may assist you in reaching a conclusion as to amount in a somewhat more mathematical and shorter way, and you may prefer to use it rather than the table first explained, but the two tables are not to be confused, for they are not to be used together, as the methods of obtaining results by them are different. I again repeat that the method of ascertaining damages by the jury, after considering all the proof, is one that the jury may determine for itself, in case they find the defendant liable. In case you find for the plaintiff, your verdict should read, 'We, the jury find, for the plaintiff the sum of so much—stating it—with costs of suit,' and your foreman will sign it.

"If you find for the defendant, your verdict will be, 'We the jury find for the defendant, with costs of suit.'"

BRAY v. MONONGAHELA RIVER CONSOL. COAL & COKE CO.

(Circuit Court of Appeals, Third Circuit. May 1, 1908.)

No. 38.

COLLISION—TOWS GOING ADRIFT IN FOG—LIABILITY OF TUG.

The owner of a tug which parted from its tow of coal boats on the Ohio river at night in a fog held not chargeable with negligence which rendered it liable for injuries done by the boats by drifting against other craft moored in the river merely because the tug was sent out with the tow from Pittsburg, 12 miles distant, at night, at a time when there was no fog.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Thomas Patterson, for plaintiff in error.

Charles G. McIlvain, for defendant in error.

Before WILLIAM HENRY MOODY, Associate Justice of the Supreme Court, and DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge. In the year 1905 the Evansville Contract Company was engaged in building part of a dam across the Ohio river about 12 miles below Pittsburg, Pa. When the work was suspended on the afternoon of Saturday, June 24, 1905, the floating plant, including derrick boats, pile driver boats, decked barges, flat boats, etc., was tied up in its usual harboring place. The Iron Age, a towboat owned by the Monongahela River Consolidated Coal & Coke Company (defendant below and here), left Pittsburg, with a tow of coal, at about 30 minutes after 10 o'clock in the evening of the 24th of June, 1905. She proceeded safely to a point adjacent to the site of the dam above referred to, where her tow was wrecked, and the barges composing it collided with the Evansville Contract Company's plant, "crushing, breaking, and injuring the same," and to recover for the loss and damage thus occasioned that company's trustee in bankruptcy instituted the action to which this writ of error relates. When, on the trial, the evidence for the plaintiff had been closed, the court entered a judgment of compulsory nonsuit, which it afterwards refused to take off; and the question now for decision is whether that judgment was, as is averred, erroneously awarded and sustained.

The "Statement of Claim," which in Pennsylvania is substituted for a common-law declaration, averred and alleged, inter alia, that the defendant was under the duty of taking care "to properly and carefully control and govern its said crafts, so as to avoid collision with, or injury to, other craft lawfully using said river, or the harbors and mooring places therein, yet the said defendant company, not regarding its duty in the premises, did so carelessly and negligently conduct its operations as aforesaid that during the night of June 24 to the morning of June 25, A. D. 1905, the said defendant sent out from the Pittsburg Harbor the steamer Iron Age, with a loaded fleet of coal boats, coal barges, model barges, etc.," and the only lack of due care asserted and relied upon in this court is that which was thus charged, namely, that "it was negligence to send out the Iron Age on the night of June 24, 1905." This position, however, is untenable, because there was no evidence upon which a verdict in its support could reasonably have been sustained. The contention that the burden of proof was shifted to the defendant is irrelevant, for the plaintiff himself adduced testimony that the fog which immediately caused the parting of the tug and its tow had "shut down and enveloped" them for "less than three minutes" before the accident happened. They had proceeded safely and without incident to that time; and it could not, we think, be justly held that, with respect to a plant lying 12 miles below, it was an act of negligence for the Iron Age to proceed at all merely because some rivermen would have thought she was "liable to have some fog" at some indeterminate time and place after starting.

No useful purpose would be served by discussing the evidence with more particularity. It must suffice to say that careful reading of the whole of it compels the conclusion that it would not have warranted a finding of negligence on the part of the defendant.

Therefore the judgment of the Circuit Court was right, and is affirmed.

CANADIAN IMP. CO. v. COOPER et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 203.

1. **BROKERS—RIGHT TO COMMISSIONS—SALE MADE BY AGENT.**

A broker employed to sell property at a fixed price is not deprived of his right to commissions because the purchaser was procured through the agency of another employed by him.

2. **SAME—REVOCATION OF AUTHORITY—BAD FAITH OF PRINCIPAL.**

Where brokers employed to sell bonds procured a purchaser who was ready and willing to take the bonds and disclosed his name to their principal, the latter cannot deprive them of their right to commissions by revoking their authority and itself making the sale to such purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 69.]

In Error to the Circuit Court of the United States for the Southern District of New York.

On writ of error to review a judgment entered May 6, 1907, upon the verdict of a jury in favor of the plaintiffs for \$20,000.

Decker, Allen & Storm (Charles A. Decker, of counsel), for plaintiff in error.

Samuel Untermeyer (Abraham Benedict, on the brief), for defendants in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This action was brought by the plaintiffs below to recover \$20,000 for services as brokers in effecting a sale at par of two million dollars of bonds issued by the defendant, for the agreed commission of one per cent.

Error is assigned as follows:

First.—The court erred in refusing to grant the motion of counsel for the plaintiff in error at the close of the case, to dismiss the complaint on the ground that no connection of the plaintiffs, or the plaintiffs as a firm, was shown with the transactions proved.

Second.—The court erred in charging the jury:

"But a man, unless the agreement is specific to the contrary, may just as well employ some one else to do his work for him as to do it all himself; he may just as well earn his commission by the labor of another whom he employs for that purpose as by his own direct personal acts."

Third.—The court erred in charging the jury:

"But if the option had expired because it had been taken away after the name of Blair & Co. had been divulged, that kind of an expiration of the option would not, in my judgment, deprive the plaintiffs of a recovery."

There was no error in refusing to dismiss the complaint on the ground that no connection of the plaintiffs with the transaction was shown. It is possible that there was sufficient uncertainty upon the subject to warrant the submission of the question to the jury but the court was clearly right in refusing to decide it as matter of law.

There was no error in the charge as quoted in the second assignment *supra*.

The language was used by the court in explanation of what immediately preceded it. The jury had just been told that if they found that the plaintiffs were the procuring cause of the sale of the bonds to Blair & Co. that such conclusion would be reached by finding that the work which procured the sale was "the labor of Anderson, one of the plaintiffs, in going to Luria, and Luria in going to Tobey and Tobey in communicating with Marston," of Blair & Co.

The broad language quoted must, therefore, be limited to the facts to which it evidently referred, and we know of no authority for holding that a broker, employed to procure a purchaser for property at a fixed price is, if he produces such purchaser, deprived of his commissions because he has employed assistants.

The quotation from the charge found in the third assignment of error, when taken in connection with the rest of the charge on the same subject, is, we think, entirely correct. The jury were instructed in substance, if they found that the plaintiffs had procured a purchaser ready and able to take the bonds and had disclosed his name to the defendant, that the latter could not, by revoking the plaintiffs' authority and selling the bonds itself to the purchaser, deprive the plaintiffs of their commissions.

In *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, the Court of Appeals, at page 384 (38 Am. Rep. 441), says:

"The right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of the obligation by the broker was purposely prevented by the principal."

We think no reversible error has been assigned and that the judgment should be affirmed with costs.

POLLOCK et al. v. RIDDICK.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1908.)

No. 1,777.

SALES—OPTION TO BUY—ACCEPTANCE.

Under a contract giving an option to purchase timber, to expire on a certain date, and providing that, "if accepted, the above-named parties are to pay for said timber an additional amount of \$2,450, in cash upon the making of a contract for the sale of said timber," the purchasers were

required to pay or tender the money before the option expired to entitle them to maintain an action to recover damages for the refusal of the seller to make the sale.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

H. R. Boyd, for plaintiffs in error.

A. W. Biggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by E. N. Pollock and H. R. Pollock to recover damages for the failure of T. K. Riddick to comply with a contract on an accepted option for the sale of timber. The court below sustained a demurrer and dismissed the case.

The material part of the option executed and delivered by Riddick on November 1, 1904, was as follows:

"Received of E. N. Pollock and H. R. Pollock, Memphis, Tennessee, the sum of fifty dollars, in consideration of which amount I have given, granted and sold to them the option and privilege of purchasing all the timber of every description now standing on that portion of my place in Crittenden county, Ark.," etc.

"This option is given for thirty days and expires on the first day of December, 1904."

"If accepted, the above-named parties are to pay for said timber an additional amount of \$2,450 in cash, upon the making of a contract for the sale of said timber."

"It is understood and agreed that if this option is accepted, and said timber purchased, the purchasers are to be allowed three years, or until the first day of January, 1908, to remove the said timber," etc.

It will be observed that this option was not one to enter into a contract for the purchase of the timber, but to purchase the timber. Its terms are clearly defined. It was given for 30 days, and expired on the 1st day of December, 1904. The Pollocks were given the option and privilege of purchasing the timber, but only within the life of the option. And they were given the option to purchase the timber by paying the additional amount of \$2,450 in cash.

But it is contended that the term defining payment is qualified by the succeeding condition; that it was to be "in cash" only "on the making of a contract for the sale of said timber"; that this last, "the making of a contract for the sale of said timber," was a condition precedent; that the cash did not have to be paid or tendered until the contract was made; and that in the present case the contract was not made, nor was there any offer to make it. The substituted declaration avers that Riddick was absent from Memphis from and after about the 20th day of November, 1904, until the 5th day of December, 1904, at Somerville, in Fayette county, Tenn., and that prior to the 1st day of December, 1904, one of the Pollocks went to Somerville, saw Riddick, and told him that they (the Pollocks) accepted the option and contract to purchase, and that they would take the timber under the terms and conditions of the option, and that Riddick returned to Memphis on or about the 5th day of December, 1904, and on that day the Pollocks "were ready, willing, and able to pay the defendant the sum of \$2,450," the

balance of the consideration named in the option and contract, and demanded under the option; that Riddick execute a contract for the timber upon said property to them, and that he comply with the conditions of said option which Riddick declined to do, on the ground that the balance of the consideration of \$2,450 was not paid or tendered on or before the 1st day of December, 1904; and that the demand for a compliance with the said contract on December 5, 1904, came too late. In brief, as shown by the substituted declaration, the Pollocks were given until the end of the 1st day of December to purchase the timber by paying the additional amount of \$2,450 in cash, and at the time of paying or tendering this money they had a right to demand a conveyance of the timber. But they let the time pass without taking advantage of the option. By the terms of the option it expired on the 1st day of December, and they waited until the 5th of December, and then demanded that Riddick execute a contract conveying them the timber. They made this demand upon the strength of the fact that on or about the 1st of December they had notified Riddick that they accepted the option, but, though they accepted it, they did not comply with its terms during its existence.

We think this case is fully covered by the decisions in *Kelsey v. Crowther*, 162 U. S. 404, 408, 16 Sup. Ct. 808, 40 L. Ed. 1017, and *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 109 Fed. 280, 283, 48 C. C. A. 363. In each of these cases an option to sell land, etc., was involved, and a proceeding to enforce the option. In each an abstract of the land covered by the option was to be furnished, and the failure on the part of the giver of the option to furnish the abstract was made the excuse for not paying or tendering the price of the land within the time fixed by the option. But the court held that the duty to tender the price of the land under the option and according to its terms existed regardless of the failure on the part of the giver of the option to furnish the abstract if the would-be purchaser desired to lay the ground for the suit for specific performance. Said the court, speaking by Mr. Justice Shiras (page 408 of 162 U. S., page 810 of 16 Sup. Ct. [40 L. Ed. 1017]):

"If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract and might have formed a successful defense to an action for damages brought by Crowther. But, if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance. To entitle themselves to a decree for a specific performance of a contract to sell land, it has always been held necessary that the purchasers should tender the purchase money."

This is in accordance with the rule laid down in *Bank of Columbia v. Hagner*, 1 Pet. 460, 464, 7 L. Ed. 219:

"The seller ought not to be compelled to part with his property without receiving the consideration; nor the purchaser to part with his money, without an equivalent in return. Hence in such cases, if either a vendor or vendee wish to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without an actual performance of the agreement, on his part, or a tender and refusal."

The same question came before this court in the case of Kentucky Distilleries & Warehouse Company v. Warwick Co., 109 Fed. 280, 48 C. C. A. 363, and the decision of the Supreme Court in Kelsey v. Crowther was expressly followed, Judge, now Mr. Justice, Day, saying (page 283 of 109 Fed., page 366 of 48 C. C. A.):

"As we understand Kelsey v. Crowther, the ruling of the Supreme Court of the United States is that notwithstanding failure to furnish an abstract when the purchase money was to be paid by a day certain, and time was of the essence of the contract, the purchaser seeking specific performance would be obliged himself to tender performance on his part."

In the present case, the option was to purchase, and it had to be used within 30 days. It was to expire on the 1st of December. Before the termination of that day, the \$2,450 must be paid in cash. If the Pollocks desired the timber, they should have paid the cash. If they desired also a written contract, they should have paid or tendered the cash on that day and demanded the contract. It does not appear they did either thing. They simply stood by and failed to take advantage of the option while it was still alive.

Judgment affirmed.

LEVY et al. v. EQUITABLE LIFE ASSUR. SOCIETY.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1908.)

No. 1,740.

LANDLORD AND TENANT—CONSTRUCTION OF LEASE—PROVISION FOR TERMINATION IN CASE OF INJURY BY FIRE.

A lease for a room in a six-story building provided that, if the "building or premises wherein said demised premises are contained" should be destroyed by fire or so badly injured that they could not be repaired within sixty days, the lease should terminate; but if said premises, "having been injured as aforesaid," should be repairable within 60 days, the lessor should repair with all reasonable speed, and the rent should cease during the time of making the repairs, and that, if so slightly injured as not to be rendered unfit for occupancy, they should be repaired and the rent should not cease. *Held*, that such provisions applied to the entire building, and that, on an injury to the building by fire which could not be repaired within 60 days, the lessor was entitled to terminate the lease, although the demised portion was only slightly injured, and not rendered unfit for occupancy.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

L. Lehman, for plaintiff in error.

D. Goldsmith and H. Craft, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is a suit which grew out of the partial destruction by fire of what was known as the Equitable Building, in Memphis. Beginning August 1, 1903, the plaintiffs leased a storeroom in one corner of the building, on the ground floor, for use as a saloon and café; first, for three years, and after that for five years more. On February 21, 1906, the building was partially destroyed by

fire. It was a large office building, estimated to be worth \$79,000, and the adjusters appraised the damage at \$43,000. The building had six stories, and the principal damage was to the upper stories. The store-room occupied by the plaintiffs was but slightly damaged; the principal injury being from water. The plaintiffs did not vacate the store-room occupied by them in consequence of the fire, but continued to do business, and on March 12, 1906, the agent of the defendant served notice upon them that he considered the lease canceled by reason of the damage to the building, and expected them at once to surrender possession of the premises. The plaintiffs refused to do this, and have been in possession ever since. Instead of surrendering, they brought the present suit to recover \$25,000 damages for breach of the two leases under which they claim to hold possession of the saloon. A part of the damages alleged rests in contract and a part in tort. Thus the lessor was to furnish water, heat, and light, but after the fire the water, gas, and electricity were shut off, it is claimed, in violation of the contract. After the fire, a fence or barricade was constructed around the saloon, to some extent hindering entrance. A shed was built over the sidewalk, and a chute, or two chutes, for brick and débris, were constructed from the second story to the street in front of the entrance to the saloon. All these acts were charged by the plaintiffs to have been wanton and unnecessarily harmful to their business. The case was tried before a jury, and there was a verdict for the defendant. The attempt is to reverse this.

The allegations of the declaration concerning the contents and provisions of the two lease contracts made and entered into between the Equitable Society and the plaintiffs were admitted by the latter in its plea to be correct. The charge of the court was based upon the statement of the declaration referred to, which is as follows:

"Both of said leases provide that if during the term thereof the building or premises wherein said demised premises are contained shall be destroyed by fire, or the elements, or be so badly injured that they cannot be repaired within 60 days from the happening of such injury, then said lessees shall immediately surrender said premises and all interest therein to the defendant. And both of said leases further provide that in case of destruction or partial destruction of said building, as aforesaid, the defendant, as lessor, may re-enter and repossess said premises; but if said premises, having been injured, as aforesaid, shall be repairable within 60 days from the happening of such injury, then the rent shall not run or accrue after such injury, or while the process of repairing is going on, and defendant, as lessor, shall repair the premises with all reasonable speed, and the rent shall re-commence immediately after such repairs shall be completed; and if said premises shall be so slightly injured by fire, or the elements, as not to be rendered unfit for occupancy, then said lessor agrees that the same shall be repaired with reasonable promptitude, and in that case the rent accrued or accruing shall not cease or terminate."

It was the contention of the plaintiffs that these leases provided that, if the demised premises should be so badly injured that they could not be repaired within 60 days after the fire, the lessees should immediately surrender the same. But, if the demised premises should be repairable within 60 days, then the rent should not accrue after the injury, or while the work of repairing was going on. The lessor should repair the premises with all reasonable speed, and rent should re-com-

mence immediately after such repairs should be completed; and, if the demised premises should be so slightly injured as not to render the same unfit for occupancy, then the same should be repaired with all reasonable promptitude, and in that case the rent accrued or accruing should not cease or terminate. In other words, the plaintiffs contended that the provisions of the lease or leases respecting the demised premises related to them alone, and not to the building as an entirety. The character of the injury done by the fire was to be determined with reference to the demised premises alone, without regard to the building in which they were contained. If the demised premises should be repairable in 60 days from the fire, or if the demised premises should be so slightly injured as not to be rendered unfit for occupancy, in either case the lessor should repair the premises with all reasonable speed. In the first case the rent should not accrue while the premises were undergoing repairs; and, in the second case, the rent should not cease or terminate.

The whole case turns upon the construction of these provisions of the leases as set forth in the declaration. The court recognized this and instructed the jury that if they believed from the testimony that the building could not have been repaired within 60 days, but that it would require more than 60 days to have repaired it and placed it substantially in the condition it was in before the fire, then their verdict should be in favor of the defendant. Asked at the close of the charge what he meant by the expression "building," the court said: "I mean the Equitable Building." And then questioned by counsel, "As a whole?" the court replied: "As a whole; from cellar to garret."

To make explicit its position with regard to the construction of the provisions of the written leases, as set out in the declaration, the court declined to charge the jury: (1) That the provisions for the termination of the leases on account of damage by fire means damage or injury repairable within 60 days to the part of the Equitable Building embraced in said leases without reference to the time required for repairing other parts of the building "(2) If you find that by the fire which occurred in said building on February 21, 1906, the part thereof demised by said lease was not injured, or was injured and the damage was repairable within 60 days from the time of the fire, then such damage did not operate to give the defendant the right to end both or either of said leases." (3) And the foregoing second instruction is applicable, even though it might have required more than 60 days from the time of the fire to have repaired other parts of the building than those covered by the lease, unless it was necessary in the repairing of such other parts to include the said leased premises in the work of repair that would take more than 60 days from the time of the fire to accomplish.

We think the court was quite right in taking the view it did of the provisions of the leases as set out in the declaration. It seems clear to us that the opening provision related to the destruction or damage by fire of the entire building described as "the building or premises wherein said demised premises are contained." It is provided that if these shall be destroyed by fire, or the elements, or be so badly injured that they cannot be repaired within sixty days from the happening of

said injury, then said lessees shall immediately surrender said premises and all interest therein to the defendant. This reading seems clear beyond controversy. An attempt is made to throw doubt upon its meaning by commenting on the succeeding provisions. But we think a careful reading of them makes their meaning plain. The declaration provides: "And both of said leases further provide that in case of destruction or partial destruction of said building, as aforesaid [observe that the reference is to the "building," meaning the entire premises "wherein said demised premises are contained"]." The defendant as lessor, may re-enter and repossess said premises [meaning evidently the demised premises]; "but if said premises, having been injured, as aforesaid [clearly referring to the entire building, the destruction or injury of which is the subject of the first provision], shall be repairable within sixty days from the happening of such injury, then the rent shall not run or accrue after such injury, or while the process of repairing is going on, and the defendant, as lessor, shall repair the premises with all reasonable speed," etc. There is room for argument that each lease should stand by itself, and that each part of the building should be considered as a unit in determining the effect of the injury caused by a fire on the lease which covers it. As a matter of policy there are arguments on both sides. It may be very impolitic to allow a lease to run simply because the room covered by it is substantially uninjured, although more than half of the building has been destroyed and will have to be rebuilt. But, after all, the question is not what the lease ought to be, but what it is, and that must be determined by a construction of the provisions of the leases as set forth in the declaration. For the reasons we have given, we think the court below was correct in the construction it gave in its charge to the jury.

Judgment affirmed.

PEOPLE'S UNITED STATES BANK v. GILSON et al.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1908.)

No. 2,690.

1. POST OFFICE—FRAUD ORDER—POSTMASTER GENERAL'S DECISION OF QUESTION OF FACT NOT REVIEWABLE.

In a doubtful case within his jurisdiction in the absence of fraud or a gross mistake of fact where there is some evidence which is satisfactory to the Postmaster General to sustain a fraud order issued under sections 3929 and 4041 of the Revised Statutes, as amended by Act Sept. 19, 1890, c. 908, §§ 2, 3, 26 Stat. 466, and by Act March 2, 1895, c. 191, § 4, 28 Stat. 964 (U. S. Comp. St. 1901, pp. 2686, 2688, 2749), his decision of a question of fact upon which the order is founded is conclusive, and it will not be reviewed by the courts.

2. SAME—COURT MAY REVIEW AND ENJOIN FOR LACK OF JURISDICTION, ERROR OF LAW OR GROSS MISTAKE OF FACT.

A court of equity may enjoin the enforcement of a fraud order (a) where the case was not within the jurisdiction of the Postmaster General as where the beneficial effect of the scheme was matter of opinion and not of fact; (b) where the issue of the order was induced by an error of law into which the Postmaster General fell; and (c) where its issue

was caused by fraud or a gross mistake of fact so that the order was "palpably wrong."

3. SAME—ISSUE OF ORDER WITHOUT EVIDENCE TO SUSTAIN IT ERROR OF LAW.

The issue by the Postmaster General of a fraud order upon facts admitted, conceded, or established beyond dispute which do not sustain it, or in the absence of any evidence to sustain it, is an error of law remediable in the courts.

4. EQUITY—ADMISSIONS—HEARING ON BILL AND ANSWER—HEARING ON BILL, ANSWER AND REPLICATION.

Where a case is set down for hearing on bill and answer, all the facts well pleaded in the answer are taken as true, whether responsive to the bill or not. But, where a case is set down for hearing on bill, answer, and replication, only those averments of the answer which are responsive to the bill are taken as true. All allegations in avoidance or justification are denied by the replication, and are taken as untrue.

[Ed. Note.—For case in point, see Cent. Dig. vol. 19, Equity, §§ 711, 712.]

5. SAME—PLEADINGS—GENERAL DENIAL INSUFFICIENT BEFORE, BUT GOOD AFTER, REPLICATION.

While a general denial in an answer of all the allegations of the bill not expressly admitted, or a negative pregnant, is insufficient on exceptions to the answer, all objections to the forms of denials are waived under equity rule No. 61 by the filing of a replication, and upon a hearing on bill, answer, and replication they do not constitute admissions of any of the averments they were interposed to deny. Where the essential equities of a bill are challenged by a general denial upon such a hearing, the complainant is entitled to no relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 653-659, 712.]

(Syllabus by Sanborn, Circuit Judge; Adams, Circuit Judge, and Philips, District Judge, concurring in result.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

For opinion of lower court, see 140 Fed. 1.

Shepard Barclay (Carter, Collins & Jones and Thomas T. Fauntleroy, on the brief), for appellant.

Henry W. Blodgett (Truman P. Young, on the brief), for appellees.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill exhibited by the People's United States Bank, a corporation of the state of Missouri, against Frank Wyman, the postmaster at St. Louis, and his subordinates, to enjoin them from marking fraudulent and returning to the senders letters and other packages of mail directed to it which contained valuable drafts and checks, in obedience to an order to that effect issued by the Postmaster General on July 6, 1905. The complainant charged in the bill that it was carrying on a legitimate and lucrative banking business through the mails; that there was never any evidence before the Postmaster General, except certain secret reports of post-office inspectors which the Postmaster General refused to divulge; that it was engaged in conducting any scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, or prom-

ises, and that it was not in fact so engaged; that at a hearing before the Assistant Attorney General for the Post-Office Department, before the fraud order was issued, these secret reports were withheld, and inspection of them was denied to the complainant, there was no other evidence that the complainant was guilty of participation in such a scheme, and all the evidence at that hearing was, and the conceded and admitted facts at that hearing were, that the complainant was not engaged in any such scheme or device, but that nevertheless the Postmaster General issued the order whereby, unless its execution were stayed by the court, some of the complainant's property, consisting of remittances by checks, drafts, and post-office money orders through the mails would be confiscated, some of it would be returned to senders, and its business and reputation would be destroyed, to its irreparable injury, in violation of the fourth, sixth, and fourteenth amendments to the Constitution. The defendants answered that the order of the Postmaster General was issued upon all the evidence taken both before and at the hearing before the Assistant Attorney General, both that in support and that in refutation of the charge that the bank was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises; that all this evidence taken together was satisfactory to the Postmaster General that the bank was so engaged; that it was in fact thus engaged; that the defendants were simply obeying the order of the Postmaster General, and they denied every allegation of the bill which was not thus expressly admitted. A general replication was filed, the case was set down for hearing on July 3, 1907, and on that day the court dismissed the bill.

Sections 3929 and 4041 of the Revised Statutes as amended by Act Sept. 19, 1890, c. 908, §§ 2, 3, 26 Stat. 466, and by Act March 2, 1895, c. 191, § 4, 28 Stat. 964 (U. S. Comp. St. 1901, pp. 2686, 2688, 2749), provide that "the Postmaster General may upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses or promises, instruct postmasters" at any postoffice at which letters to such a person or company arrive to mark them fraudulent and to return them to the senders. The Supreme Court has had occasion to consider these acts of Congress in two cases, in the *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 107, 108, 109, 110, 23 Sup. Ct. 33, 47 L. Ed. 90, and in *Public Clearing House v. Coyne*, 194 U. S. 497, 506, 509, 24 Sup. Ct. 789, 48 L. Ed. 1092. In the former case the Postmaster General had found, upon evidence satisfactory to him, that a scheme or device for obtaining money through the mails by means of pretenses, promises, and representations that physical ills could be benefited and cured by the proper exercise of the mind was a scheme denounced by these acts of Congress, and had issued an order commonly called a "fraud order" against the company which practiced it, whereby he directed the local postmaster to mark the letters

sent to the complainant which contained checks and drafts for money "Fraudulent," and to return them to the senders. The Supreme Court held (1) that, where the beneficial effect of the scheme or device in question as in that case is a matter of opinion not susceptible of proof as an ordinary fact, the Postmaster General has no lawful jurisdiction or authority to issue a fraud order (pages 106, 107 of 187 U. S., page 38 of 23 Sup. Ct. [47 L. Ed. 90]); (2) that, where the Postmaster General is induced to issue a fraud order by an error of law, his action is reviewable, and the execution of his order may be enjoined by the courts, citing *Burfenning v. Chicago, etc., Railway Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, *Johnson v. Drew*, 171 U. S. 93, 99, 18 Sup. Ct. 800, 43 L. Ed. 88, and *Gardner v. Bonestell*, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574, which apply the same rule to the Land Department (page 108 of 187 U. S., pages 38, 39, of 23 Sup. Ct. [47 L. Ed. 90]); (3) that if there is no evidence before the Postmaster General of the violation of the federal law, or if the admitted, conceded, or established facts before him show no such violation, the Postmaster General's determination that the evidence of such violation is satisfactory to him and his issue of a fraud order thereon is a pure mistake of law remediable by the courts (pages 109, 110 of 187 U. S., page 39 of 23 Sup. Ct. [47 L. Ed. 90]); and (4) that, where the Postmaster General issues a fraud order without jurisdiction or by reason of an error of law, and thereby stops the delivery of letters which contain valuable inclosures, he violates the property rights of the person or company whose letters are thus withheld (page 110 of 187 U. S., page 39 of 23 Sup. Ct. [47 L. Ed. 90]).

In *Public Clearing House v. Coyne*, 194 U. S. 497, 510, 515, 24 Sup. Ct. 789, 48 L. Ed. 1092, the Postmaster General had held that a scheme or device for obtaining money through the mails by means of pretenses, promises, and representations that persons who remitted \$3 enrollment fee and \$1 per month for 60 months would receive moneys in return proportionate to the increase of the membership of the association they joined, subject to numerous conditions, whereby the scheme "must ultimately and inevitably result in failure" and in loss to the great majority of the members (page 515 of 194 U. S., page 796 of 24 Sup. Ct. [48 L. Ed. 1092]), was not a lottery, but a scheme or device denounced by the acts of Congress. The court below had reviewed the finding of fact of the Postmaster General and had found that it was not such a scheme, but that it was a lottery. The Supreme Court upheld the constitutionality of these acts of Congress, "the only reservation being that the person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority or his action is palpably wrong," (page 509 of 194 U. S., page 794 of 24 Sup. Ct. [48 L. Ed. 1092]); and it said:

"Inasmuch as the action of the postmaster in seizing letters and returning them to the writers is subject to revision by the judicial department of the government in cases where the postmaster has exceeded his authority under the statute (*School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90), we think it within the power of Congress to intrust him with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases." Pages 509, 510 of 194 U. S., page 794 of 24 Sup. Ct. (48 L. Ed. 1092).

It also held that there was no error in the finding by the court below that the Postmaster General was mistaken in his finding of the fact that the plan was a scheme to obtain money by false representations and promises and in the finding of the court that it was in fact a lottery and not such a scheme. It sustained the fraud order because the plan constituted a lottery. Pages 512, 515 of 194 U. S., pages 795, 796, of 24 Sup. Ct. (48 L. Ed. 1092). A significant fact in this case is that the Supreme Court affirmed the review by the lower court of the Postmaster General's finding of fact, approved its reversal of that finding, and declared that such a review would not be made in doubtful cases, but only when his finding was "palpably wrong." Pages 509, 510 of 194 U. S., pages 793, 794 of 24 Sup. Ct. (48 L. Ed. 1092). These decisions are in exact accord with the settled principles of law which govern the decisions and acts of the Land Department and of the other executive departments of the government upon which quasi judicial powers are conferred by acts of Congress and from them, and the decisions cited therein and below, these conclusions may be safely drawn.

In a doubtful case within his jurisdiction in the absence of fraud or a gross mistake of fact, where there is some evidence which is satisfactory to the Postmaster General to sustain a fraud order, his decision of the question of fact upon which the order is founded is conclusive, and it will not be reviewed by the courts.

But his authority, like that of every other executive officer upon whom quasi judicial power is conferred by acts of Congress, is neither unbounded, arbitrary, nor discretionary. It is limited, and its exercise is governed by the acts of Congress which confer it and by the laws of the land, and his violation or disregard of either is remediable in the courts. If he is induced to issue a fraud order in a case beyond his jurisdiction, or by reason of an error of law in a case within his jurisdiction, and its issue in the absence of any evidence before him to sustain it, or upon facts found, conceded, or established without dispute which do not sustain it is an error of law, or if he is caused to issue it by reason of fraud or gross mistake of fact which renders its issue palpably wrong, the victim of the order is not remediless. He may avoid the decision of the Postmaster General and enjoin the execution of the order in a court of equity on the ground (1) that it was issued in a case which was not within the jurisdiction of the Postmaster General (*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 107, 23 Sup. Ct. 33, 47 L. Ed. 90); (2) or on the ground that it was issued in the absence of any evidence to sustain it or upon facts found, conceded, or established beyond dispute which do not sustain it, or that its issue was induced by any other error of law; or (3) that through fraud or a gross mistake of fact the Postmaster General fell into a misapprehension of the facts which caused him to issue an order which was palpably wrong (*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 107, 108, 109, 110, 23 Sup. Ct. 33, 47 L. Ed. 90; *Public Clearing House v. Coyne*, 194 U. S. 496, 509, 510, 512, 24 Sup. Ct. 789, 48 L. Ed. 1092; *Bates & Guild Co. v. Payne*, 194 U. S. 106, 111, 24 Sup. Ct. 595, 48 L. Ed. 894; *Noble v. Union River Logging R. R. Co.*, 147 U. S.

171, 172, 13 Sup. Ct. 271, 37 L. Ed. 123; Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71; Rosenberger v. Harris [C. C.] 136 Fed. 1001, 1003; Missouri Drug Co. v. Wyman [C. C.] 129 Fed. 623, 629; Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225; Wallace v. Adams, 74 C. C. A. 540, 545, 143 Fed. 716, 721; James v. Germania Iron Co., 46 C. C. A. 476, 479, 107 Fed. 597, 600, and cases there cited). The burden was on the complainant in this case to establish that it would suffer irreparable injury because the Postmaster General had issued the order, of which it complained, either without jurisdiction, or by reason of an error of law, or because of a gross mistake of fact which made the order palpably wrong. The first question in the case is, therefore: Did the complainant establish these essential facts by the pleadings, for if introduced no evidence?

The replication was filed on November 24, 1905. By consent of parties six orders were made by the court from time to time which extended the time for complainant to take its proofs until June 2, 1907. On June 20, 1907, the court below denied a motion of the complainant for a further extension of time to take its testimony and a motion of the defendants for a decree upon the pleadings, and set the case down for hearing on bill and answer on July 3, 1907. On the day last mentioned it rendered its decree of dismissal. The court erred in setting the case down for hearing on bill and answer because the complainant had filed and had not withdrawn its replication, and a replication works a radical change in the legal effect of the pleadings. When a case is set down for hearing on bill and answer, all the facts well pleaded in the answer are taken as true, whether responsive to the bill or not (Perkins v. Nichols, 11 Allen [Mass.] 542; American Carpet Lining Co. v. Chipman, 146 Mass. 385, 16 N. E. 1; Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425); but, where it is set down for hearing on bill, answer, and replication, only those averments of the answer which are responsive to the bill are taken as true. All allegations therein in avoidance or justification are denied by the replication, and are taken as untrue. Van Dyke v. Van Dyke, 26 N. J. Eq. 180, 181; Story's Equity Pleading (10th Ed.) p. 418, note 3. But this is a suit in equity. It must be heard anew in this court. A wrong reason is not fatal to a right decree and the question recurs whether or not the decree was right upon the bill, answer, and replication.

Counsel for the complainant suggest that the verification of the answer is defective, but an answer under oath was waived by the complainant, the verification is not material to the issues here, and the answer will be treated as without verification. Where the complainant waives the oath, an unsworn answer which denies material averments of the bill puts the complainant to his proof thereof, and he is entitled to relief only upon the allegations of the bill which are admitted by the answer. Beach's Modern Equity Practice, § 634; Union Bank v. Geary, 5 Pet. (U. S.) 99, 112, 8 L. Ed. 60; Reese v. Barker, 85 Ala. 474, 5 South. 305, 306; Winter v. City Council, 83 Ala. 589, 3 South. 235, 238. The gravamen of the bill was that the complainant was engaged in a prosperous and lucrative banking busi-

ness, that irreparable injury would be inflicted upon it by sending back to the remitters the checks, drafts, and money orders which were on the way to the bank through the mails and by the ruin of its reputation and business by the fraud order which was issued without the jurisdiction of the Postmaster General, by reason of an error of law and gross mistake of fact which made it palpably wrong. The defendants admitted by their answer that the order was issued by the Postmaster General; that they were obeying it; that there was a hearing before the Assistant Attorney General on June 16, 1905, before the order was issued; that there was no evidence that the complainant was engaged in any unlawful scheme or device for obtaining money through the mails at that hearing, or before the Postmaster General, except the secret reports of the inspectors, and that those reports and the evidence in refutation of the charge presented by the complainant constituted the evidence upon which the Postmaster General issued the order, and that this evidence was satisfactory to him. The answer contained no other admissions; and it closed with this denial:

"And these defendants deny each and every allegation in complainant's bill contained, save and except those that are hereby expressly admitted to be true."

The answer contained affirmative averments that E. G. Lewis, in the name of the bank, made false representations and promises which induced many persons to send more than two millions of dollars to the complainant and Lewis, a portion of which Lewis had converted to his own use, to the use of the Lewis Publishing Company and of the University Heights Realty & Development Company. But these allegations were and are futile because they were in avoidance of the charge of the bill. They were denied by the replication, and no evidence was introduced to prove them. When a suit in equity is heard on bill, answer, and replication the answer must be taken as true in all matters of confession responsive to the bill, but all matters in avoidance are denied by the replication, and they are not available to the defendant unless proved by evidence. *Van Dyke v. Van Dyke*, 26 N. J. Eq. 180, 181; *Humes v. Scruggs*, 94 U. S. 22, 24, 24 L. Ed. 51; *Jacks v. Nichols*, 5 N. Y. 178; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280.

But no relief may be lawfully granted to the complainant upon the pleadings in equity, except upon allegations of the bill that are admitted by the answer. Did the general denial in the answer admit the substantial equities of the bill? Did it admit the averments of fact to the effect that the complainant was conducting a legitimate and lucrative banking business, and that the execution of the fraud order would inflict irreparable injury upon it? If it did not, these averments were not admitted at all, and, as there is no proof of them, the complainant was not entitled to a decree even if the fraud order was beyond the jurisdiction of the Postmaster General, or was induced by an error of law, or by fraud, or by a gross mistake of fact, which made it palpably wrong. The admission or the proof of resulting irreparable injury, continuing or threatened, was as essential to

the injunctive relief sought as the admission or proof of causal wrong. *Darragh v. H. Wetter Mfg. Co.*, 23 C. C. A. 609, 619, 78 Fed. 7, 17.

Complainant's counsel insist that the general denial is an admission of all the averments of the bill which are not otherwise expressly admitted, although it in terms denies them. They argue and cite the following authorities to sustain their contentions: (1) That a general interrogatory in a bill is sufficient to require the defendants to answer all the charges it contains (Equity Rule No. 40; *McClaskey v. Barr* [C. C.] 40 Fed. 559, 561); (2) that a denial of a conclusion of law in an answer which contains an admission or averments of facts which establish that conclusion, is an admission of the conclusion (*Union Mutual Ins. Company v. Insurance Co.*, 24 Fed. Cas. 609 [No. 14,372]; *Adams v. Adams*, 21 Wall. [U. S.] 185, 190, 22 L. Ed. 504; *Caldwell v. Carrington*, 9 Pet. [U. S.] 86, 103, 9 L. Ed. 60; *Bartlett v. Gale*, 4 Paige, Ch. [N. Y.] 503, 507; *Robinson v. Stewart*, 10 N. Y. 189, 194); (3) that an averment in a bill not denied in any way in an answer is admitted (*Sanborn v. Adair*, 29 N. J. Eq. 338, 345; *Lee v. Stiger*, 30 N. J. Eq. 610, 611); and (4) that in equity the complainant is entitled to a specific answer to every material averment of his bill in order that he may know what is admitted and what he will be required to prove, and a general denial or a negative pregnant is insufficient (*Holton v. Guinn* [C. C.] 65 Fed. 450, 451, 452; *McClaskey v. Barr* [C. C.] 40 Fed. 559, 561; *Reed v. Insurance Co.*, 36 N. J. Eq. 146, 152; *Woods v. Morrell*, 1 Johns. Ch. [N. Y.] 103, 106; *Pierson v. Ryerson*, 5 N. J. Eq. 202, 203; *Story's Equity Pleadings* [10th Ed.] § 852). The first three contentions are conceded without qualification. The fourth proposition states a general rule which governs when invoked in due time and in the proper manner; but does it prevail after replication? In every case cited by counsel or by Story in which this rule has been applied the objection was taken by exception to the answer or upon bill and answer before a replication was filed and it was generally treated as a matter of form, and opportunity was given to amend and to interpose new denials. No case has been cited in which, after replication, a general denial or a negative pregnant has been held to constitute an admission of the indispensable averments of the bill at which it was leveled. The reason for the rule that denials must be full and explicit, and that general denials and negatives pregnant are insufficient, is that the complainant may know before he files his replication and joins issue what averments are admitted and what he must prove. If he is of the opinion that a general denial or a negative pregnant sufficiently informs him he may waive more specific denials. Equity Rule No. 61 reads:

"After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient."

It is conceded that, if exceptions had been filed to the form of this denial, it would have been insufficient, but the defendants would have been given an opportunity to amend their answer and to interpose

denials or admissions that would have been sufficient. The election of the complainant to file no exceptions undoubtedly led the defendants to believe that the form in which their averments and denials were presented was admitted to be sufficient, and hence it estopped the complainant from denying its sufficiency. The form of its denial was not of the substance or essence of the answer, and the objection to its sufficiency because it was not more specific was waived by the failure to except to it. It must now "be deemed and taken to be sufficient." A general replication admits the sufficiency of the answer as a discovery, and is a waiver of any objection to the form in which its defenses are presented. I Beach's Modern Equity Practice, § 474; Story's Equity Pleadings (10th Ed.) § 877; McGorray v. O'Connor, 31 C. C. A. 114, 116, 87 Fed. 586, 588.

A general denial or a negative pregnant in an answer in equity, while it is insufficient on exceptions, cannot be deemed an admission of the averments of the bill thus denied after replication, and no relief can be granted upon those averments in the absence of proof. *Savage v. Benham*, 17 Ala. 119, 132; *White v. Wiggins*, 32 Ala. 424; *Russey v. Walker*, 32 Ala. 532, 534; *Parkman v. Welch*, 19 Pick. (Mass.) 231, 234; *United States v. Ferguson* (C. C.) 54 Fed. 28; *Robinson v. American Car & Foundry Co.* (C. C.) 132 Fed. 166; *Patton v. J. M. Brunswick & Balk Co.*, 23 Fla. 283, 2 South. 366, 367. There are so many averments of the bill in this case which are essential to its equity, including among others the allegations relating to the legitimate and lucrative character and to the extent of the business of the complainant, and to the existence, the nature and the extent of the injury, present and prospective, which an enforcement of the fraud order had inflicted and would be likely to inflict upon it, that were not admitted by the general denial in the answer but were in form denied that its equity was not established and no decree for the complainant could therefore have been lawfully granted upon these pleadings in the absence of proof.

For this reason, the decree of dismissal of the bill must be affirmed. It is so ordered.

ADAMS, Circuit Judge, and PHILIPS, District Judge (concurring). We agree with the result reached in the foregoing opinion, but are unable to give our assent to the general classification of cases in which the action of the Postmaster General may be reviewed by the courts. It is said, in effect, that his action is reviewable when it is "palpably wrong," or when, through "gross mistake of fact, he fell into a misapprehension of the facts" resulting in a palpably wrong order. The words "palpably wrong" and "gross mistake of facts" are very comprehensive and elastic, and may be interpreted to mean what we would be unwilling to say would justify injunctive relief in an individual case. Moreover, we doubt whether the rules, as broadly stated, are warranted by the decisions of the Supreme Court, including the case of *National Life Ins. Co. of N. A. v. National Life Ins. Co.*, 28 Sup. Ct. 541, 52 L. Ed. —, decided by the Supreme Court on April 6, 1908, taken as a whole, and, believing that the recognition of them as law might afford ground for a contest over any fraud

order issued, and thereby seriously embarrass the administration of the affairs of a great department of the government, we prefer to express no opinion upon them until a case arises demanding it.

TOWN OF HINGHAM v. UNITED STATES.

In re UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 9, 1908.)

No. 760.

1. EMINENT DOMAIN—PROCEEDINGS FOR CONDEMNATION OF PROPERTY—PROOF OF INCIDENTAL DAMAGES.

In a proceeding for the condemnation of a part of a tract of land, to authorize the court to submit to the jury the question whether the value of the part not taken was diminished by the taking, and, if so, to what extent, as an element of damages recoverable, there must ordinarily have been testimony on the subject from witnesses shown to have special knowledge or qualifications to enable them to form an intelligent and correct judgment, and the fact that the jury viewed the premises cannot dispense with such testimony.

2. SAME—INTEREST ON AWARD.

In a proceeding by the United States to condemn land for public purposes, brought in conformity to Rev. Laws Mass. c. 1, § 7, the rule of *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 906, 42 L. Ed. 270, was applied, to the effect that the owner is not entitled to interest pending the proceedings, at least unless he proves that he has in fact suffered loss of the use of the land by reason thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 638-643.]

In Error to the District Court of the United States for the District of Massachusetts.

John D. Long and Joseph O. Burdett, for plaintiff in error.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty. (Roscoe Walsworth, Sp. Asst. U. S. Atty., on the brief), for the United States.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This is a proceeding on the part of the United States for the condemnation of certain lands belonging to the town of Hingham, for the site, location, and construction of a naval magazine. The proceeding was authorized by Act April 27, 1904, c. 1622, 33 Stat. 324, 338. In support thereof an act was passed by the Legislature of Massachusetts (chapter 446, p. 398, of the Acts and Resolves of 1905), giving the consent of that state to the acquisition by the United States by condemnation of the lands in question for the purposes described in the statute of the United States which we have cited. This act ceded jurisdiction to the United States, and also all tide-water lands belonging to Massachusetts within the area to be acquired.

The petition for condemnation was filed in the District Court on August 7, 1905. This seems to have been the initiation of the pro-

ceedings, and it closes with a prayer to the effect that, on proof that the amount awarded had been paid by the United States, the court should enter a decree that the fee of the land and "all and every right, title, and interest in and to the same," should be vested in the United States. The case was tried to a jury, by which the verdict fixing the damages was rendered on the 1st day of November, 1907. A decree of condemnation was entered on December 7, 1907, which concluded as follows:

"It is now, to wit, on this 7th day of December, 1907, further ordered, adjudged, and decreed that upon the payment within 30 days after the date of this decree to the said town of Hingham of the sum of \$10,500 damage, and its lawful costs in this proceeding, to be taxed by the clerk, or, upon the neglect or refusal of the said town of Hingham to receive said sums, then upon the payment of said sums into the registry of this court for the use of the said town of Hingham, the fee of said land hereinbefore described, and all easements, rights, and interests therein, be vested in the United States of America, to have, hold, possess, and enjoy for its use, forever."

There never has been any final order in accordance with the closing paragraph of the petition for condemnation, to the effect that, after payment of the award, the District Court would decree that the fee of the land be vested in the United States.

During the course of the trial the town reserved exceptions which make the basis of this writ of error. The facts are better stated by extracts from the bill of exceptions than otherwise, as follows:

"This was a proceeding for condemnation of a tract of about 750 acres of land in Hingham, and about 250 acres of land in Weymouth, for the purposes of a naval magazine, under the act of Congress approved April 27, 1904. The entire tract included in the petition for condemnation is shown upon a plan, entitled 'Plan Showing Ownership of Lands at Hingham and Weymouth, Taken by the United States of America for Purposes of a Naval Magazine, August, 1905,' which may be referred to in argument by either party.

"That portion of the respondent's land included within the tract sought to be condemned consisted of about 35½ acres, and was a part of the poor farm of said town. The remaining part thereof contained some 20 acres, and the poorhouse, barn, and other buildings for the accommodation and support of the town poor were situated thereon. The jury took a view of the land so taken and of the said remaining land, with the buildings thereon, and a plan showing both, and showing the contiguity and proximity of said remaining land to the land so taken for a naval magazine, was proved and put in evidence. Said plan is made a part of this bill, and may be referred to. Except as above, and the fact that the taking was for use as a naval magazine, no evidence was introduced tending to show damage to respondent's remaining land, or tending to show the proposed location of said naval magazine upon the tract, or its character or proximity to or distance from respondent's remaining land. Nor, except said view and plan, was there any evidence as to any diminution of accessibility to said remaining part by reason of said taking. The respondent requested the judge to rule that the jury, in considering the damage to the respondent's remaining land, might consider the damage resulting to it from the contiguity and proximity of said remaining land to the land condemned, and that the respondent's counsel might argue to the jury the damage so resulting."

The judge refused so to rule; but he, among other things, instructed the jury as follows:

"I instruct you, gentlemen, that you have no evidence before you which will warrant you in finding that the value of that part left has been dimin-

ished or made less in any other way. You have before you no evidence which would warrant you in concluding, from the mere fact that the part left will hereafter adjoin land taken for a naval magazine, that its value is thereby diminished by that fact alone."

This last ruling forms the basis of the first exception brought to our attention. The bill of exceptions proceeds further, as follows:

"The evidence showed that the town had made no use of the land taken since the filing of condemnation proceedings, to wit, August 7, 1905. It had before that permitted one Peterson to excavate and take away therefrom small amounts of sand gravel, of the value of about \$200 a year. Peterson testified that previous to August 7, 1905, he had excavated some 3,500 tons, and had left it lying in a pile in the form of screenings. These he has taken away since said date.

"The United States had caused the land described in the petition to be surveyed, and monuments to be erected thereon, marking its boundaries. There was no other evidence tending to show an entry upon the land by the United States.

"The respondent asked the judge to instruct the jury that, having determined the amount of damage to the respondent as of the 7th of August, 1905, they should add thereto interest from that date to the date of their verdict, or such sum as would cover the loss of the use of the land in question between said dates, which request the court refused to give, but instructed the jury as follows:

"I shall instruct you that there is no evidence here by which it could be found that the town has been deprived of the use of the land since August 7, 1905, and no evidence, therefore, upon which any interest should be awarded by you upon the amount of your verdict, when made up as of the date which I have named."

It thus appears that we have two questions. The first is whether there was evidence which the law regards as sufficient to enable the jury to ascertain whether the value of the part of the parcel not taken had been diminished by the taking, and, if "Yes," to what extent it had been so diminished. The other is whether interest from the time of the filing of the petition for condemnation to the time of the verdict of the jury should have been included in that verdict. As to the first question, it is plain that, unless there was evidence which enabled the jury to determine with a reasonable degree of definiteness to what extent the value of the part left had been diminished, it would have been useless for the jury to have undertaken to determine whether it had been in fact diminished. Therefore we have left only the question whether on such an issue, which is evidently more complicated than one merely of the value of land taken, a jury, which may be constituted in a major part, if not in the whole, of men who have no practical knowledge or experience, either as to the topic at large or as applicable to the particular locality involved, can dispose of it without the assistance of the testimony of persons of some skill in either one or both directions. In view of the fact that the parties, and especially the court, are not assumed to know whether or not a jury selected in the ordinary manner may contain a single person capable of forming a valuable judgment on a topic of that kind, it must be apparent that a verdict given without such assistance would be entirely in the air; and it is also apparent that, without some evidence of that character, the court would be wholly incapable on a motion for new trial, or for a reduction of damages, of forming any

judgment on the question whether the amount awarded was unjust, or even absurdly so. As to witnesses on an issue of this character, the rule is so thoroughly settled that they must be shown to be qualified in order to render their opinions of value that we need not enlarge on it, unless, perhaps, to cite the general language found in section 437 of Lewis' *Eminent Domain* (2d Ed.), that:

"Such a witness must appear to have some peculiar means of forming an intelligent and correct judgment beyond what is presumed to be possessed by men generally."

It seems to follow, therefore, as a necessary conclusion, that the law will not substitute jurymen, who may be wholly inexperienced, in lieu of witnesses on a topic of this character, thus nullifying the fact that as to witnesses it always requires a certain amount of special knowledge on the part of those who testify. It strikes the judicial mind, accustomed to trials of issues of fact, that in this case no substantial proof was offered on this particular issue.

The town of Hingham fails to cite any authorities supporting its position, except that it relies on *Parks v. Boston*, 15 Pick. (Mass.) 198, 209, 210, 211. We are unable to perceive that this gives the town any support. The real pith of the case is that it sustained the rulings of the trial court, on page 199, and it had no occasion to go further. It appeared there that witnesses had been called on the topic, and the court instructed the jury that, having heard the witnesses and enlightened their consciences as fully as they could, they must give a verdict according to their own opinions and convictions. Such is the customary rule, and it cannot be questioned. Then the court cautioned the jury that, if any one of them had any peculiar knowledge, he should disclose it, and testify to it in court. It also instructed the jury that they were entitled to take counsel of their own experience and knowledge of like subjects, and should consider, not only what the witnesses testified to, but what they had seen in the view which they had taken, and that, if witnesses had sworn to matters of opinion which the jurors, in the exercise of their good sense, did not believe to be correct, they should disregard such testimony. All these things are within the ordinary rules constantly given by the courts to juries, as confirmed by *Shoemaker v. United States*, 147 U. S. 282, 303, 305, 306, 13 Sup. Ct. 361, 37 L. Ed. 170; and, so far as the case related to the topic now brought to our attention, the opinion of Mr. Chief Justice Shaw, when he spoke in behalf of the court, merely sustained what we have cited. It is true that the opinion seemed to attach special weight to the knowledge acquired by the view because the case related to an estimate of damages; and so the Chief Justice, in speaking for himself alone, observed that he could see no reason why the jury might not estimate the damages without any evidence aliunde. It must be borne in mind here, however, that *Parks v. Boston* related entirely to estimating the value of the land taken, which is a far less complicated proposition than that before us, where the question with reference to the effect of taking a portion of a parcel of land on the remaining portion depends, of course, on a large range of circumstances, which no ordinary jurymen, and also no man not

experienced, can be assumed to take into account and properly weigh. Nevertheless, the only question before the court was the correctness of what appeared at page 199, which, as we have explained, was clearly in accordance with common rules.

As to the question of interest, we refer again to *Parks v. Boston*, which leads up to the other propositions which we need to consider, in that, at page 206 et seq., the opinion insists on, and reiterates and illustrates, the rule that the value of the land taken is to be estimated as of the time of taking. Such being the fact, it would seem to follow that the obligation to make compensation for the land arises *prima facie* as of the time of taking, so that, therefore, according to the ordinary rules, it should carry interest from that time. It is true that, under the provisions of many Constitutions, and also in accordance with the terms of the pleadings and judgment of condemnation in this case, title is not wholly divested out of the owner until payment is made; but, on fundamental principles, when the title does completely vest, it is as of the time when the taking occurred. In other words, the well-known rule thus explained in *Parks v. Boston* usually, in Massachusetts, determines the point as of which all the rights of the parties are ultimately fixed. There may be exceptional cases, as was pointed out by us in *United States v. Nahant*, 153 Fed. 520, 525, 82 C. C. A. 470. The general rule was recognized in *Old Colony Railroad Company v. Miller*, 125 Mass. 1, 3, 28 Am. Rep. 194, and in *Drury v. Midland Railroad Company*, 127 Mass. 571, 585. Indeed, this is carried to such an extent that in *Imbescheid v. Old Colony Railroad Company*, 171 Mass. 209, 50 N. E. 609, the owner was held entitled to interest, although he remained in possession of the lands and took the rents, leaving the corporation which exercised the right of eminent domain to recoup by subsequent suit. This was reaffirmed in *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327. In *United States v. Nahant*, already referred to, we refused to apply so technical a rule, in view of the fact that the town remained in full enjoyment of the use of what was there taken by condemnation, and in view, further, of the fact that the amount of compensation was the cost of reproducing what was taken, rather than any market value, and in view, further, that what was taken had not been reproduced. Consequently we relieved the United States from the payment of interest. We thus practically balanced the matter in accordance with the suggestions of *Shoemaker v. United States*, 147 U. S. 282, 321, 13 Sup. Ct. 361, 37 L. Ed. 170, already cited. In fact, in *United States v. Nahant*, the United States claimed no rule other than that which we have said is customary in the state of Massachusetts.

In the present case, however, the United States call our attention to a line of decisions of the Supreme Court, culminating in *Bauman v. Ross*, 167 U. S. 548, 598, 17 Sup. Ct. 966, 42 L. Ed. 270, to the effect that the payment of damages and the vesting of title in the United States are to be contemporaneous, and that consequently the owner is not entitled to interest pending the proceedings assessing them. Inequitable as it may be that any public authority should be enabled to tie up the lands of any person or corporation for some consider-

able time, pending proceedings in litigation, in such a way that the owner is barred from disposing of them as his own, we find that we must sustain the position of the United States on this proposition. The proceedings here were taken in conformity with the statutes of Massachusetts by virtue of Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), which provides that the proceedings shall conform as near as may be to the practice existing in like causes in the courts of record within the state where the land is situated. The petition for condemnation which we have described was consequently framed on section 7 of chapter 1 of Revised Laws of Massachusetts, from which section was derived the provision in the petition, and in the judgment of condemnation, that, if the appraisal was paid within one month, the fee should vest in the United States. Under a similar state statute, passed expressly to authorize taking the land where the Post Office Building at Boston is now situated, and which statute is set out at large in the margin of *Burt v. Merchants' Insurance Company*, 115 Mass. 1, the ordinary rule that the value of the land is to be estimated as of the time of taking, and not as of the time of trial, was reaffirmed; but, at page 14, it was observed that the effect of provisions like that which we have cited from the Revised Laws was that the final decision on the question of compensation fixed the time when the compensation should be paid, and the title vest in the United States. What is more peremptory are *Edmonds v. Boston*, 108 Mass. 535, 551, and *Norcross v. City of Cambridge*, 166 Mass. 508, 44 N. E. 615, 33 L. R. A. 843, to the effect that, where a statute provides that damages shall not be paid until the land has been entered upon, and possession taken, without any provision for compensation for delay in payment, the ordinary rule as to interest does not apply, and interest is not payable until the money becomes due, and that the Constitution of Massachusetts permits this, unless the owner proves that he has been put to trouble or expense, or incurred loss of the use of his land, not considered in assessing the damages. There is no evidence here of anything of that nature; and, therefore, for aught we can see, we must hold that the rulings of the District Court were correct.

The judgment of the District Court is affirmed.

UNITED STATES EXPRESS CO. v. KRAFT.

(Circuit Court of Appeals, Third Circuit. May 13, 1908.)

No. 20.

1. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—NEGLIGENCE.

Where a passenger, riding on the running board of a street car, was struck by the shaft of an express wagon standing against the curb, the owner of the wagon was negligent in not exercising due care in placing the wagon and securing the horse; plaintiff being entitled to assume that such care had been taken as to prevent the shafts of the wagon projecting over the running board of street cars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1515.]

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Plaintiff, while riding on the running board of a street car, was injured by coming in contact with an express wagon backed against the curb. The court charged that every one was called on to exercise the best judgment he could by using his eyes and senses to keep out of danger; that if plaintiff could see the obstruction in the street when he was getting on the car, or while the car was moving, he should have avoided putting himself in a place of danger, and if the accident was really plaintiff's fault, because he put himself in a place of danger, he could not recover; but that, in order to entitle plaintiff to recover, the jury must find, not only that defendant was negligent, but that plaintiff was not negligent. *Held*, that such instruction presented the question of contributory negligence to the jury in as favorable a manner to defendant as it had a right to expect.

3. MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREETS—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff by being struck by the shafts of an express wagon standing against the curb and extending into the street, as plaintiff was riding on the running board of a street car, evidence *held* to require submission of the question of plaintiff's contributory negligence to the jury.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

J. B. Woodward, for plaintiff in error.

John M. Garman, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. This was an action by the defendant in error, hereinafter called the plaintiff, to recover damages for personal injuries sustained by him, which he alleged were caused by negligence of the plaintiff in error, hereinafter called the defendant; and the latter concedes that "the sole question before this court is whether the plaintiff was guilty of contributory negligence which precluded recovery."

During the afternoon of June 4, 1906, the plaintiff boarded a moving street car, which had just left the beginning of its route at the corner of Broad and South Wyoming streets, in the city of Hazleton. It was an open car, with cross-seats and a running board on the side. It was somewhat crowded, but the plaintiff believed he could get a seat inside, and intended and attempted to do so, although he was still wholly or partly on the running board, when, after the car had gone about 127 feet, a point opposite to the place of business of the defendant was reached. There one of its express wagons, with horse attached, was standing between the track and the curb, and the shaft of this wagon struck the plaintiff, threw him from the car, and seriously hurt him. It is probable that the projection of the shaft over the running board of the car resulted from some immediate movement of the horse; but whether it did or did not is unimportant, for in either case it might have been prevented by due care in placing the wagon and securing the horse, and the plaintiff had a right to assume that such care had been taken.

The learned judge dealt with the subject of contributory negligence in a manner quite as favorable to the defendant as it had any right

to expect. He told the jury that "every one is called upon to exercise the best judgment he can, by using his eyes and his senses, to keep out of danger"; and this he said with express reference to the claim of the defendant that "the plaintiff could see the obstruction in the street there, that it was in plain view when he was getting on the car, * * * while the car was moving, and that he ought to have noticed it and avoided putting himself in that way in a place of danger." And he added:

"If this accident really is the fault of the plaintiff, because he put himself in a place of danger, he cannot recover; but if he exercised the care that any one would, any person of judgment, all the care that could reasonably be expected of him, and the defendant is found to have been negligent, then a complete case would be made out here, which would entitle him to a verdict."

And this statement, in substance, was reiterated in answering the points submitted by counsel, as, for instance, in saying:

"You must find that the defendant was negligent. If you at the same time find that the plaintiff was negligent, also, your verdict would be for the defendant. You have got to find both those points in favor of the plaintiff before he is entitled to your verdict."

Thus the question of contributory negligence was clearly and correctly submitted to the jury, and we cannot assent to the proposition that the court erred in refusing to decide that, upon the defendant's hypothesis of fact, negligence per se on the part of the plaintiff had been shown. Assuming "that the plaintiff chose to board a moving car when he might have got a seat before it started, or have stopped the car and got a seat after it had started, and would then have been safe, and the obstacle which struck him while on the running board was in plain view," yet it was for the jury to say whether these incidents, taken in connection with all the circumstances, did or did not constitute negligence in fact. They did not establish its existence as matter of law. It is true that where contributory negligence of either class is so conclusively proven that a verdict for the plaintiff, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. But the rule generally applicable, and which was rightly applied to this case, is that, as the question of negligence on the part of the defendant is one of fact for the jury to determine, under all the circumstances of the case and under proper instructions from the court, so, also, is the question of whether there was negligence on the part of the plaintiff, which was the proximate cause of the injury. *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 482, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Washington & Georgetown R. R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284.

The judgment of the Circuit Court is affirmed.

UNITED STATES v. MERRIAM.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1903.)

No. 1,407.

1. EMINENT DOMAIN—WHEN TITLE VESTS.

Under the direct terms of Rev. Laws Hawaii 1905, § 506, title to property acquired by condemnation proceedings does not vest in plaintiff until judgment of condemnation has been filed and recorded in the office of the registrar of conveyances.

2. SAME.

Under Rev. Laws Hawaii 1905, § 506, requiring a judgment of condemnation to be filed and recorded before title to property, acquired by condemnation proceedings, shall vest in plaintiff; and under section 2380, making unrecorded deeds void as against subsequent purchasers without notice, where the United States condemned land, and afterwards received a deed from owners of the property, registration of both the deed and the judgment of condemnation was essential to the security of the government's title, as against subsequent purchasers.

3. SAME—PLANS AND SURVEYS—STATUTE CONSTRUED.

Act April 3, 1905 (Sess. Laws Hawaii 1905) No. 23, § 1, requires the registrar of conveyances to file, on the payment of a fee, any plan of land, if it contains the name of the owner, etc. Section 2 prescribes what writing and mathematical markings shall appear upon a plan authorized to be filed under section 1, etc. Section 3 prescribes the size of the cloth upon which a plan is shown, and the scale upon which it must be drawn. Section 4 forbids the registrar to accept for record or to record any plan after the taking effect of the act. The title reads: "An act providing for the filing of plans and surveys of lands," etc., disclosing no purpose to amend or repeal statutes requiring record of condemnation judgments or of conveyances, where maps are themselves attached to the deed as included parts of the description. Rev. Laws Hawaii 1905, § 506, requires a judgment of condemnation to be filed and recorded before title to property, acquired by condemnation proceedings, shall vest in plaintiff. Section 2380 makes unrecorded deeds void as against subsequent purchasers without notice. Section 2358 requires the registrar to make literal copy of all instruments required to be recorded in his office. *Held*, that Act No. 23 does not cover the subject of recording judgments in condemnation suits, that it is not a substitute for section 506, and that it does not affect the recording of conveyances wherein a description of the property conveyed is included, without reference to plats on file in the registrar's office.

4. MANDAMUS—JURISDICTION—ANCILLARY REMEDY—RECORDING INSTRUMENTS.

The duty of the registrar of conveyances in Hawaii to record a judgment of condemnation in condemnation proceedings, and a subsequent deed acquired by plaintiff from the owners to complete its title, being ministerial, an application for a writ of mandamus to compel him to perform that duty will lie as an ancillary proceeding to carry out of the objects of the main case in eminent domain and to give complete relief.

In Error to the District Court of the United States for the Territory of Hawaii.

The United States applied to the District Court of the United States, in and for the district of Hawaii, for a writ of mandamus, commanding Charles H. Merriam, defendant in error, as registrar of conveyances of the territory of Hawaii, to receive for record and to record certain instruments. The petition alleges that on February 11, 1905, the United States instituted, in the District Court of the United States for Hawaii, a certain action against J. W. Kawai and his wife, and against the estate of Henry Waterhouse, de-

ceased, Ida Waterhouse, widow of said Henry Waterhouse, deceased, Eleanor Wood, daughter of said Henry Waterhouse, deceased, and her husband, Arthur B. Wood, against Mary Corbett, daughter of said Henry Waterhouse, deceased, and David Corbett, her husband, and Albert, son of said Henry Waterhouse, deceased, and Gretchen, the wife of Albert. It is alleged in the petition that the action referred to was brought by the United States against the defendant for the purpose of having certain real estate, situated in the territory of Hawaii, and alleged to be the property of the defendants in that action, condemned for public uses, and that such proceedings were had that, on the 14th of July, 1905, a judgment of condemnation was duly and regularly entered, whereby, and by virtue whereof, certain real estate, situated on the island of Oahu, in Hawaii, was condemned to the public use of the United States, and the title thereto was decreed to be in the United States; that thereafter, on the 21st of July, 1905, the estate of Henry Waterhouse, deceased, the executors of the last will and of the estate of Henry Waterhouse, deceased, the widow and daughters of the said deceased, and the other persons, except Kawai and wife, named as defendants in the above referred to action, in order to complete the title of the United States to the said real estate, made and delivered unto the United States a deed, conveying to the United States all their right, title, and interest to the said property; that the said deed was acknowledged, by the parties executing the same, before officers authorized to take acknowledgments, and that the acknowledgments were in the form prescribed by the laws of the territory of Hawaii. It is alleged that Merriam, as registrar, was required, under the law, to receive for record and to record all instruments relative to the title of real estate within the territory of Hawaii, provided such instruments should be executed and acknowledged in the manner prescribed by the laws of the territory; that thereafter, on August 1, 1905, the United States, through its agents, offered to the said Merriam, as registrar of conveyances, for record a copy of said judgment so recovered, as aforesaid, and did likewise offer for record the said deed of conveyance hereinbefore referred to, and tendered to the defendant and the respondent the fees for such recording required by the laws to be paid. It is alleged that the respondent, as registrar, refused to receive the said instruments, or either of them, for record, and refused to record the same; that his action in refusing to receive or record the said instruments is contrary to law, and that petitioner is without remedy, except by writ of mandamus.

The court made an order that the registrar receive for record and record certified copies of the judgment and deed, or show cause why he should not do so. The registrar of conveyances, by plea, objected to the jurisdiction of the court, upon the ground that the writ issued was an original writ, and not necessary or ancillary to the exercise by the court of its jurisdiction. The plea to the jurisdiction was allowed as to the Waterhouse deed, but overruled as to the judgment of condemnation. Thereafter a demurrer to the petition was overruled, and the respondent filed an answer. He admitted that the condemnation suit and entry of judgment had been instituted and made as alleged, made no reference to the allegations concerning the execution of the Waterhouse deed of July 21st, admitted that it was the official duty of the registrar to receive and record all instruments entitled to record under the laws of Hawaii, admitted the offer of the United States for record of a duly certified copy of the condemnation judgment, and the tender of fees, but denied that the United States had, in every respect, complied with the laws of the territory required of persons presenting instruments for record. The registrar then set up that, by virtue of the laws of the territory of Hawaii, as contained in Act No. 23, Sess. Laws 1905, duly approved April 3d, being an act entitled "An act providing for the filing of plans and surveys of land in the office of the registrar of conveyances," it was provided as follows:

"Section 1. The registrar of conveyances shall, on application, accept and file in the archives of his office, on the payment of a fee of one dollar, any plan of land, but such plan must contain the name of the owner of the land and his address, the maker's name and address, the surveyor's name and address, date of survey, scale, the meridian line, areas, name of ili or ahupuaa, district and island, the true bearings and lengths of principal lines, the names

of all known adjoining owners, and such data concerning the original title of the land platted as may be known. It shall be necessary that one or more monuments shall be placed on the land, which shall, if possible, connect with the government triangulation system. All such monuments shall be placed as indicated on the plan.

"Sec. 2. A description of the land platted shall be written upon said plan, and all outside corners of said tract shall be substantially marked by monuments on the ground, where practicable; provided, however, that in all cases where tracts of land are subdivided into lots, with the intention of conveying said separate lots by lot number and reference to such plat, it shall be necessary to show the true bearings and lengths of a sufficient number of principal lines, and a sufficient number of monuments shall be located on the ground so as to accurately identify each lot.

"Sec. 3. All such plans must be on tracing cloth of a size not greater than 36 by 42 inches, and the scale thereof must be some one of the following, viz: 10 feet, 20 feet, 30 feet, 50 feet, 100 feet, 200 feet, 500 feet, 1,000 feet or 5,000 feet to an inch.

"Sec. 4. It shall be unlawful for the registrar of conveyances to accept for record and record any plan of land after this act takes effect.

"Sec. 5. This act shall take effect from and after the date of its approval."

The registrar pleaded that the certified copy of the judgment recovered in the condemnation proceedings, offered to him as registrar for record, contained and had as a part thereof, and attached thereto, and made a part thereof, a certain plan, drawing, and blue print, purporting to be a drawing of the boundaries of the land, subject to the said condemnation proceedings, as alleged in the petition; that the said plan, drawing, and blue print did not contain the name of the owner of the land, or the name of the ili or ahupuaa, or the true bearing and lengths of principal lands, or the names of all known adjoining owners, or such data, concerning the original title of the lands platted, as might be known, or a description of the land platted written thereon, nor was such plan on tracing cloth of a size not greater than 36 by 42 inches. The registrar then alleged that it was not his duty to receive for record, or even for filing, the said plan, as hereinbefore described, inasmuch as the laws of the territory of Hawaii made the receipt of such plan unlawful; and that the plan, drawing, and blue print referred to, attached and made a part of the judgment referred to, was an inseparable part thereof.

Hearing was had, and the petition for a writ of mandamus was denied. Writ of error was thereafter sued out.

R. W. Breckons, U. S. Atty., J. J. Dunne, Asst. U. S. Atty., and Robt. T. Devlin, for plaintiff in error.

E. C. Peters, M. F. Prosser, and William F. Fleming, for defendant in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

HUNT, District Judge (after stating the facts as above). The opinion of the lower court shows that the question there presented was whether the government had a vested right to conduct the condemnation proceedings in eminent domain, which were initiated before April 3, 1905, to final determination, and to register the judgment in the same manner as if the act of April 3, 1905, had never been passed. It was thus accepted, apparently, as a correct premise that the new law forbade the record of any map; and, after proceeding to discuss the question whether Act No. 23 merely related to procedure or destroyed a vested right, it was concluded by the learned judge that the United States had no vested right of registration, and was therefore restricted to the record of the order of condemnation in words and figures only.

But as the case is presented to us, we will go behind the assumed premise, and ascertain the scope and meaning of Act No. 23, as applied to maps and plans attached to and made integral parts of judgments and conveyances.

Under the eminent domain statutes of Hawaii an action is commenced by filing a petition and issuing a summons thereon. The petition must contain, among other information, a description of each and every piece of land sought to be condemned, and must be accompanied by a map, which shall correctly delineate the land sought to be condemned and its location. The statute, after prescribing how and what notice must be given, and when judgments must be paid, also provides as follows:

"Sec. 506. Final order of condemnation. When all payments required by the final judgment have been made, the court shall make final order of condemnation, which must describe the property condemned and the purposes of such condemnation, a certified copy of which must be filed and recorded in the office of the registrar of conveyances; and thereupon the property described shall vest in the plaintiff." Rev. Laws Hawaii 1905.

The direct language of this provision makes it plain that the judgment must be filed and recorded before the property vests in the plaintiff. By the use of the adverb "thereupon" the law fixes the time when title shall vest; that is, when the act of filing and recording the certified copy of the judgment is done, and not until then. *Spangler v. Sanborn*, 7 Colo. App. 102, 43 Pac. 905. The reason for requiring such registry must also lie in the general rule that the judgment, unless filed and recorded, would not create a lien upon the realty involved, or conclude any who were not parties to the condemnation proceedings. *Lindsey v. Kainana*, 4 Haw. 165; *Baker v. Morton*, 79 U. S. 150, 20 L. Ed. 262.

Further suggestions might be made, such, for instance, as possible consequences between the grantee and an innocent third person, why protection to title demands that a judgment in condemnation, as well as a deed for realty, should be put upon the public records; but it is unnecessary to advance them, for, in the territory of Hawaii, the policy of registration of deeds is expressed by statute, which prescribes that all deeds must be recorded, or they will be void as against subsequent purchasers without notice. Rev. Laws Hawaii 1905, § 2380. Viewed, therefore, from the standpoint of obedience to literal statutory mandate, and considering, as well, the objects underlying recording statutes generally, recording of the judgment was essential to that fixed right of present or future enjoyment which obviously the United States desired, while registration of both deed and judgment was essential to make the government secure in title as against subsequent purchasers.

In construing Act No. 23 we find that its scope is narrower than the court below held it to be. We do not think that the several provisions of the statute indicate that the subject of recording judgments in condemnation suits was covered by its terms, or that the Legislature intended the act to be a substitute for section 506 of the Revised Laws of Hawaii of 1905, or that it affects the recording of conveyances

wherein a description of the property conveyed is included without reference to plats on file in the registrar's office.

By the filing of plans of land, referred to in section 1, is meant surveyors' maps, or other plats or plans prepared by draftsmen, which may appropriately be made parts of the archives, and to which reference may be made in conveyances, but which have no relation to independent descriptions of property shown on maps inserted in instruments of conveyance or judgments in condemnation.

Section 2 of the act deals primarily with the subject of what writings and mathematical markings must appear upon a plan authorized to be filed under section 1, and expressly recognizes that conveyances may be made in cases where property is subdivided into lots, with reference to a plan or map filed with the registrar. It is, of course, a common practice to transfer property by incorporating in the body of the instrument a mere general description of the lot by number and block, followed by reference to the particular marking and showing upon a plat or map as on file in the office of the registrar of conveyances of the county or locality in which the property is situated. This method presupposes that there is on file, as part of the archives, a plat of the land referred to, made as the statute may point out, and which, by such reference, becomes part of the description in the conveyance. But Act No. 23, while it may affect registration of judgments and deeds which merely refer for description to plats or plans on file, in that it makes it unlawful to receive plats not conforming to the specific provisions of sections 1, 2, and 3 of the statute, cannot be extended to prevent the record of deeds or judgments in condemnation which are not offered for filing and record as plans of land, and do not attempt to transfer by lot number and reference to plats on file with the registrar, but do convey by independent descriptions, parts of which descriptions are maps or plats attached to and included in the orders or instruments of conveyance.

Section 3 of the act prescribes the size of the cloth upon which a plan is shown, and fixes the scale upon which it must be drawn. It has nothing to do with conveyances, and, so far as it aids us at all in gathering the meaning of the whole act, it confirms the view that only such plans as have been enumerated in the preceding sections are included.

Section 4, in forbidding the registrar to accept for record and to record any plan of land after Act No. 23 became effective, must be construed with relation to the context, which has to do exclusively with plans and surveys of property filed as such, and does not control the record of deeds of property or judgments in condemnation where, as before stated, maps are attached and made integral parts of special description, but which are not brought into the body of the instrument by reference to plans or maps on file in the office of the registrar.

Again, section 2358 of the territorial law of conveyances (Rev. Laws Hawaii 1905) makes it the duty of the registrar to make an entire literal copy of all instruments required to be recorded in his office. In our opinion, whatever may be the indispensable requisites to registration of conveyances, where reference is made to plats on file, special descriptions, made parts of instruments and complete without such references, must

be recorded as parts of the instruments, just as the registrar was obliged to record them prior to the enactment of Act No. 23. *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; *Morgan et al. v. Moore*, 69 Mass. 319; *Hutchcraft v. Ludwig et al.*, 13 Wash. 240; 43 Pac. 29; *Davis v. Rainsford*, 17 Mass. 207; *Warville on Abstracts*, p. 161; *Lunt v. Holland*, 14 Mass. 149.

We perceive no repugnancy between the general laws of the territory, relating to conveyances, and Act No. 23, affecting the questions involved in this case. Giving all possible weight to the argument of the defendant in error, it carries us no farther than to a point where we may admit that the case presents difficulty in finding out just what the Legislature meant by Act No. 23, when considered with other statutes bearing upon titles and transfer of property. An aid in the solution of such a difficulty, however, lies, not only in the analysis of the statutes just hereinbefore made, but by resort to the title to Act No. 23, which reads:

"An act providing for the filing of plans and surveys of lands in the office of the registrar of conveyances."

In *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304, Chief Justice Marshall said:

"Neither party contends that the title to an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

It is significant that nowhere in the title is there a word which discloses that the purpose of Act No. 23 was to amend or repeal the statutes requiring record of condemnation judgments, or record of conveyances of property, where maps are themselves attached to the deed as included parts of the descriptions of the realty. We cannot extend the statute by construction or imply a repeal.

Defendant in error is a public officer; and, as his duty to record is ministerial, he is obliged to perform it. The procedure by application for writ of mandamus may be treated as one made necessary in order to carry out the objects of the main case in eminent domain, and to give complete relief. In this sense it is ancillary, and jurisdiction obtains. *Roberts, Treasurer, v. United States*, 176 U. S. 221, 20 Sup. Ct. 376, 44 L. Ed. 443.

This disposes of the material questions raised by the pleadings. The judgment of the District Court is reversed, and the cause is remanded, with directions to issue the writ as prayed for.

RONEY v. CHASE, TALBOT & CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 229.

SHIPPING—DEMURRAGE—LIABILITY OF SHIPPER.

Where a contract of affreightment required a vessel only to deliver the cargo at the port of New York, although it contained no specific provision for demurrage, she is entitled to recover damages in the nature of demurrage for delay resulting from her being ordered by the cargo owner to discharge at a berth, which she could not then reach, because of dredging work being done by the government.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 576.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 160 Fed. 268.

E. L. Owen, for appellant.

Hagen, Goodrich & Coughlan, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The libel in this case was filed for freight, \$98.84, and as amended, for demurrage of \$232. The district judge allowed the freight only.

There was no charter, and the bill of lading contained no provision as to lay days or demurrage. But the second article of the libel charged as a part of the contract:

"That the lay days should be at the rate of 20,000 feet per day (Sundays and holidays excepted) after 48 hours for orders, after which demurrage at the rate of 10 cents per registered ton per day for vessels under 250 tons register."

The answer admitted these allegations. At the trial the respondent asked leave to amend the answer as follows:

"The respondent admits the allegations of the second article of the libel, except that he denies that it was a specific contract between the parties that the rate of discharge should be as named in the second article of the libel, and alleges that there was no written agreement as to the discharge of the vessel; but that the rates named in the second article of the libel are the customary rates of discharge in New York, by which the respondent is bound."

The court refused to permit this amendment, and the respondent duly excepted. It was also stipulated that the vessel was of 232 tons net register, and carried 202,791 feet of lumber; that the proper charge for demurrage was \$23.20 per day; that she should have been discharged June 17, at 10 a. m., but was not discharged until June 26, at 6 p. m. The proof showed that of this delay of 10 days 1½ days were due to the refusal of the vessel's stevedores to work, and the remaining 8½ days to dredging in Gowanus Canal by public authority, which prevented the vessel from getting to the wharf to which the respondent ordered her.

We think the respondent is bound by its admissions in the pleadings, and in the case which established a contract to receive the cargo within the time fixed, and therefore left all delays, not excepted nor caused by the vessel, at the respondent's risk. Adopting, however, the contention of the respondent that the amendment to the answer should have been allowed, and that, having made no contract to pay demurrage, it was only liable to pay for delay caused by its default, we still think the libellant was entitled to recover damages in the nature of demurrage for $8\frac{1}{2}$ days' delay.

The respondent relies upon the fifth conclusion of the Circuit Court of Appeals for the Eighth Circuit, in the case of the Empire Transportation Company v. Philadelphia & Reading Coal & Iron Company, 77 Fed. 919, 925, 23 C. C. A. 564, 35 L. R. A. 623:

"(5) Proof that the vessel was delayed in unloading beyond the customary time for unloading such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay, by proof of the actual circumstances of the delivery and his reasonable diligence thereunder."

The proofs showing that there was a delay of $8\frac{1}{2}$ days beyond the customary time for unloading, the consignee justifies it by saying that the delay was caused by dredging of the public authorities in the canal. The bill of lading only required the vessel to deliver to the respondent or assigns in the port of New York, and although it was her duty to discharge, at the wharf to be designated by the respondent, it was equally its duty to order the vessel to a wharf where she could get. If the bill of lading had required delivery at the wharf to which the vessel was subsequently ordered, or if there were no other wharf in the port at which she could be discharged, the delay would have been at the risk of the vessel, but, this not being the case, the delay was caused by the order which the respondent gave. There was nothing unforeseen, or extraordinary about the dredging, nor anything that affected the port or the trade generally. It was open and notorious. The fact that the respondent had previously sold the cargo to be delivered at this wharf without knowing of the dredging being done in the canal is no reason for throwing on the vessel the delay of getting there.

The decree is reversed, and the cause remanded to the District Court, with instructions to enter a decree for the libellant in the sum of \$98.84 freight, and \$197.20 demurrage, with interest from June 27, 1907, and costs.

SOUTHERN RY. CO. v. TOWNSEND.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1908. On Rehearing, April 20, 1908.)

No. 1,351.

1. RAILROADS—FORECLOSURE SALE—CONDITION REQUIRING PURCHASER TO PAY CLAIMS AGAINST RECEIVERS—CONSTRUCTION OF DECREE.

Where a court, in its decree confirming the sale of railroad property in a foreclosure suit, required the purchaser to assume and pay any indebtedness or liability incurred by the receivers which should be adjudged priority over the mortgage and should not be paid by the receivers from

funds in their hands, and reserved jurisdiction of the case for the enforcement of such requirement, a subsequent order, requiring all claimants to present their claims before the master before a date fixed, for action thereon by the court, and barring any not so presented, does not necessarily include claims which were then in suit before the same court.

2. SAME—RECEIVERS—GROUNDS FOR APPOINTMENT—ACTIONS PENDING AGAINST DISCHARGED RECEIVERS.

On a subsequent discharge of the receivers, such actions at law pending against them not having been disposed of, the court had power, under such reserved jurisdiction, to appoint a special receiver against whom such actions might be revived, and to defend the same and retake possession of sufficient property to satisfy any judgments recovered, if not paid by the purchaser.

Burns, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

Milton Humes and Paul Speake, for appellant.

Lawrence Cooper, for appellee.

Before McCORMICK, Circuit Judge, and NEWMAN and BURNS, District Judges.

NEWMAN, District Judge. On July 27, 1892, the Memphis & Charleston Railroad was placed in the hands of Charles M. McGhee and Henry Fink as receivers, in the Western district of Tennessee, and on July 29th thereafter, under an ancillary bill filed in the Northern division of the Northern district of Alabama, the same receivers were named for the property of the railroad company in Alabama. On April 15, 1897, a decree of foreclosure of the mortgage, which was one of the purposes of the bill, was entered in the Circuit Court for the Northern District of Alabama, following a decree of foreclosure in the Western district of Tennessee. Subsequently, in 1898, the property was sold, and the order confirming the sale contains this provision:

"* * * Ordered, adjudged, and decreed that the sale so reported by said special master, and the purchase of said railroad property, rights, assets, and franchises by said purchasers shall be, and the same is hereby, confirmed. And the court reserves full power from time to time to enter orders binding upon the said Southern Railway Company, as purchaser, requiring it and its successors and assigns to pay, satisfy, and discharge: * * * (b) Any unpaid indebtedness and obligations or liabilities which shall have been duly contracted or incurred by the receivers before delivery of possession of the property sold. * * * The court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell the property this day confirmed, if the purchasers or their successors or assigns shall fail or neglect fully to complete such purchase and to comply with the orders of the court in respect to full payment and performance of such bid, or to pay into court, in accordance with such decree of sale, and supplemental decree, all such sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens, or claims as it may adjudge and decree should be paid out of the proceeds of sale in preference to the bonds secured by the mortgage of the said Memphis & Charleston Railroad Company herein foreclosed. * * *"

A deed was made to the purchaser of the property, the Southern Railway Company. The special master's deed conveying the property contained the following provisions:

"Witnesseth: * * * Upon the condition that, to the extent that the assets or the proceeds of the assets in the receiver's hands shall be insufficient the said Southern Railway Company and the said purchasers, its or their successors or assigns, shall pay, satisfy and discharge: * * * (b) Any unpaid indebtedness and obligation or liabilities which were duly contracted or incurred by the receivers before delivery of possession of the property sold. * * * And subject also to all the conditions and reservations of said deed of sale, * * * including the reservation to said Court of the power to retake and resell the premises conveyed or any parcel thereof, in case the said parties of the second party, their successors and assigns shall fail to pay any sum required by them under said decrees within the time specified in said decrees, respectively, after the entry of an order requiring such payment. * * * And the grantees, parties of the second part, agreeing to take the property so sold as aforesaid, subject to the performance by them, or by their successors or assigns, of all pending contracts in respect thereto, theretofore lawfully made by the receivers, the said grantees and their successors or assigns, having nevertheless the right, within ninety days after the completion of the sale and delivery of this deed, to elect whether or not to assume or adopt any lease or contract whether or not sold with the railroads and other property and franchises, neither they nor their successors or assigns to be held to have assumed any of said contracts or leases, which they shall not so elect to assume; provided, however, that upon publication by the said special master, when ordered by the court, as provided in said decree, of a notice requiring holders of any claims to present the same for allowance, and any such claim which shall not be so presented or filed within the period of six months after the first publication of such notice, shall not be enforceable against the property sold, or against the said grantees, their successors or assigns. * * *"

On March 16, 1898, an order was entered in this case, appointing a special master for the purpose of taking proof and reporting upon all claims which arose within the Northern district of Alabama, or which were held by parties residing within said district, against Charles M. McGhee and Henry Fink, receivers of the Memphis & Charleston Railroad Company, or against the said Memphis & Charleston Railroad Company under this decree. The order provided that:

"Said special master will make publication in some newspaper published in Huntsville, Alabama, once a week for three successive weeks, requiring all creditors or persons having claims which arose within the Northern district of Alabama or which are held by parties residing within said district either against the said receivers of the Memphis & Charleston Railroad Company or against the said Memphis & Charleston Railroad Company, claiming priority over the mortgage bonds, to file the same herein on or before September 24, 1898, for allowance and action thereon by this court, or the same shall be forever barred and denied any participation in the assets in the hands of said receivers. Said master will after the filing of any such claims, and after giving due notice of the same to the counsel representing such claims, and to the Southern Railway Company, take such proof as may be offered in support of, or in defense of such claim, and report thereon for the action of the court herein. Any claim against such receivers, or against the said the Memphis & Charleston Railroad Company within the jurisdiction of this court not filed within the time required hereby shall be forever barred from all participation in the assets derived from the sale of the mortgaged property made in this case."

Subsequently the receivers were discharged, and their bonds canceled. At the time the order was made appointing the special master to take proof of claims, etc., on March 15, 1898, an action was pending in the same court—that is, in the Circuit Court of the United States for the Northern Division of the Northern District of Alabama—in favor

of Lemon Townsend against McGhee and Fink, receivers, for damages which he alleged he had sustained by reason of the negligence of the receivers, their agents, servants, and employés, while in the employment of said receivers.

Subsequently to the discharge of the receivers, Lemon Townsend brought a petition in the Circuit Court, setting out the fact of the appointment of McGhee and Fink as receivers in 1892, their operation of the property down to 1898, the order discharging them as receivers, and that the Southern Railway Company had become the purchaser, and that said company had taken the property by its purchase, subject to the unpaid obligations and liabilities incurred by the receivers. The petition sets out the fact of his injury in 1896, while in the employ of the receivers, by reason of the negligence of the receivers, their employés and agents, while they were in charge of the railroad property, and the fact that his suit had been brought on the 16th day of March, 1897, for the recovery of damages by reason of his injuries. It further alleges that the Southern Railway Company had failed and refused to pay him damages for the injuries so sustained, and that he is advised that he is wholly remediless in the premises, in the prosecution of his suit, unless by order of the court a receiver or receivers are appointed for the property theretofore belonging to the Memphis & Charleston Railroad Company, so that his suit can be maintained and prosecuted to judgment, and the amount due him ascertained as provided by law. He states the fact that other suits are pending in the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, instituted against McGhee and Fink as receivers, and which remain undetermined. He prays that by the decretal order of the court a receiver be appointed for the properties of the Memphis & Charleston Railroad against whom his said suit may be prosecuted, under the orders of the court.

This petition was answered by the Southern Railway Company, which set up as a defense to the suit the order of the court requiring all claims to be filed by September 24, 1898, and that, although the special master appointed by the order had given the notice required, Lemon Townsend had failed to come in and make proof of his claim before the special master, and that he was barred of any right or claim against the Southern Railway Company by reason thereof.

Judge Jones entered a decree appointing a receiver; the decree of appointment being as follows:

"Upon the consideration of the petition of Lemon Townsend, filed in this cause on the 14th day of October, 1902, and the answer thereto of the Southern Railway Company and the record of proceedings in this cause, and also the record of proceedings in the other equity cause in this court of Farmers' Loan & Trust Company v. Memphis & Charleston Railroad Company and certified statements of E. E. Greenleaf and John B. Clough as special masters on file in this cause the court finds: (1) That the discharge of the receivers herein, Chas. M. McGhee and Henry Fink, was not intended as a final disposition of this cause, but that the court expressly retained jurisdiction to make such further orders therein as might from time to time be deemed proper. (2) That the purchaser of the property of the Memphis & Charleston Railroad Company, which was sold under decree of foreclosure in this cause, agreed, as a part of the consideration, and in addition to the sum bid at such foreclosure sale, to pay any unpaid indebtedness and obligations

or liabilities 'which shall have been duly contracted or incurred by the receivers before delivery of the possession of the property sold.' (3) That the purchaser of the property so sold at said foreclosure sale went into possession of said property, and accepted a deed thereto, under which the purchaser holds said property subject to the payment of the liabilities of said receivers, and by deed of indenture covenanted and agreed to pay and discharge said liabilities. (4) That in the decree confirming said sale, the court reserved full power, notwithstanding the conveyance and delivery of possession, to retake and sell the property if the purchaser or its successors should fail to comply with any of the orders in respect to the payment of the full consideration of said bid. (5) That said Chas. M. McGhee and Henry Fink, former receivers, left some liabilities incurred by them as such receivers in the operation of the Memphis & Charleston Railroad under the orders of this court, as to which actions were pending against them at the time of their discharge, which liabilities are still in litigation and remain unpaid. It further appears to the court that the petitioner Lemon Townsend and other petitioners similarly situated have pending actions at law which have not been disposed of by judgments in the law courts in which they are pending, and which were pending at the time of the discharge of said receivers, and have an equity if they obtain judgment against a receiver in this case, to subject said property of the Memphis & Charleston Railroad in the hands of the purchasers, to the payment of the debts and liabilities of the receivers incurred in the operation by said McGhee and Fink as receivers, and the further right to litigate the liability of the receivers to them by suit in a court of law.

"On consideration of the premises the court is of the opinion that a trust exists which might fail for want of a trustee, if no successor is appointed to said McGhee and Fink as receivers to fully execute said trust, and conserve the rights of the persons interested therein. It is therefore ordered, adjudged, and decreed that Edward E. Greenleaf, of Huntsville, Ala., be and he is hereby appointed receiver in this cause of the property, assets, and rights of the Memphis & Charleston Railroad Company, as successor to said McGhee and Fink, receivers, but without power, except as herein otherwise decreed, to interfere with or take possession of any of the property of the Memphis & Charleston Railroad which has heretofore been sold by decree of this court; and that said Greenleaf, as such receiver, shall defend all suits now pending against said McGhee and Fink as receivers concerning their liabilities growing out of their operation as receivers of the Memphis & Charleston Railroad, whenever such suits shall be properly revived against him. In that event he shall immediately notify the purchasers of the property of the Memphis & Charleston Railroad of the revivor of said suit against him, and notify the purchasers that they may appear and defend in his name, if they so desire. Whenever any judgment is rendered against said Greenleaf as receiver in any action or suit revived against him, and which was pending at the time of the discharge of said McGhee and Fink as receivers, whether the purchasers appear and defend on said action or suit or not, said Greenleaf, as receiver, shall report the facts to the court, and, after giving five days' notice to the purchasers, shall proceed by petition in this cause for a decree to sell so much of the property conveyed to the purchaser by the special master's deed of date February 26, 1898, as may be necessary to pay the judgment so rendered against said Greenleaf as receiver, and the costs and expenses incident thereto, including the costs and expenses of such petition."

It is from the granting of this decree that the present appeal is taken.

Was there such error in the action of Judge Jones in entering this decree as requires its reversal?

This was an administrative order made in connection with the foreclosure proceeding and receivership, looking to the protection of those having claims against the property which had been in the hands of the court and had been sold with the reservations shown in the order con-

firming the sale and in the deed to the purchasers. It was the method adopted by the court of enabling Lemon Townsend and others similarly situated to assert against the Southern Railway Company whatever claims they might have against that company. The court appointed the receiver with the limited powers stated in the decree of appointment, because, by the discharge of McGhee and Fink as receivers, Townsend and others had been left without any one against whom they might assert their claims. Other methods might have been adopted for reaching the same result, but that which was adopted does not seem to us to have violated any sound principle of equity, or any rule of equity practice. Townsend and others had no one, as the case stood (at least it was evidently so considered by the court) against whom they might assert their rights, and even the right to show that their claims were not barred by the order of March 15, 1898, providing for the filing of claims, etc.

The important question, coming to the merits of this matter, of course, is whether Townsend and others similarly situated were barred from asserting their rights against the purchasers of the property by reason of their failure to file their claims with the master as provided in the order of March 15, 1898. Their suits were pending at the time and in the court in which this order was entered, and we are not satisfied that the order could be held to embrace them. The order requires "all creditors or persons having claims, * * * claiming priority over the mortgage herein, to file the same herein on or before September 24, 1898, for allowance and action thereon by this court, or the same shall be forever barred," etc. The claims of Townsend and others were filed, as stated, in the court at the time this order was made, and we do not believe that the reasonable purpose and intent of this order was such as to require them to be filed again. Certainly counsel for Townsend and plaintiffs in other cases thus pending might well have considered the order as not applying to such cases, and the court might well hold we think, as it did, that the order limiting the time for filing claims did not necessarily require these claims to be noted before the master, and might do so without any invasion of the lawful rights of the purchasers of the property. The language of the order, it will be perceived, is that parties are required, as to demands claiming priority over the mortgage, "to file the same herein * * * for allowance and action thereon by this court." Even considering the language of the order specifically and technically, we do not see that it embraces these suits, and considered with reference to its purpose and intent, as has been stated, it is still more evident that they were not included. The purpose was to get before the court within a reasonable time all claims and demands which the purchasers would have to pay, if determined against them, and Townsend's claim, and that of the others in like situation, were then before the court.

The particular language of the deed made by the special master to the Southern Railway Company and others, which is relied upon here by the Southern Railway Company as a defense to this proceeding, concerning debts which "shall not be enforceable against the property, sold, or against the said grantees, their successors or assigns" is : "Any such claims which shall not be so presented or filed within the period of

six months," etc. As stated, we think the claims of Townsend and others, being already of file in the court, there was no necessity for presenting them to the special master. The language used in the deed follows and conforms to the language used in the order confirming the sale, and the purchasers could not acquire any different or more enlarged rights or exemptions from liability by reason of the deed than they acquired by the order of confirmation.

Finding no error in the action of the court in entering the decree appointing Greenleaf receiver for the purposes stated, and with the restricted powers named therein, the decree is affirmed.

BURNS, District Judge (dissenting). The writer, with great deference to the view announced by the majority in sustaining the action of the lower court in the appointment of a receiver of the Memphis & Charleston Railroad to appear and defend cases pending on the law side of the docket in the Northern district of Alabama, is unable to concur, and the reasons therefor should be briefly stated.

The record proceedings are fully given in the statement of the case, from which it appears that plaintiff, Townsend, was injured December 8, 1896, while in the service of McGhee and Fink, receivers; that he filed suit against the said receivers on March 16, 1897; that the said receivers were finally discharged February 26, 1898, and thereafter, by order dated March 15, 1898, claimants were allowed six months in which to present claims growing out of the receivership to the special master, and claims not so presented were to be deemed barred. The case of Townsend appears to have continued upon the law side of the docket without progress until entry of order of date October 14, 1903 (based on petition of that date), appointing Greenleaf receiver. The situation obtains that 11 years after institution of the action at law, and 10 years after the final discharge of the receivers, it is deemed equitable that a receiver should appear and defend in order that a presumed or possible trust might be the more fully and equitably administered. There is no suggestion, or contention, that the purchaser, the Southern Railway Company, is at fault, or that it dissents from the terms and conditions imposed by the final decree of foreclosure. The plaintiff, Townsend, had more than 14 months after injury in which to prosecute his action against the original receivers, and his suit continued upon the docket more than 11 months before the receivership was closed. After the discharge of the receivers, a plea in abatement was filed setting up their discharge, and the record discloses that the plea has not been determined.

If it should appear that the plaintiff, notwithstanding the discharge of the receivers, had a clear, positive, and adequate remedy at law, it is difficult to understand why a court of equity should reach out its arm and by process of development employ other and unusual facilities in behalf of this sleeping litigant. It may be pertinent to depart from a statement of the general rule that equity will never grant relief where the complainant has an adequate remedy at law, to point out the legal remedy available to the plaintiff upon the discharge of the receivers. By amending his petition, setting up the discharge of the receivers, making the purchaser, the Southern Railway Company, a party defend-

ant, under the terms of the decree fixing the liability for the acts of the receivers, the plaintiff upon verdict, would have been entitled to his execution. This is the proper and usual course, not attended with difficulty, and doubtless familiar to practitioners in the state and federal courts. This statement should be conclusive of the proposition that plaintiff had and has an adequate remedy at law, and, more, he could have instituted and maintained his suit against the receivers, and upon their discharge, against the purchaser, in any state court of Alabama. Act Cong. March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 629, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).

In the case of *Cahn v. Johnson*, 12 Tex. Civ. App. 304, 33 S. W. 1002, the court uses this language:

"The first question arising from the record, and presented by appellant's assignment of error, is: Will a court of equity grant its aid by appointing a receiver in favor of mere general creditors, whose rights rest only in contract and are not reduced to judgment, and who have acquired no lien upon the property of the debtor? Upon the great weight of authority, we answer this question in the negative." High, Rec'r (3d Ed.) § 406, and authorities cited in note 1, page 430; *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.; Lawyers' Ed.) 144, and authorities cited in note; 3 Pom. Eq. Jur. § 1415; 20 Am. & Eng. Enc. Law, p. 30; *Carter v. Hightower*, 79 Tex. 135, 15 S. W. 223.

The existence of an adequate remedy at law is always a bar to the aid of equity granting a receivership. High on Receivers, par. 741. A receiver will not be appointed if any other remedy will afford ample protection. *Etowah Min. & Mfg. Co. v. Wills Valley Min. & Mfg. Co.*, 106 Ala. 492, 17 South. 522. To justify the appointment it must appear that the possession of defendant was obtained by fraud, or that the income is in danger of loss from neglect, waste, or misconduct. *Gilbert v. Block*, 51 Ill. App. 516. The power to appoint a receiver will never be exercised except upon a very grave necessity and upon a clear showing that the applicant has otherwise no adequate remedy, and is in danger of suffering irreparable loss. *People's Investment Co. v. Crawford* (Tex. Civ. App.) 45 S. W. 738; *Cahn v. Johnson*, 12 Tex. Civ. App. 304, 33 S. W. 1000; *Bank v. Dunham*, 18 Tex. Civ. App. 184, 44 S. W. 605; *Land Co. v. Blevens*, 12 Tex. Civ. App. 410, 34 S. W. 832; High on Receivers, Par. 3, 288, 289, 292; 20 Am. & Eng. Ency. Law, pp. 18-21; *Bank v. Gage*, 79 Ill. 207; *Weatherly v. Water Co.*, 115 Ala. 156, 22 South. 142; *Darragh v. Manufacturing Co.*, 78 Fed. 15, 23 C. C. A. 609.

The opinion in *People's Investment Company v. Crawford*, supra, concludes with this statement:

"The appellees' remedy without the aid of a receiver being adequate, it follows that the trial court erred in making the appointment, for which error the order of the court below appointing the receiver in this case is reversed, set aside, and the receivership vacated."

Before appointment is made, the court must be satisfied that a receiver is necessary to preserve the property, and thus adequately to protect the rights of the parties interested therein. *Clark v. Ridgely*, 1 Md. Ch. 70; *Orphan Asylum Soc. v. McCartee*, Hopk. Ch. (N. Y.) 429; *Chase's Case*, 1 Bland (Md.) 213, 17 Am. Dec. 277; *Blondheim*

v. Moore, 11 Md. 365; Walker v. House, 4 Md. Ch. 39; Bloodgood v. Clark, 4 Paige (N. Y.) 574; Lloyd v. Passingham, 16 Ves. Jr. 59-70.

If the plaintiff has an adequate remedy at law, then a receiver will not be appointed. This principle is but the application in receivership matters of a general principle in equity jurisprudence. Smith on Receivership, § 5, p. 14; Wooden v. Wooden, 3 N. J. Eq. 429; Mullen v. Jennings, 9 N. J. Eq. 192; Speights v. Peters, 9 Gill (Md.) 473; Rice v. Ry., 24 Minn. 464; Corey v. Long, 43 How. Prac. (N. Y.) 497; Parmly v. Bank, 3 Edw. Ch. (N. Y.) 395; Winkler v. Winkler, 40 Ill. 179; Coughron v. Swift, 18 Ill. 414.

The mere fact that the pursuit of the legal remedy is difficult, or that the remedy at law has been lost by the laches of the party entitled thereto, will not be sufficient to justify the appointment of a receiver. Alderson on Receivers, § 7, p. 11; Brown v. Chase, Walk. Ch. (Mich.) 43; Kean v. Colt, 5 N. J. Eq. 365; Fogarty v. Burke, 2 Dru. & War. 580; Gray v. Chaplin, 2 Russ. 126; Skinners Company v. Irish Society, 1 Myl. & Cr. 162; Drewry v. Barnes, 3 Russ. 94; Municipal Com'rs v. Lockhart, Ir. 3 Eq. 515.

It may be observed that the order of the court appointing Greenleaf receiver will defeat the very object which the plaintiff has in mind, in that the plaintiff and the receiver, being resident citizens of the state of Alabama, the Circuit Court will be without jurisdiction of the parties, and, aside from this, the statute of limitation will be as available to the receiver as to the purchaser.

On Rehearing.

PER CURIAM. There is no new ground or argument advanced in this application for rehearing. The judges who sat on the original hearing gave the matter a very careful consideration, and only reached a conclusion in the case after going over the whole matter very carefully, and they all concur in the view that the petition of the appellant for a rehearing should be denied.

And it is so ordered.

STERNBERG MFG. CO. v. MILLER, DU BRUL & PETERS MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1908.)

No. 2,655.

1. TRADE-MARKS AND TRADE-NAMES—NAME USED TO DESIGNATE PATENTED ARTICLE—EFFECT OF EXPIRATION OF PATENT.

Where complainant manufactured and sold a cigar mold under a patent, and adopted the name "Vertical Top" to designate such mold alone in its literature, catalogues, etc., which it used during the life of the patent, on its expiration the name, as well as the article, became free to the public, and complainant could not perpetuate its exclusive right thereto by registering it as a trade-mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 15.]

2. SAME—UNFAIR COMPETITION.

Evidence held to entitle complainant to an injunction restraining defendant from unfair competition in making and selling a cigar mold des-

ignated by the same name as one made by complainant, and in using similar cuts in its catalogues representing cigar maker's tools, without stamping its name upon such molds and plainly indicating on the cuts that it, and not complainant, was the manufacturer of the articles represented thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 106.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

W. J. Roberts, for appellant.

Hervey S. Knight and William C. Howell, for appellee.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is a bill in equity by the appellee, an Ohio corporation (hereinafter designated the complainant), to enjoin the appellant, an Iowa corporation (hereinafter designated the defendant), from infringing a trade-mark, known as the "Vertical Top," used on cigar molds, claimed to have been adopted by the complainant as early as 1876. After the complainant had taken evidence in chief in support of this bill, it filed a supplemental bill, charging the defendant with unfair competition in business.

The Miller & Peters Manufacturing Company was organized in 1873. Its name was changed in 1880 to the Miller, Du Brul & Peters Manufacturing Company. Its principal place of business was at Cincinnati, Ohio, with branches in other cities. The defendant had been in business since 1893, as a copartnership under the name of William Sternberg & Co. until 1895, when it was incorporated under its present name. On April 4, 1876, Frederick C. Miller, a member of said firm of Miller & Peters Manufacturing Company, obtained letters patent No. 175,573, entitled "improvement in cigar molds." The specifications, in so far as pertinent to this inquiry, are as follows:

"This invention relates to cigar molds adapted for pressing a number of bunches of tobacco into cigar shape, the bunches being placed in deep matrices, and simultaneously pressed into the required form by the operation of a series of plungers or cups. My improvement consists: First. In so constructing the plungers or cups, which are made of wood like the rest of the mold, that the grain of the wood shall run vertically—that is, at right angles to the face of the backing to which the plungers are attached. This enables me to obtain, not only durable, but also sharp, edges along the sides of the concaved face of the plungers, which sharp edges are of the utmost importance to the proper action of the mold, and which, if formed on plungers having the grain of the wood running longitudinally, in accordance with the common method of construction, do not possess the requisite strength and durability. Second. Of a peculiar method of securing the plungers or cups to their backing, whereby a strong attachment and a perfect register with the matrices is obtained. This method consists in making the matrices somewhat deeper than required; then gluing the backing to the face of the matrix-board; then sawing the block thus formed into two parts on a line a little below the top of the matrix-board, so that a thin strip of it will remain attached to the backing for the plungers; and, finally, inserting the plungers or cups in the cavities in this thin strip of the matrix-board adhering to their backing, and

securing them in proper manner. Third. In the combination, with the matrix-board, of one or more bars for expelling the bunches after they have been pressed. The bar is seated in a longitudinal groove across the matrices, its upper edge having notches corresponding to the cross-sectional contour of the matrices."

Its first claim is as follows:

"1. The plunger or cup of a cigar mold made of wood, the grain of which runs perpendicularly to the plane of the cup, substantially as specified."

It will be noticed that the invention specified in the claim is rather upon the plunger or cup (top) of the individual mold than the series. While it recites that the invention pertains to cigar molds used by "the operation of a series of plungers or cups," the claim specifies the single plunger or cup as the real improved device. Molds embodying the improvement were thereafter manufactured and marketed by the Miller & Peters Manufacturing Company under the designation of the "Creaseless Vertical Top Cigar Mold." Its use passed to the complainant under the abbreviated name of the "Vertical Top" mold for cigars, and was extensively advertised by the complainant. Without stating in detail the evidence, suffice it to say that during the life of the patent the words "Vertical Top" became associated with the manufactured article as descriptive of its character and quality, indicating the complainant's best grade of mold for making cigars. If it was descriptive or indicative of the grade or quality of the cigar mold, it could not be regarded as a trade-mark, especially during the life of the patent. *Paul on Trade-Marks*, page 47, §§ 27, 28; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Raymond v. Royal Baking Powder Co.*, 85 Fed. 231, 236, 29 C. C. A. 245; *Centaur Co. v. Heinsfurter et al.*, 84 Fed. 955, 28 C. C. A. 581.

The specification of the patent itself shows that the two halves of the mold at the point of contact should be made of hard wood in order to withstand great pressure. The upper half is made with the grain of the wood running vertically, up and down; the edges, owing to the vertical grain of the wood, being stronger than if it were made of iron, according to the complainant's testimony. It was stated in the circular literature issued by the complainant that no nails, staples, or pegs were used in the construction of "our creaseless Vertical Top molds." The circular further stated: "Our Vertical Top creaseless mold is not only the best, but the cheapest, because it will last twice as long as any ordinary mold and will produce far better and paying results." In short, the very claimed invention of the Vertical Top mold was to remedy the hitherto ill-fitting tops with their thick edges; and the evidence further discloses that the term "Vertical Top" was employed to indicate the best quality of mold manufactured by the patentee, as distinguished from the "Flange Top" manufactured by the complainant as an inferior article.

When this patent expired in 1903, the complainant clearly enough, as we think, sought to perpetuate its monopoly by registering the name "Vertical Top" as a trade-mark. In the leading case of *Singer Manufacturing Co. v. June Manufacturing Company*, 163 U. S. 169,

16 Sup. Ct. 1002, 41 L. Ed. 118, after the expiration of the Singer Manufacturing Company's patent, it sought to perpetuate its monopoly by adopting and laying claim to the exclusive use of the word "Singer" as a trade-mark, which term had become designative of the machine manufactured and sold by the company during the life of the patent. The court held that the designation of the machine as "Singer" during the existence of the patent indicated merely the class and type of the machine made by the company; that it constituted "the generic description, conveying to the public mind the machine made by it." Mr. Justice White further said:

"It is self-evident that on the expiration of the patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. * * * It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly, by his having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name, which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly; in other words that the patentee or manufacturer could take the benefit or advantage of the patent upon the condition that at its termination the monopoly should cease, and yet, when the end was reached, disregard the public dedication and practically perpetuate indefinitely an exclusive right. The public having the right on the expiration of the patent to make the patented article and to use its generic name to restrict this use, either by preventing its being placed upon the articles when manufactured or by using it in advertisements or circulars would be to admit the right and at the same time destroy it."

This was followed and applied by Mr. Justice Brewer, speaking for this court, in *Centaur Co. v. Heinsfurter et al.*, supra. In that case one Pitcher obtained letters patent No. 77,758, for a composition to be employed as a cathartic, or substitute for castor oil; and, while the word "Castoria" did not occur in the specifications, it was claimed to have been adopted and used as a trade-mark during the life of the patent, and was attempted to be exclusively continued in use thereafter. But it was held that on the expiration of the patent such name became public property, and its use by another, without unfair competition, did not entitle the complainant to relief against the use of the word "Castoria" by the defendant for its manufactured composition.

Counsel for complainant quite ingeniously attempts to differentiate the case at bar from the foregoing by the suggestion that the words "Singer" and "Castoria" describe the articles patented, and therefore necessarily became generic terms. But the essence of the ruling in the foregoing cases is that the patent conferred only the right of exclusion to manufacture and sell the article, and not the appropriation of any particular name, whether it was merely arbitrary or sug-

gested by the thing itself, and that after the expiration of the patent, not only the right to manufacture and sell the patented article, but also to use the particular name by which the patentee had designated it, passed to the public. Mr. Justice Brewer said:

"It is true that during the life of a patent the name of the thing may also be indicative of the manufacturer, because the thing can then be manufactured only by the single person; but, when the right to manufacture and sell becomes universal, the right to the use of the name by which the thing is known becomes equally universal. It matters not that the inventor coined the word by which the thing has become known. It is enough that the public has accepted it as the name of the thing, and thereby the word has become incorporated as a noun in the English language and the common property of all."

Having regard to the philosophy of the principle, it can make no difference that the Centaur Company designated its moderate imitation of castor oil by the name of "Castoria," and that the complainant should have designated its manufacture as "Vertical Top," because of the manner in which the grain ran into the wood constituting the top. Notwithstanding the studied effort of Mr. Du Brul in his testimony to evade the fact, his cross-examination compels the conclusion that the words "Vertical Top" were employed in his manufacture and trade to designate a superior quality in construction as compared with the "Flange Top" employed in the manufacture and sale of cigars.

The Circuit Court found the issues for the complainant, whereby it not only affirmed the claim of the complainant to the trade-mark, but the language of the decree is so broad and comprehensive as to perpetuate the exclusive right of the complainant to manufacture the mold and all the tools, implements, and machinery connected therewith. After sustaining the trade-mark, the decree adjudged:

"That the defendant, its officers, agents, employés, etc., are hereby perpetually enjoined and restrained from making or selling or offering for sale cigar makers' presses, bundlers, tools, machinery, and accessories to the cigar makers' trade, in substantially exact imitation of the presses, bundlers, tools, machinery and accessories to the cigar makers' trade manufactured by the complainant and having a characteristic shape and design, and from copying or reproducing in its catalogue, circulars, and other printed advertising matter the cuts, figures, illustrations, or representations originated, produced, and used by the complainant in its circulars and catalogues in advertisement of the presses, bundlers, tools, machinery, and accessories to the cigar makers' trade manufactured and sold by the complainant."

Was the complainant entitled to relief on the supplemental bill charging the defendant with unfair competition in business? As the tools, implements, and machinery employed by the complainant, in connection with its manufacture of the molds, were not covered by any patent grant, they were free to the public to manufacture and use, even in exact imitation of those employed by the complainant. *Singer Manufacturing Co. v. June Manufacturing Co.*, supra; *Lamb et al. v. Grand Rapids School Furniture Co.* (C. C.) 39 Fed. 474. The only limitation the law places upon the right of the defendant to manufacture and sell the molds and to manufacture and use the tools, implements, etc., like those hitherto employed by the complainant, is that he shall not so exercise it as to impose his manufactured article

upon the public as that of the complainant's product. As expressed by Mr. Justice White, in the Singer Manufacturing Co. Case, the right is "accompanied with the obligation of so exercising it as not to destroy the property of others, and also in such a manner as not to deceive the public."

When the defendant began the manufacture and sale of the "Vertical Top" mold in Iowa, although it had the right, it did not stamp upon or otherwise mark the molds manufactured by it with the words "Vertical Top"; but it distinctly stamped its own name thereon, indicating the origin of manufacture. Later it moved its business to Milwaukee, Wis., where its factory, with its stamps, etc., were destroyed by fire. Mr. Sternberg in his testimony, assigned to that misfortune the reason for not stamping its molds made at Milwaukee after the fire with its name, intending to do so when it procured the stamp. This omission covered a period of about a year. This was unimportant, however, under the decisions hereinbefore cited, in view of the fact that it did not stamp its molds with the words "Vertical Top."

The only basis for complaint of unfair competition is reduced to the pamphlets and literature sent out by the defendant, in which it is claimed it so closely followed the cuts, figures, and the order of their occurrence in the display of like publications by the complainant as not to sufficiently distinguish one from the other. It is true the evidence on behalf of the defendant, which was uncontradicted, was that all of the tools, implements, machinery, etc., published by it, were of its manufacture. It must also be conceded to the defendant that the complainant's evidence fails to show affirmatively that any purchaser was thereby deceived into the belief that he was purchasing the goods of the complainant's manufacture. There was some indicia about the pamphlets, etc., sent out by the defendant with the names on them, from which it might, if seen, be inferred that the cuts, figures, etc., were manufactured by it. Without entering into a detailed delineation, we are of the opinion that the close copy in the pamphlets and literature published by the defendant, and the order of the arrangement of the closely imitated cuts of tools, implements, and machinery of the complainant, were such as to impose upon the defendant, in fair, honorable competition, the obligation of more distinctly indicating that the articles as pictured and described were of its manufacture, so as to reasonably advise the public thereof. This the defendant was not sufficiently doing at the time the supplemental bill was filed; and the evidence does not disclose a declared purpose on its part to make any change in this respect.

But it is apparent, from the part of the decree above quoted, that it goes beyond the limitations imposed by the law. It goes to an extent as if the complainant had an exclusive monopoly of the right to manufacture and use "the tools, machinery, and accessories to the cigar makers' trade."

The decree of the Circuit Court must therefore be reversed, and the case is remanded, with directions to set aside and vacate the decree herein, and in lieu thereof to enter a decree dismissing the bill of complaint as to the claimed trade-mark right to the words "Vertical

Top," and on the supplemental bill to enter a decree enjoining the defendant from manufacturing and placing upon the market the "Vertical Top" cigar mold, without plainly stamping thereon, or otherwise plainly indicating, the name of the defendant as the manufacturer thereof, and also from copying or reproducing, in its published catalogues, circulars, or other printed advertising matter, the cuts and figures of tools, implements, and machinery produced and published by the complainant connected with its trade, without distinctly indicating therewith, so as to reasonably advise the public, the fact that the same are of the manufacture and use of the defendant.

There is no occasion for a reference to the master. "Damnum absque injuria."

HOYT v. WEYERHAEUSER et al.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1908.)

No. 2,637.

1. PUBLIC LANDS—RAILROAD LAND GRANTS—GRANTED AND INDEMNITY LANDS—WHEN TITLE VESTS RESPECTIVELY.

The right to particular tracts of land within the place limits of a railroad grant like that to the Northern Pacific Railroad Company vests in the grantee upon the filing of the map of definite location of the railroad, approved by the proper officer of the government.

The right to particular tracts of indemnity land under such a grant vests in the company upon the approval by the Secretary of the Interior of the company's selection of them, and neither this right nor the title thereunder relates back so as to divest the rights of prior entrymen or purchasers of the land under the general land laws of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 232, 251.]

2. SAME—WITHDRAWALS AND SUSPENSIONS OF INDEMNITY LANDS UNDER NORTHERN PACIFIC GRANTS VOID BEFORE APPROVAL OF SELECTIONS.

Under the grants to the Northern Pacific Railroad Company, the Secretary of the Interior had no authority to withdraw or suspend from sale or entry lands within the indemnity limits of the grants which had not been previously selected with his approval, to supply deficiencies within the place limits of the grant, and such withdrawals and suspensions were ineffectual.

3. SAME—INDEMNITY LANDS OPEN TO ENTRY AND SALE UNTIL APPROVAL OF SELECTIONS.

Lands within the indemnity limits of these grants were open to entry and sale under the general land laws of the United States until the Secretary approved their selection by the grantee, although the lists of their selection had been duly filed with the Land Department.

4. SAME—LAND DEPARTMENT—JURISDICTION AND POWER OF DISPOSITION OF PUBLIC LANDS NOT ARBITRARY BUT SUBJECT TO LAW AND JUDICIAL CORRECTION.

The jurisdiction and power of disposition of the public lands by the Land Department of the United States is not arbitrary, unlimited, or discretionary; but it is subject to and must be exercised in accordance with the laws of the land, and any violation or disregard of them by the Land Department is remediable in the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 301.]

5. SAME—PATENT TO LAND—COURTS MAY CHARGE TITLE UNDER WITH TRUST FOR RIGHTFUL CLAIMANT.

Whenever the officers of the Land Department have been induced by erroneous views of the law, by fraud, or by clear mistake of fact, to issue a patent to the wrong party, a court of equity, at the suit of the rightful claimant, may avoid the decision, charge the legal title under the patent with a trust in his favor, and execute the trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 301.]

6. SAME—INDEMNITY LANDS—SELECTION AGAINST ENTRY—FACTS—CONCLUSIONS.

The land in question was within indemnity limits under the grants to the Northern Pacific Railroad Company (Act July 2, 1864, 13 Stat. 363, c. 217; Joint Resolution No. 67, May 31, 1870, 16 Stat. 378), and the Secretary had withdrawn and suspended it from entry and sale. The company had filed its selection of this land, but the Secretary had not approved it. Thereupon Jones entered and paid for it under the timber and stone acts, Act June 3, 1878, c. 151, § 1, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), and Act Aug. 4, 1892, c. 375, § 2, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1547). Thereafter the Secretary approved the railroad company's selection and issued a patent for the land to that company.

Held, the entire beneficial interest and the equitable right to the land vested in Jones upon his completion of his purchase, and the railroad company and its successors in interest held the title under the patent in trust for him and his grantees.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Minnesota.

Herbert H. Hoyt, pro se.

Charles W. Bunn, for appellees.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. Hoyt, the complainant below, brought a suit in equity to obtain a decree that the defendants below, who were the grantees of the patentee, the Northern Pacific Railway Company, held the title to 40 acres of land in Minnesota in trust for him. The ground of his suit was that the Land Department of the United States, by reason of errors of law into which its officers had fallen, awarded and patented this land to the railway company, when its legal duty required it to award and patent it to Jones, the grantee of the complainant. He rested his claim to relief on the established and familiar rule that if the officers of the Land Department are induced to issue a patent to the wrong party by erroneous views of the law, or by a fraudulent or gross mistake of the facts, the rightful claimant may avoid that decision and charge the legal title under the patent with a trust in his favor by a proper suit in equity. *James v. Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. 597, 600, and cases there cited. At the final hearing the court below was of the opinion that the officers of the Land Department had fallen into no error of law in the consideration and disposition of this land, and it accordingly dismissed the bill, and the complainant appealed.

The claim of Jones to the title to this land arose under the timber and stone acts, Act June 3, 1878, c. 151, § 1, 20 Stat. 89 (U. S. Comp. St.

1901, p. 1545), and Act Aug. 4, 1892, c. 375, § 2, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1547).

On December 17, 1897, he filed in the proper local land office his application to purchase this land under these acts, and the local land officers received that application and accepted their fees for its filing. On the same day notice of this filing and that the applicant would present his proof thereunder on March 22, 1898, was issued by the register of the local land office, and on the next day it was posted and published. The land lay coterminous with the line of the railroad between Duluth and Ashland within the second indemnity limits of the grant to the Northern Pacific Railroad Company under Act July 2, 1864, 13 Stat. 365, c. 217, and the joint resolution of May 31, 1870 (Resolution No. 67, 16 Stat. 378). The Secretary of the Interior had withdrawn it from entry and sale prior to 1894. The company had filed on October 17, 1883, with the officers of the local land office at Duluth, and they had accepted, a selection of this and other lands in bulk in lieu of lands claimed by it to have been lost within the place limits of its grant. In 1893 it rearranged this selection and specified the particular tract lost in lieu of which it claimed each tract upon this list of selected lands. On August 27, 1896, the Secretary of the Interior erroneously decided that the eastern terminus of the Northern Pacific Railroad was at Duluth. In re Northern Pac. R. Co., 23 Land Dec. Dep. Int. 204; Doherty v. Northern Pacific Ry. Co., 177 U. S. 421, 20 Sup. Ct. 677, 44 L. Ed. 830; United States v. Northern Pacific R. R. Co., 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836. On March 22, 1897, he caused the company's selections of this and other lands coterminous with the line of railroad east of Duluth to be canceled, and on or before July 17, 1897, he restored all this land to the public domain and made it subject to disposal under the timber and stone acts, the homestead and other general laws for the disposition of the public lands. In re Northern Pac. R. Co., 25 Land Dec. Dep. Int. 47; Jones v. Northern Pac. R. Co., 34 Land Dec. Dep. Int. 105. On February 28, 1898, he suspended these lands from entry pending the judicial determination of the location of the eastern terminus of the railroad, but directed that in all cases where entries had been theretofore allowed parties should be permitted to complete the same by making proof thereof, but that the issue of patents should be suspended until such judicial determination. In re Northern Pac. R. Co., 26 Land Dec. Dep. Int. 265; Id., 26 Land Dec. Dep. Int. 488. On March 22, 1898, Jones made plenary proof, and on December 10, 1898, he bought and paid for the land in question in strict accordance with the provisions of the timber and stone acts, and the receiver of the local land office issued the customary receiver's receipt to him, save that he wrote across the face of it in red ink:

"This receipt is issued under the order of the Secretary of the Interior dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company may have to the lands herein described."

The Supreme Court decided that the eastern terminus of the Northern Pacific Railroad was at Ashland on April 16, 1900. On July 12, 1900, the Secretary restored to the records of the Land Department the selections made by the company of this and other lands coterminous

with the portion of the line of the railroad east of Duluth, because the courts had decided that the eastern terminus of the road was at Ashland, and directed that these selections should be "considered upon their legality otherwise and in connection with any conflicting claims." He never approved the selections by the company of this land, or of any land coterminous with the line of its railroad east of Duluth until months after Jones had entered and paid for the land which is the subject of this litigation. In 1905 he sustained a decision of the Commissioner of the General Land Office that the entry of Jones should be canceled, and he subsequently caused a patent of the land to issue to the railway company. *Jones v. Northern Pac R. Co.*, 34 Land. Dec. Dep. Int. 105.

The complainant contends that this decision and action were induced by erroneous views of the law, in that the Secretary held: (1) That the Northern Pacific Railway Company had succeeded to the rights of the Northern Pacific Railroad Company to this land under the latter's land grant; (2) that the company had sustained a legal loss of the tract of land in lieu of which the land in controversy was selected; (3) that it could lawfully select the latter, although this tract was not on the same side of the railroad as the former and was not the nearest unappropriated land to it; (4) that the complainant was not entitled to the land by virtue of the provisions of Act July 1, 1898, 30 Stat. 620; and (5) that the entry of and payment for the land by Jones conferred upon him no equitable right to the land superior to that of the railway company. The last specification will be first considered because if it is well founded, the complainant was entitled to a decree below, although the first four specifications he urges were baseless. In the discussion of the questions here presented no distinction will be made between the railroad company and the railway company, but it will be assumed that the latter has succeeded to all the rights of the former, and the companies will be called the "Railway Company."

The claim of the railway company to this land is founded on the joint resolution of May 31, 1870, which provided that it should be entitled, under the direction of the Secretary of the Interior, to as many sections of land within 10 miles on each side of its road beyond the limits prescribed in its charter of July 2, 1864 (13 Stat. 370, c. 217), as would make up the deficiency in the lands within the place limits of its grant which was specified in the resolution. All the land granted by this resolution was indemnity land. None of it was within the place limits of the grant or what is ordinarily termed granted land. The right of a railroad company to granted land vests in the grantee on the filing of the map of definite location approved by the proper government officer. Its right to indemnity land vests on the approval of its selection by the Secretary of the Interior. The same rules of law govern the inception by this railway company of an equitable right to a particular tract of indemnity land under the resolution of 1870 that condition the inception of such a right under its charter of 1864, and the Supreme Court has adjudged that these principles control the initiation of such a right:

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of

the Secretary of the Interior; that up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." *Sjoli v. Dreschel*, 199 U. S. 564, 565, 26 Sup. Ct. 154, 50 L. Ed. 311.

How can the claim of Jones be denied without a violation of these principles? No approval of any selection of this land by the railway company was ever made by the Secretary until after Jones had entered, purchased, and paid for it, and hence no right ever attached in favor of the company. The indorsement upon Jones' receiver's receipt that it was issued subject to any claim that the Northern Pacific Railroad Company might have to the land described in it was ineffective, because that company had and could have no legal or equitable claim to it against such a purchaser. *Ryan v. Railroad Co.*, 99 U. S. 382, 388, 25 L. Ed. 305; *St. Paul Railroad v. Winona Railroad*, 112 U. S. 720, 731, 5 Sup. Ct. 334, 28 L. Ed. 872; *Barney v. Winona, etc., R. R. Co.*, 117 U. S. 228, 232, 6 Sup. Ct. 654, 29 L. Ed. 858; *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 512, 10 Sup. Ct. 341, 33 L. Ed. 687; *Oregon, etc., R. R. Co. v. United States*, 189 U. S. 103, 112, 113, 23 Sup. Ct. 615, 47 L. Ed. 726; *New Orleans Pacific Railway v. Parker*, 143 U. S. 42, 58, 12 Sup. Ct. 364, 36 L. Ed. 66.

Upon the filing of the map of definite location from Thomson Junction to Ashland, this and other indemnity land was withdrawn from sale and entry by the Secretary of the Interior. *Humbird v. Avery*, 195 U. S. 480, 482, 25 Sup. Ct. 123, 49 L. Ed. 286. On or before July 17, 1897, these lands were restored to entry and sale (In re Northern Pac. R. Co., 25 Land Dec. Dep. Int. 47; *Jones v. Northern Pac. R. Co.*, 34 Land Dec. Dep. Int. 105), and on February 28, 1898, they were suspended from entry by direction of the Secretary, except that those who, like Jones, had been allowed to enter land, were permitted to make proof and payment. But the Secretary's original withdrawal and his subsequent suspension were alike futile. He was without lawful authority to make either, and the lands always remained open to entry and sale under the timber and stone act, the homestead, the pre-emption, and the other general laws for the disposition of the public lands until each particular tract was either sold thereunder or the Secretary approved its selection by the railway company. *Hewitt v. Schultz*, 180 U. S. 139, 21 Sup. Ct. 309, 45 L. Ed. 463; *Nelson v. Northern Pacific Railway*, 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406; *Oregon, etc., R. R. v. United States*, 189 U. S. 103, 110, 23 Sup. Ct. 615, 47 L. Ed. 726.

Before the Secretary approved the company's selection of this land, Jones, a qualified entryman, entered, purchased, and paid for it in strict accordance with the provisions of the stone and timber act, and obtained his receiver's receipt therefor. From the moment of that purchase this land became the property of Jones, and it was no longer the land of the United States. He was the owner of the entire beneficial interest in and of the equitable title to it, and the only title remaining in

the United States was the naked legal title which it held in trust for him. *Carroll v. Safford*, 3 How. 441, 460, 461, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 218, 219, 18 L. Ed. 339; *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 506, 10 Sup. Ct. 341, 33 L. Ed. 687.

Jones completed his purchase and obtained his receipt on December 10, 1898. His entry was not canceled until some time subsequent to August 30, 1905, pursuant to the decision of the Secretary of the Interior made on that day, and the patent was finally issued on October 18, 1905. The defendants purchased of the railway company on January 19, 1900, many years before Jones' entry was canceled. They were not therefore bona fide purchasers without notice, but they were purchasers from the United States through the railway company with full notice of the equitable right of Jones, and they stand in the shoes of their grantor the United States. As the United States never after December 10, 1898, had anything but the legal title to this land which it held in trust for Jones and his assigns, these defendants have nothing more.

Counsel for the defendants contends that the foregoing application of the rules of law which have been stated to the facts of this case is incorrect because the facts in *Sjoli v. Dreschel*, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. Ed. 311, differ from those in the case at bar, in that *Sjoli* occupied his land as a homesteader before the railroad company filed its list of selections, and the company's selection of *Sjoli's* land was never approved. But the rules of law announced in *Sjoli's* Case were established by prior decisions of the Supreme Court, some of which have been cited, and it is those rules restated and reaffirmed in *Sjoli's* Case, and not the particular facts in that suit, which determine the controversy before us. Moreover, the decisive facts of the two cases are the same in legal effect. *Sjoli* initiated his equitable right to his land by settlement upon it in 1884, while it was withdrawn from entry and sale under the grant to the Northern Pacific Railroad Company by an order of the Secretary made in 1871 (*Sjoli v. Dreschel*, 90 Minn. 108, 95 N. W. 763), and the Supreme Court held that withdrawal void and disregarded it, as the law requires that the withdrawal and the suspension from entry of Jones' land before the railroad company's selection was approved by the Secretary shall be held and disregarded in the case at bar. The railroad company filed its selection of *Sjoli's* land in June, 1885, but it was rejected by the officers of the Land Department. *Sjoli's* application to enter the land upon which his patent was founded was not filed until 1895, and the Minnesota Supreme Court held that the Secretary ought to have approved the railroad company's selection, that as the company had done all in its power to secure the land its right to it was established by and dated from the filing of its selection, and that *Sjoli's* subsequent entry and patent gave him no right to or interest in it. But the Supreme Court held that the railroad company acquired no right to the land by filing its selection until that selection was approved by the Secretary, just as the law now requires that the selection of Jones' land, unapproved by the Secretary until after Jones entered and purchased it, shall be held to have initiated no right of the railway company thereto. The Supreme Court said:

"But, as already stated, the result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selections nor until its selections were approved by the Secretary of the Interior. * * * The company's unapproved selections did not therefore stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale. No such approval ever occurred." *Sjoli v. Dreschel*, 199 U. S. 564, 568, 26 Sup. Ct. 154, 156, 50 L. Ed. 311.

Counsel says that when the Supreme Court said that, "notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale," it did not mean that the Secretary is without jurisdiction to approve a selection, because a settler under the pre-emption or homestead laws claims the land or files an application for it, but that its meaning was that in such a case the land is within the jurisdiction of the Land Department which may, if the facts warrant it, award it to the claimant under the settlement laws, and that a mere filing of a claim to such land under the latter laws does not deprive the Secretary of jurisdiction to approve the selection made by the railway company. Let that proposition be conceded. The question here is, not the jurisdiction, but the legality, of the decision of the Land Department and especially of the Secretary, its head, whereby he awarded this land to the railway company. The facts and the law warranted and require its award and sale to Jones. When he presented his application to purchase it under the timber and stone act, the railway company's selection of it was unapproved by the Secretary, and that company was without equitable right to it. The Land Department had jurisdiction to accept the application of Jones and to sell the land to him, or to approve the selection of the company and to award the land to it. It exercised this jurisdiction, accepted the application of Jones, permitted him to enter the land, to prove up his claim to it, sold it to him, took his \$100 in payment for it, and issued to him his receiver's receipt, and did all this before the selection of the company was approved and before the company could acquire any right to the land. Jones' equitable title to the tract had then vested, and, while the jurisdiction of the Land Department continued until the patent issued, its power was neither arbitrary, unlimited, nor discretionary, and its action was subject to judicial correction for error of law, fraud, or clear mistake. The jurisdiction and power of disposition which the Land Department has of the lands of the United States, like the power of every other department of the government, is subject to the laws of the land, and the Land Department's violation or disregard of them is remediable in the courts. Its power "cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of

any other lawfully acquired property. Any attempted deprivation in that way will be corrected whenever the matter is presented so that the judiciary can act upon it." *Cornelius v. Kessel*, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; *Germania Iron Co. v. James*, 89 Fed. 811, 818, 32 C. C. A. 348, 354, 355; *James v. Germania Iron Co.*, 46 C. C. A. 476, 481, 107 Fed. 597, 602; *Black v. Jackson*, 177 U. S. 349, 357, 20 Sup. Ct. 648, 44 L. Ed. 801; *Orchard v. Alexander*, 157 U. S. 372, 383, 15 Sup. Ct. 635, 39 L. Ed. 737; *Brown v. Hitchcock*, 173 U. S. 473, 478, 19 Sup. Ct. 485, 43 L. Ed. 772.

There is nothing in the opinion in *Humbird v. Avery*, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. Ed. 286, inconsistent with the views which have been expressed. The Supreme Court held in that case that the lands there in controversy were subject to the provisions of Act July 1, 1898, 30 Stat. 597, 620, c. 546, and were still within the power of the Land Department, which had not then finally decided the questions properly before it concerning them, and hence that the suit was premature. Counsel for the defendants asserts, and the fact is conceded, that the land here in question is not subject to the act of 1898, and the Land Department had finally decided all questions regarding this tract that were before it and had issued a patent for it before this bill was exhibited.

Attention is called to an opinion of the Attorney General (25 Opinions of the Attorneys General, 632), in which may be found an intimation that the title of a railroad company, upon an approval by the Secretary after a sale of a tract of land to a purchaser under the general land laws, of its selection of it filed before such sale, relates back to the date of the grant and divests the right of the purchaser to the land. No other authority in support of that theory has been discovered. The decisions of the Supreme Court limit the right and title to indemnity land to the date of the approval of the selection, and, even if the theory could be sustained, its effect would be limited to lawful approvals, and the approval of the selection of this tract was illegal because the tract was not the property of the United States and was not open to selection by the company at the time of the approval.

Finally, counsel invokes the familiar rule that the decisions of officers of other departments of the government upon questions within their jurisdiction are cogent and persuasive and should be followed by the courts, unless they are clearly erroneous, and he reminds us that the Secretary of the Interior and the Commissioner of the General Land Office have carefully considered the questions in this case and have decided that Jones was without legal or equitable claim to this land, and that the right of the railway company to it was superior. But Jones was a qualified entryman. The attempted withdrawals and selections of the land by the Secretary prior to his approval of the company's selection were unauthorized by law and without legal effect. The land was open to entry and purchase until he approved the selection. Jones entered, bought, and paid for it before any such approval was made. And the decisions of the Supreme Court which have been cited leave no doubt that the Secretary and the Commissioner fell into a plain error of law when they took the land which Jones had lawfully purchased from him or from his grantees and gave it to the

railway company. Erroneous decisions of questions of law by the officers of the Land Department cannot be permitted to deprive the equitable owner of his vested right to lands which he has lawfully purchased from the United States. *Johnson v. Towsley*, 13 Wall. 72, 80, 20 L. Ed. 485; *Gibson v. Chouteau*, 13 Wall. 92, 102, 20 L. Ed. 534; *Shepley v. Cowan*, 91 U. S. 330, 340, 23 L. Ed. 424; *Moore v. Robbins*, 96 U. S. 530, 536, 24 L. Ed. 848; *St. Paul R. R. Co. v. Winona Railroad*, 112 U. S. 720, 733, 5 Sup. Ct. 334, 28 L. Ed. 872.

The conclusion is that by his entry and purchase Jones acquired the entire beneficial ownership and the equitable right to the land in controversy, and that the railway company and its successors in interest obtained nothing under the patent but the naked legal title, which they held in trust for him and for his successors in interest.

This conclusion renders the other questions presented in this case immaterial.

The decree must accordingly be reversed, and the case must be remanded to the court below, with directions to enter a decree for the complainant for the relief prayed in the bill.

It is so ordered.

CAMPBELL v. WEYERHAEUSER et al.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1908.)

No. 2,638.

1. PUBLIC LANDS—PATENT—ONE NOT IN PRIVACY WITH THE UNITED STATES CANNOT MAINTAIN SUIT TO CHARGE TITLE UNDER WITH TRUST.

One who has never by acceptance of a grant, or by settlement and improvement, or by entry, or by payment, placed himself in privacy with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under it with a trust in his favor.

One, whose application to purchase is rejected when presented may not maintain such a suit.

2. SAME—NORTHERN PACIFIC LAND GRANT—ONE, WHOSE APPLICATION TO PURCHASE WAS DENIED WHEN PRESENTED, NOT A BENEFICIARY OF ACT JULY 1, 1898, c. 546, 30 STAT. 620.

The beneficiaries of Act July 1, 1898, c. 546, 30 Stat. 620, are purchasers directly from the United States of, occupants of, and qualified settlers upon, the lands there described prior to January 1, 1898, under some law of the United States or some ruling of the Interior Department.

One who had not purchased of the United States, or occupied, or settled upon, or acquired any equitable right to, or interest in, any of the land there described prior to January 1, 1898, but whose application to purchase had been rejected by the Land Department when presented, does not fall within the provisions of the act and cannot invoke its aid.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Minnesota.

Herbert H. Hoyt, for appellant.

Charles W. Bunn, for appellees.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. The nature of this case and the questions presented in it are the same as those in *Hoyt v. Weyerhaeuser et al.* (in which the opinion is filed herewith), 161 Fed. 324. The facts of this case differ from the facts in that case in this: In *Hoyt's Case* his remote grantor, Jones, entered, purchased, and paid for his land in 1897 and 1898 under the timber and stone acts (Act June 3, 1878, c. 151, § 1, 20 Stat. 89, Act Aug. 4, 1898, c. 375, § 2, 27 Stat. 348 [2 U. S. Comp. St. 1901, pp. 1545, 1547]), before its selection by the railway company had been approved by the Secretary of the Interior. In this case the complainant, Campbell, repeatedly filed with the Land Department his application to enter the land which he claims under those acts prior to January 1, 1898, and before the railway company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. In *Hoyt's Case* Jones became the vendee of the United States, paid for and became the equitable owner of his land. In this case, Campbell was refused permission to purchase the land he seeks, he never entered or paid for it, his right to buy it was never recognized by the United States, and he was never in privity with it. The difference is radical and fatal to this suit in equity.

One who has never by acceptance of a grant, or by settlement and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another may not maintain a bill in equity to charge the title under the patent with a trust in his favor. *Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. Ed. 875; *De Weese v. Reinhard*, 10 C. C. A. 55, 59, 60, 61 Fed. 777, 781, 782; *Hartman v. Warren*, 22 C. C. A. 30, 36, 76 Fed. 157, 163; *New Dunderberg Mining Co. v. Old*, 79 Fed. 598, 606, 25 C. C. A. 116, 124; *Spencer v. Lapsley*, 20 How. 264, 269, 15 L. Ed. 902; *Beard v. Federy*, 3 Wall. 478, 493, 18 L. Ed. 88; *McIntyre v. Roeschlaub* (C. C.) 37 Fed. 556, 557. The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the Land Department unlawfully deny. The right to an allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. Irreparable injury is conclusively presumed from the refusal of one to perform his contract to convey real property, and it is upon that ground that suits in equity to charge titles under patents with trusts for vendees and grantees are maintained; but there is no presumption of irreparable injury from the unlawful refusal of the government to sell land in which the applicant has secured no equitable interest, and hence such a refusal will not sustain a bill in equity. The applicant pays nothing for the tract he is re-

fused permission to buy, his loss by the refusal is measurable in damages, he may purchase another tract, and if courts of equity should entertain suits upon such applications and denials they would become courts for the production, rather than for the prevention, of a multiplicity of suits. In *Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. Ed. 875, the Supreme Court said that one who would maintain a suit in equity to charge a title under a patent with a trust in his favor must "connect himself with the original source of title so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands." The complainant in this suit made no such connection, and he had no equities of that character.

Counsel, however, urges another reason why his bill should be sustained. He claims that Campbell is entitled to the land under the provisions of Sundry Civil Act July 1, 1898, c. 546, 30 Stat. 597, 620; but the beneficiaries of that act are purchasers directly from the United States of, occupants of, and qualified settlers upon, the lands there described prior to January 1, 1898, under some law of the United States or some ruling of the Interior Department. The complainant was not a member of either of these classes. He had not purchased, or occupied, or settled upon, or acquired any equitable right to or interest in, the land in controversy prior to July 1, 1898, and he cannot successfully invoke the aid of the act of July 1st of that year.

There is no equity in the suit of the complainant, and the decree which dismissed his bill is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1908.)

No. 1,779.

RAILROADS—INJURY TO PERSON ON TRACK—LIABILITY UNDER TENNESSEE STATUTE.

Shannon's Code Tenn. §§ 1574, 1575, which require a railroad company to keep some one on the locomotive always on the lookout ahead, and if any person, animal, or other obstruction appears on the track to sound the whistle and employ every possible means to stop the train, and make a company which fails to observe such precautions responsible for all damages resulting from any accident or collision, as construed by the Supreme Court of the state, apply to the case of a train being backed on a passing track at a station while waiting for the passing of another train on the main track, and make the company liable for the injury of a person run over by such train, where, owing to its length, those in the engine could not see the track in front of the moving cars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1257-1266.]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

R. M. Jones, for plaintiff in error.

H. Reed, Morrow & Waddle and J. C. J. Williams, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SÉVERENS, Circuit Judge. This is an action brought by the plaintiff, suing by a next friend, to recover damages resulting from an injury caused by the negligence of the railway company in failing to keep a proper lookout and give the proper signals while moving one of its trains in its yard at a station on its road called Oneida. There was evidence at the trial tending to show, and from which the jury might have found, the following facts: The railroad at this place runs north and south. There were four tracks on the west side of the station house, the first and nearest of which was the main line. The second track was a passing track, that is, for the use of trains meeting and passing there. The third and fourth tracks were used for switching purposes in organizing or reorganizing trains. The train which injured the plaintiff was a freight train, which had some time before come into that station and had passed onto one of the switching tracks in order to let out or take in some cars. It had completed its work on the switching tracks, and had moved out upon the passing track, where it had stood ready to go for half an hour or more before the accident. The engine was headed north; but it could not proceed because of other trains standing in front of it on the passing track. All these trains had been waiting for a passenger train to pass the station on the main line. The plaintiff, who was a boy eight years old, was returning to his home on the east side from the west side of the tracks on a path which had for many years been used by the public as a crossing. When he reached this freight train he found the rear end of it standing over the crossing and extending a little to the south. He turned out and went around the rear end, and while he was doing this the engineer suddenly and without warning commenced to back the train down to a switch at the south end of the yards leading onto the main track, from whence the train would take up its passage to the north. There was no lookout at the rear at the time the train was driven back, and the plaintiff was not seen. The plaintiff was struck by the rear car of the train and thrown upon the track, where both his feet were crushed by the wheels so badly that amputation became necessary.

At the conclusion of the evidence counsel for the railway company requested the court to instruct the jury that the plaintiff was not entitled to recover, and that they should find for the defendant. This the court refused, and the counsel for the defendant excepted. The verdict was for the plaintiff in the sum of \$7,500, and judgment was given accordingly.

The case turns upon the construction and effect of a Tennessee statute imposing certain duties upon railway companies while operating their trains, and provides as follows:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident." Acts 1857-58, p. 54, c. 44, § 3; Shannon's Code, § 1574 (4).

"Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all

damages to persons or property occasioned by, or resulting from, any accident or collision that may occur." Shannon's Code, § 1575.

"No railway company that observes, or causes to be observed, these precautions shall be responsible for any damages done to person or property on its road. The proof that it has observed said precautions shall be upon the company." Shannon's Code, § 1576.

The precautions here mentioned were not complied with in this instance. If this statute is applicable to the facts of this case, the verdict and judgment were warranted. The trial judge held that it did apply, and so instructed the jury. If he was wrong, the judgment must be reversed. There is no other ground on which the case could have been taken from the jury. On its face the statute applies to all cases where the circumstances mentioned in the statute exist; but it has been construed by the Supreme Court of Tennessee as not extending to cases where a compliance with its provisions would be impossible or extremely difficult or embarrassing. In other words, that court has applied a well-known rule of statutory construction that it is to be presumed that a statute was not intended to apply to exceptional cases, when its application would be attended by such consequences. Accordingly it has been held that it does not apply to the operation of railways in switching yards; the reason being that in such places the individual cars or parts of trains are being constantly shifted about in various directions and hardly ever in one direction for any length of time, and it is necessary that some should be run upon the track a little distance, and often toward nearby places which a particular car is not intended to reach; in short, when the observance of the statute would paralyze the necessary operations in the switching yards, or embarrass them to such an extent as to make them impracticable. *Railroad Co. v. Pugh*, 95 Tenn. 419, 32 S. W. 311. In *Southern Ry. Co. v. Simpson*, 131 Fed. 705, 65 C. C. A. 563, a case coming here from Tennessee, where an engine was running backward with a tender in front, in the daytime, but the evidence tended to show that the engineer was on the lookout ahead and saw the vehicle in which the plaintiff was riding as soon as if the engine were running the other way, and he then performed the other requirements of the statute, we held the Tennessee law was complied with. The Tennessee cases were there fully considered in the opinion delivered by Judge Lurton, and there is no need to rehearse them now.

In the present instance there is no reason which would justify a disregard of the statute, or imposing upon it the limitation which has been found necessary in other conditions. This train had been on the switching tracks; but it had for some time been on the passing track, fully organized for proceeding on its trip. True, it had to go back to the switch before it proceeded on its main course; but its position was in no respect different from any passing train. The circumstance that it had some time before been in the switching yard was of no importance whatever. The Supreme Court of Tennessee holds that the statute applies to all moving trains, and that if the railway company disables itself from complying with it by pushing its train backward it is absolutely liable for the consequences of moving a train in this way, instead of so moving it that it could have been relieved

from liability for accidents by complying with the statute. In the Simpson Case, *supra*, though the engine was running backward the engineer was not deprived of the means of complying with the statute. Here there was a long train of cars in front, and those on the engine could not see the track on which the cars were moving. In *Railroad Co. v. Dies*, 98 Tenn. 655, 41 S. W. 860, the engine was running backward in the night with no headlight on the tender. The darkness of the night in that case, and the intervening train of cars in this, alike prevented the engineer from looking ahead.

The local law as construed by the highest state court furnishes the guide for the federal courts; and we think the court below gave the law to the jury correctly when it told them that the statute so construed applied to this case.

It is not important for us to consider the question of negligence on the part of the plaintiff, since by another statute of Tennessee the negligence of the plaintiff is not a bar, but goes only to the mitigation of the damages. The court instructed the jury upon that subject in a manner not now complained of. Our conclusion upon the principal question disposes of the case.

The judgment must be affirmed, with costs.

GORMLEY & JEFFERY TIRE CO. v. PENNSYLVANIA RUBBER CO.

(Circuit Court of Appeals, Third Circuit. April 1, 1908.)

No. 69.

PATENTS—INFRINGEMENT—RUBBER TIRES.

The Jeffrey patents, Nos. 454,115 and 558,956, for improvements in rubber tires, both narrowly construed as required by the prior art, *held* not infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 155 Fed. 982.

Livingston Gifford, for appellant.

George H. Christy and J. C. Sturgeon, for appellee.

Before GRAY, Circuit Judge, and CROSS and HOLLAND, District Judges.

HOLLAND, District Judge. This case comes here on an appeal from a decree of the Circuit Court of the Western District of Pennsylvania dismissing the bill. In the court below infringement was charged as to four patents. On this appeal two of the patents are dropped, and the two relied on were granted to Thomas B. Jeffery for inventions in vehicle tires. The infringement is charged as to claims 1, 2, 3, 4, 5, and 6 of letters patent No. 454,115, issued June 16, 1891, on application filed March 26, 1891, and claims 5 and 10 of letters patent No. 558,956, issued April 28, 1896, on application filed April 3, 1891. In the opinion of the Circuit Court, reported in 155 Fed. 982, it was held that infringement was not proven, for which reason the

bill was dismissed. Rubber tires have been used on vehicles for a number of years, particularly upon bicycles, and at first were solid and attached to the rim of the wheel by various devices. Improvements in the art followed rapidly, both as to the construction of the tire and the mode of adjustment, so that by the time they had advanced from bicycles to automobiles the art had progressed from the solid to the cushion, and thence to the pneumatic form. Patents were issued for each of these improvements, both as to the construction of the tire and the mode of attachment.

First. The oldest and most obvious form was the solid tire consisting of mere hoops or bands of rubber, with some means of attachment, such as screws or bolts. Then was introduced the tube extending through the inside of the rubber tire so as to give it more elasticity, and was called a "cushion" tire. In still others this tube was filled with compressed air to still further increase the elasticity, and these were called "pneumatic" tires. They were attached to the rim of the wheel by bolts, diverging flanges or ears, wire bindings, and sometimes by cement. But however attached, and whether the tire itself was solid or cushion or pneumatic, it invariably, in this stage of the art, was completely formed and self-sustaining both before attachment to and after detachment from the wheel; and in every case the means of attachment, whether bolts, ears, wires, or cement, was a mere addition to the complete tire, performing no function in resisting any strain from within the tire. Up to this time they contained no sheath, but every advance was patented, both as to construction and mode of attachment. Next was developed the tire containing a sheath, which is not made up until attached to the wheel, and in which the wheel rim and sheath together form a girdle to restrain the tube from bursting. The Dunlop was the progenitor of this class, and was patented in England March 8, 1889, and in the United States (No. 435,995) on September 9, 1890, upon an application filed March 11, 1890. It is referred to in the first patent in suit, to wit, No. 454,115, descriptively as "a tire having a core composed of elastically expandible tube, which is inflated by air or gas and distended thereby to some extent, the air or gas being under such tension that but for a restraining or enclosing sheath such core would be liable to burst." The claim in Dunlop's patent is as follows:

"In hollow air-inflated wheel-tires for cycles and other vehicles, the combination, with an inner expandible tube and outer protective covering of strengthening folds or layers of cloth, canvas, or linen, and protective strips of caoutchouc interposed between the edges of the rim and strengthening fold or layer, substantially as and for the purposes herein set forth."

Beside this, there is one other patent of importance in considering the state of the art in connection with the questions at issue. This patent was issued in England to Golding on December 8, 1890, and in the United States (No. 493,160) on March 7, 1893, on an application which had been filed October 6, 1891. It was for an improvement in rubber tires and rims for velocipedes, and other light carriages. We find from the specifications that:

"The edges of the rim are bent round and brought a short distance toward each other and nearly parallel to the flat surface of the rim, thus forming an

inner recess or groove along the rim on both sides, suitable for holding the projecting flanges of the tire."

The tire contained a corresponding lateral flange, which was inserted into this recess and secured by the pressure of the compressed air when the tire was inflated.

Claim 1 is as follows:

"The combination with a metallic wheel rim having lateral recesses formed by reflexing the edges, of an inflatable tire having corresponding lateral flanges which are detachably inserted into such recesses, and are secured therein by the pressure of the contained compressed air when the tire is inflated substantially as hereinbefore set forth."

Claim 3 shows that Golding used a sheath and an inner inflatable tube. This patent was purchased by the appellant soon after it was issued, and owned by it down to the time it expired.

The first Jeffrey patent in suit, No. 454,115, is for an improvement in wheel tires, and "is designed to provide improved means for protecting a rubber wheel tire, and is particularly designed and adopted for an inflation tire; that is to say, a tire having a core composed of an elastically expansible tube, which is inflated by air or gas and distended thereby to some extent, the air or gas being under such tension that but for a restraining or inclosing sheath such core would be liable to burst." The inflated core or elastically expansible tube, encased in a restraining sheath, of the Dunlop patent, is the same in the Jeffrey patent. The improvement of the latter, among other things, over the Dunlop, extends to the device for attaching the tire to the rim of the wheel. This, in the description, we find is a "rim" provided with hooked edges. "The hooks may be turned either inward or outward. * * * The tire-sheath is provided with correspondingly hooked edges. * * * Ordinarily the entire sheath will be made of canvas or similar woven fabric comparatively inelastic, and, in that event, the hooked edges will be stiffened with caoutchouc or india rubber, or they may be vulcanized if the sheath is made of suitable substance to endure the temperature. * * * On some accounts the hooks on the rim are preferably turned outward, chiefly because the center of the body or inflatable core is thereby rendered free from the irregularity which the hooks form when they are turned inward. On the other hand, the liability of the sheath hooks to be pulled out from the rim hooks by the expansive tendency of the core when inflated is somewhat less when the hooks are turned inward; but practically the two methods are about equally desirable." In either case it should be observed that the hook is open toward the axis, and it is preferably approximately in the direction of a tangent to the inflatable core, so that the expansive tendency of the core will tend to draw the hooks into close engagement.

This improvement in the attachable device, which the patentee has designated "hooked edges," both on the rim and on the tire, is variously stated in claims 1, 2, 3, 4, 5, and 6, which claims the defendant is charged with infringing. They are as follows:

"1. In combination with the rim having recesses open toward the axis of the wheel, the tire-sheath having its edges reversed and engaged in such re-

cesses, and the elastic expansible core between the rim and sheath, substantially as set forth.

"2. In combination with the rim having hooked lateral edges, the tire-sheath transversely flexible and having hooked edges which detachably engage the hooked edges of the rim, substantially as set forth.

"3. In combination with the flexible tire-sheath having rigid hooked edges, the rim having hooked edges to engage those of the sheath, substantially as set forth.

"4. In combination with an inflatable core, the rim in which such core is seated, having its edges reversed to form hooked flanges approximately tangential to the core, and the flexible sheath for such core, having its edges engaged in such hooked flanges, substantially as set forth.

"5. In combination with the rim having hooked lateral edges, the flexible sheath and rigid strips about which the lateral edges of the sheath are wrapped inserted with the enwrapping-sheath edges within the hooks at the edges of the rim, substantially as set forth.

"6. In combination with the rim having hooked lateral edges, the flexible sheath and rigid strips about which the lateral edges of the sheath are wrapped, such strips being folded with the enwrapping sheath to form rigid hooks at the edges of such sheath, such hooks being engaged with the hooks at the edges of the rim, substantially as set forth."

It will be seen that the attachable device in this patent is the "hooked connection" of the sheath and tire edges. The patentee says "the rim is provided with hooked edges," and, as said by the court below, these hooks on the rim are "doubled back U-shaped, so as to form recesses and permit engagement in such recesses of corresponding hook points on the hooks of the sheath." This hook is open toward the axis, and is "preferably approximately in the direction of a tangent to the inflatable core so that the expansible tendency of the core will tend to draw the hooks into close engagement." The complainant never manufactured tires with the attachable device described in its patent No. 454,115. It was found to be, to say the least, an objectionable means of attachment, and no tires were manufactured as therein described; but the complainant modified its form of attachment by changing the device from a hook, with its opening toward the axis, to a projection of the rim more nearly parallel to the flat surface of the rim, and changed the angle of the hook on the tire more nearly to that of a flange to correspond with the tire. This is the form of the appellee's device, and, if the hook-shaped attachment described and claimed in appellant's patent No. 454,115 includes the form appellant has used down to the present time, then the appellee has infringed, because the latter is using the same kind of attachable device used by appellant, but the appellee claims both are using the device described in the Golding patent, which has expired and was public property before appellee began to use it. When Jeffrey patented his hooked device set forth in No. 454,115, the field had been well covered, and, if he had made his claim sufficiently broad to include "an extension of a rim partly or nearly parallel with the flat portion of the wheel with the flange on the tire to correspond, such as both parties here are using, he would have invaded the domain pre-empted by the Golding patent, of which the "edges of the rims are bent round and brought a short distance toward each other and nearly parallel to the flat surface of the rim, thus forming an inner recess * * * for holding the projecting flanges of the tire. * * * The tire is

made to fit the rim rather tight * * * and the flanges spring into the recesses." So that the Jeffrey patent can only be sustained by a construction restricting it within the narrow limits of the hooked device which "opens toward the axis," and cannot be extended to a flange "nearly parallel to the flat surface of the rim," and, so construed, it is not infringed. It will, therefore, be unnecessary to consider the question of the patentability of Jeffrey's improvement.

The conclusion of the court below that the second patent No. 558,956 was not infringed we also think is correct, and we cannot do better than to quote the language there used:

"The second patent is No. 558,956, issued April 28, 1896, for a wheel tire, claims 5 and 10 of which are alleged to be infringed. Respondent defends on the ground of noninfringement. We are of the opinion the defense is sustained. The subject-matter of this patent, its late date in the art, and the close differentiations required to obtain the narrowly limited claims in question indicate the patent was restricted to a comparatively narrow field of improvement. The specification states: 'This invention relates to tires having inflatable cores; and it consists in the character and construction of the inclosing sheath and the mode of securing the same to the rim.' The character and construction of the proposed sheath are specifically shown. No novelty was suggested in the rim. Its construction for the broader type of the device is: 'The rim is a hollow rim made in a familiar manner from tubing * * * having the outer side transversely concave to form a seat for the tire.' A special form is suggested: 'For the purpose of adapting it to receive my improved tire the rim is preferably formed with the peripheral channels, A-1, A-1, in the outer or concave wall; but these are not essential to my invention considered in its broadest phase. Their use, when present, will appear from the further description.' The lateral portions of the sheath the patentee made of folded canvas or other web, joined at the folded edges to thread or rubber of sufficient thickness to stand wear and 'sufficient elastic flexibility to adapt it to yield with the core, and having also tensile elasticity. So that the sheath which comprises it as the middle section is transversely extensible to a slight degree.' The purpose of this extensibility was to adapt the sheath for use with either an inflatable or a nonextensible core. At the outer end of the folded canvas, hooks or buttons were placed and in the rim at corresponding distances were put engaging eyelet holes or buttons; 'said eyelet-holes or button-holes being formed in the channels, A-1, when the rim is made with such channels.' When the core is inflated, 'its tension being exerted in all directions tend to draw the hooks securely into the respective holes in the rim and effectually prevent dislodgment.' Of this button connection, which the patentee evidently regarded as the substantial feature, 'in the character and construction of the inclosing sheath and the mode of securing the same to the rim,' he says: 'The use of the buttons or hooks, in lieu of any continuous fastenings, affords the advantage of detachability for short distances without detaching the entire edge or even any large section of the edge, and as compared with familiar devices, such as continuous lacing, it affords a similar advantage that the fastening need not even be relaxed or slackened anywhere except at a point where it is desired to completely detach in order to get full access to the core.' To make the fastening still more secure the patentee suggested an additional element, which it will be noted forms an element in the claims here in controversy. It is thus described: 'It is not a necessity that the lateral pieces, C'—that is, the canvas or web sides—terminate at their lines of reinforcement or attachment to the rim, and, on the contrary, one or both of them might be extended farther under the inflatable core, so as to rest between said core and the rim and form a lining for the seat of the core in the rim; and such extension adapts the sheath to be held more firmly in its place by the inflation of the core, and such inflation, holding the inwardly extended edge of the sheath firmly seated between the core and the rim, keeps the beads formed by the cord, c'—an alternative construction of strengthening cord placed in the folded edges of the web—in the grooves or channels, A-1, of the

rim and makes them assist materially in holding the sheath from spreading when the core is inflated.'

"The limited side type is described in claim 2, which reads as follows: 'The rim and an inflatable core combined with an envelop or sheath for the core parted under the core and fastened to the rim at two peripheral lines, one on each side of the plane of parting, and detachable from the rim at one of the said lines of fastening; said sheath having its lateral portions flexible, but not laterally extensible, and its middle portion, including the thread, elastically extensible; substantially as set forth.' And the extended side in claim 5, which is for: 'The rim and an inflatable core combined with an envelop comprising a thread of cushioning substance and lateral portions composed of textile fabric which are joined to the rim at two peripheral lines, and extend inwardly from said lines underneath the core between the same and the rim in the plane of the pressure radial with respect to the wheel, which is experienced by the thread and exerted by the inflation of the core; whereby the tension of the air in the core due to inflation and to the pressure of the load operates on said inwardly-extending fabric portions of the sheath to hold them seated in the rim; substantially as set forth.' And in claim 10, which is for 'in combination with the rim having peripheral grooves, in the tire seat, the inflatable core and envelop for the same rifted at the inner side to admit the core to permit its removal, and comprising a thread of cushioning substance, and lateral portions which are provided respectively with beads adapted to engage the grooves of the rim, and extending inward from said beads to the rift; whereby the inflation of the core presses such inwardly extending marginal portions of the sheath against the rim between the planes of the beads; substantially as set forth.'

"In the respondent's device, however, the sheath ends with its two peripheral side connections with the rim. No theory or ingenuous contention can change that fact; and fact, not theory, is the test of infringement. Accordingly we hold respondent does not infringe."

The decree is affirmed, with costs.

CONSOLIDATED RY. ELECTRIC LIGHTING & EQUIPMENT CO. v.
ADAMS & WESTLAKE CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1908. Rehearing Denied May 6, 1908.)

Nos. 1,388, 1,394.

1. PATENTS—PRIORITY OF INVENTION—BURDEN OF PROOF ON ISSUE.

The grant of a patent raises a presumption that the patentee was the original inventor of the thing patented, and that the invention was made at the time the application was filed, and one claiming priority of invention has the burden of proving, by evidence which is clear and certain, that the invention was conceived and reduced to practice by another prior to the date of the application. When such proof is made, however, the burden is shifted to the claimant under the patent to establish, if not with equal certainty, at least to the satisfaction of the court, a still earlier date of invention by the patentee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 121.

Priority and continuance of public use of invention as affecting patentability. See notes to *Eastman v. Mayor, etc., of City of New York*, 69 C. A. 646.]

2. SAME—MECHANISM FOR ELECTRIC LIGHTING OF CARS.

The Kennedy patent, No. 740,982, for mechanism for driving dynamos on railway trucks for the purpose of the electric lighting of cars, *held* void on evidence clearly showing that the invention was conceived and reduced to practice by another some months before the patentee's application was filed; there being no satisfactory proof of conception of the invention by the patentee at an earlier date.

Appeal and Cross-Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion of court below, see 153 Fed. 193.

The appellant, Consolidated Railway Electric Lighting & Equipment Company, was the complainant below in a bill filed against the Adams & Westlake Company, as defendant, for alleged infringement of three claims of patent No. 740,982, issued to the complainant, as assignee of Patrick Kennedy. The decree of the Circuit Court adjudged infringement of the claims by the defendant, in a single instance, for which injunction was granted, but that the third claim was not infringed thereby; and further adjudged that other alleged infringing devices were not infringements of either claim in suit, under the limited scope awarded, and that an accounting be denied. Assigning error for the limitations thus placed upon the several claims, and denials of relief thereupon, the complainant brings this appeal, and the defendant prosecutes its cross-appeal from the adjudication of validity or infringement of the claims in any particular.

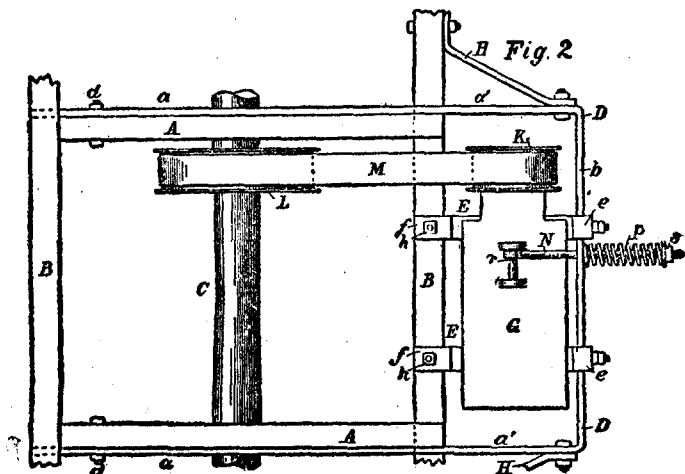
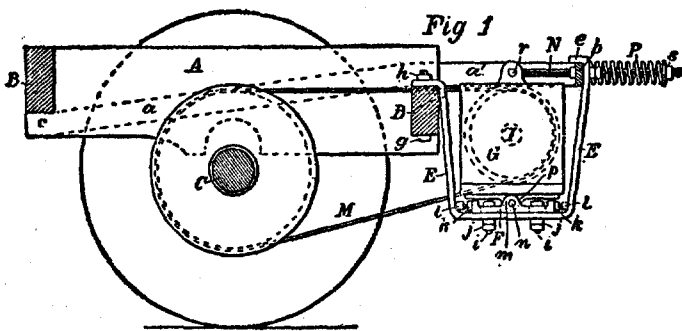
Patent No. 740,982 (in suit) is entitled "Mechanism for Driving Dynamos on Railway Trucks," and was granted October 6, 1903, on application filed June 5, 1903, by Patrick Kennedy as inventor. It purports to be an improvement in the system of electrical lighting for railway cars, with the dynamo driven by the revolution of the car-wheels, but relates specifically "to means for mounting the dynamo upon the truck of a railway car." The description contained in the brief, submitted on behalf of the complainant appellant, is adopted, for the present statement, as follows:

"The patent recites the prior state of the art, in which dynamos had been located either inside the cross-beam of the railway truck, or, as an alternative, suspended from the car-body, and states that these expedients had faults which greatly impaired their utility. The suspension of the dynamo inside the truck brought the driving-pulley closely adjacent to the pulley on the armature of the dynamo, thus necessitating a short belt, which is liable to be

deranged, and gives an imperfect transmission of power. It is stated, also, that such arrangement of the parts rendered them difficult of access for removal or repair, and the suspension of the heavy dynamo directly from the bolts gave inadequate support under the severe usage to which railway trucks are subjected. The suspension of the dynamo from the car-body was objectionable, because, when the car is turning curves, the angle of the belt to the armature is changed, and the belt is liable to be thrown from the pulley. The object of the invention is stated as follows:

"The object of my invention is to obviate these practical difficulties in the transmission of power from car-axes to dynamos. To this end, I provide certain new and useful combinations of instrumentalities, hereinafter fully set forth, whereby I am enabled to place the dynamo outside of the cross-beams of the truck, and thereby secure the transmission of power thereto through a driving-belt of increased length, whereby the apparatus is made readily accessible for examination, lubrication, etc., whereby it may be readily removed from the truck when required, and whereby it is provided and held in place upon the truck with great stability and security, these advantages resulting in a much greater degree of safety, durability and economy in working than has heretofore been attained in the class of mechanisms to which my invention relates."

"The specification then proceeds, with a description of the mechanical structure of the device, which, in substance, is as follows:



"Instead of suspending the dynamo between the axles of the wheels, the inventor suspends it outside of the end-beam of the truck, and this he accomplishes by providing a horizontal bracket frame of U-shape, the two parallel legs, a, a, being bolted to the longitudinal beams of the truck, extending outwardly beyond the cross-beam B, and connected at the ends by an integral cross-arm, b. The bracket-frame is braced by diagonal pieces H, which are bolted to it and to the end-beam, B, thus affording a strong and rigid frame within which a cradle for holding the dynamo is supported. The cradle is composed of two U-shape pieces, E, having horizontal lugs, which rest, respectively, upon the cross-beam, B, of the truck and the cross-arm, b, of the bracket, so that the cradle is suspended from the bracket, and is not dependent for its support upon the bolts by which it is secured. The cradle may be removed readily by loosening the bolts and withdrawing it from the bracket. The dynamo is pivoted to adjustable blocks, F, which are held at the base of the cradle by bolts I passing through slots, so that the blocks may be shifted endwise, and may thus provide for the alinement of the dynamo in parallelism with the car-axle. Set-screws, 1, are provided as a convenient means for effecting this adjustment. The dynamo, G, is pivoted to the blocks at n, and tension is imparted to it by an adjustable spring, P, drawing the dynamo outwardly in opposition to the tension of the driving-belt, M, which extends from a pulley, K, on the shaft of the dynamo to a pulley, L, on the car-axle, C. The spring thus keeps the driving-belt taut, and by its action in conjunction with the adjustment afforded by the pivot-blocks, F, the dynamo is maintained in an upright position, and constantly in proper relation and alinement with the axle, so that the best conditions for driving are at all times maintained.

"The specification concludes with the following statement of advantages:

"It will be seen that, by the novel combinations of parts herein described, the dynamo may be located at any desired distance from the driving-axle of the truck, thereby insuring the advantages of a longer driving-belt, this permitting the use of larger pulleys whether on the axle or on the armature-shaft; also that the dynamo and its adjuncts may be readily reached and inspected; also that the dynamo and its adjuncts may be easily removed and replaced as occasion demands; also that, aside from the driving-pulley on the axle, the apparatus may be readily detached from the truck by removing the bolts which attach the bracket-frame to the beams, and that when in use the tension of the driving-belt in its hold upon the armature-pulley is made constant, and held at any desired strain by adjusting the compression of the spring which actuates the dynamo."

"The first three claims are in issue, and are as follows:

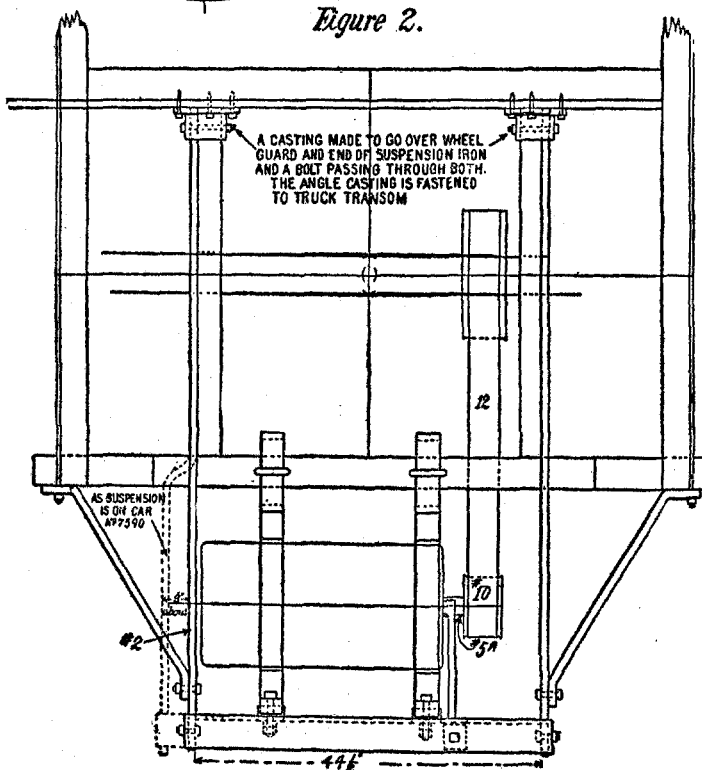
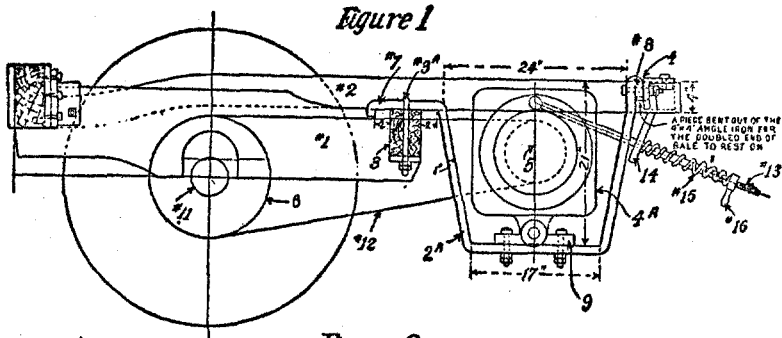
"1. The combination with a car-truck and a bracket device, extending outside of the beams of said truck, of a removable cradle placed between said bracket and an outside cross-beam of the truck, a dynamo within the cradle and adjustably pivoted thereto, a pulley on the armature-shaft of the dynamo, a driving-pulley on an axle of the truck, a driving-belt extended from the driving-pulley to the pulley on the armature-shaft and means for elastically swinging the dynamo to maintain the tension of the belt as described.

"2. The combination with a car-truck and a bracket extended outside of the beams of said truck, of a removable cradle placed between said bracket and an outside cross-beam of the truck, a dynamo within the cradle, adjustably pivoted at the bottom thereof, a pulley fast on the armature of the dynamo, a driving-pulley on the axle of the truck, a driving-belt extended from the driving-pulley to the pulley on the armature-shaft, and a compression-spring, provided to swing the dynamo to maintain the tension of the driving-belt as described.

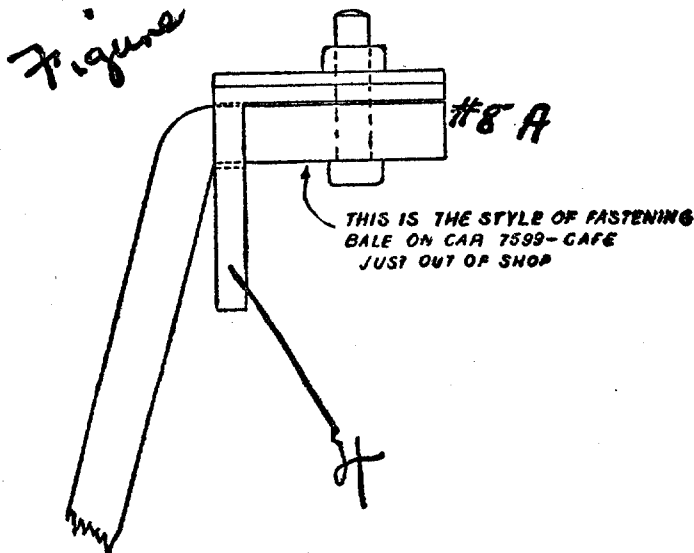
"3. The combination with a car-truck of a bracket-support outside of an outer cross-beam of the truck, a cradle having lugs at opposite sides of its top to rest upon the bracket and the adjacent cross-beam to suspend the cradle in the space between them, and a dynamo pivotally supported at its bottom within the cradle, of a pulley on the armature-shaft of the dynamo, a driving-pulley on an axle of the truck, a driving-belt extended from the driving-

pulley to the pulley on the armature-shaft, a compression-spring for swinging the dynamo against the tension of the belt to control said tension, and means for adjusting the compression of the spring as described."

The defendant's device, with which a single car was equipped, adjudged by the decree to be an infringement of claims 1 and 2, but not of claim 3, appears in Exhibit Figures 1 and 2, as follows:



In making subsequent devices for this so-called "cradle" the defendant changed the means for suspension and fastening, so that the trial court upheld its contention that the cradle was not made removable in the sense of the patent claims and escaped infringement. The changed form is illustrated in Exhibit Figure 1a, as follows:



Other facts involved in the controversy are mentioned in the opinion.

Thomas W. Bakewell and Edward Rector, for complainant.

Louis K. Gillson and Charles C. Linthicum, for defendant.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The patent in suit, No. 740,982, involves no question of advance in method or means of lighting trains of cars by electricity, with the revolution of the car wheels utilized for generating the current, beyond improvement in the means for suspension and operation of the dynamo outside of the truck-frame of the car. Both utility and commercial value of the device are facts in this record, but the narrow scope of the claims alleged to be infringed is likewise well established, if their patentability can be upheld under the evidence. The prior state of the art appears from uncontroverted testimony and exhibits, and no review in detail is needful for present consideration. We deem it sufficient to mention these facts as thus established in this record: The lighting of cars by electricity was well known, and various methods were in general use on railroad trains. An early means was storage batteries, carried on the car and charged for each trip; and later a dynamo and engine were employed for the purpose, carried on the car or train, as exemplified in Arnold's patent of 1887, No. 366,292. Then came the system of using dynamos "driven from the car-axles," as referred to in the patent

in suit, and recognized as well known, with various locations of the dynamo and adaptations of means for its operation. Among other prior patents for improvements in the use of this system were two Moskowitz patents of 1901 (Nos. 665,539, 665,540) and two patents issued to Kennedy, the present patentee assignor (No. 685,516 of 1901 and No. 699,187 of 1902), each relating to the place and means for mounting and operating the dynamo. Moskowitz, in the one patent, shows his dynamo placed on the locomotive, belted to a pulley on an axle; and in the other the dynamo is described as "movably connected with the car-body" on a car, and shown as suspended partly from the car bed, and partly from the end of the truck. In both of the above-mentioned Kennedy patents the dynamo is carried in a cradle underneath the car; the one device with cradle irons suspended inside the truck-frame, and the other with the cradle overhanging the end of the truck-frame, referred to in the briefs as the "outside suspension," which was adopted for the improvement in suit. This location is of advantage (as disclosed by the evidence) "in the ready accessibility of the parts for removal and repairs"; and the utility of the suspension means shown in the present patent "consists in its stability and safety."

The decree upholds the validity of claims 1 and 2 of the patent, with limited scope, so that all the devices made by the defendant, except one of earlier construction, "applied by it to café car No. 7,594 of the Pennsylvania Company," for which relief was granted, were pronounced free from infringement; while claim 3 was limited thereby "to the specific form of cradle irons shown in the drawings," and the bill dismissed as to that claim for noninfringement. In the appeal by the complainant broader construction is sought of all these claims, and extension of relief thereupon against all of the defendant's structures in evidence, with the limitations placed upon the alleged invention as the sole question for review. The cross-appeal of the defendant, however, raises the questions of validity, as well as scope of these claims; and the patentability of the device is challenged, under the answer and evidence, as neither an original conception by the patentee, nor otherwise involving invention.

Careful examination of the record and briefs has confirmed the impressions we brought from the oral argument that the complainant's contentions as to the scope of invention, for more liberal interpretation of the claims, to reach other devices made by the defendant than the one originally used and adjudged to be an infringement, are untenable, that error is not well assigned, for the interpretation applied by the trial court, in so far as the relief granted by the decree, was thereby limited, and that the complainant raises no well-founded objection to the decree under its appeal. In view of our conclusions upon the defense arising under the cross-appeal, the foregoing propositions do not require specification, either of the rules of limitation thus applied to the claims, or the facts in evidence for their application.

The defendant seeks reversal of the decree, notwithstanding the seeming unsubstantial measure of relief granted in favor of the patentee, and the twofold defenses set up against the patent and claims in suit are pressed for consideration to that end on the cross-appeal. Both are issues of fact, fairly raised by the evidence, and neither is

entirely free from difficulty in the solution. The one presents conflicting testimony as to the conception of means for the patent-device, whether it originated with Kennedy, the patentee, or one Sherbondy, who reduced the conception to practice before the date of Kennedy's application; while the other involves the complicated problem of patentable invention, in the light of the prior art, with irreconcilable conflict in the expert testimony. Determination of either issue hinges, as we believe, on the *prima facie* force of undisputed facts, for application of the rule of law which casts the burden of proof upon one or the other party, instead of the difficult problem, urged for solution, as to the credibility of witnesses and the intrinsic weight of their testimony, respectively, and thus simplifies the issue when the rule referred to is ascertained. In this view we proceed to the consideration of the first-mentioned defense, as it is obvious that the bill must be dismissed if the evidence is sufficient to defeat the patentee's claim of originality in conception of the device for which monopoly was granted.

The patent (No. 740,982) was issued October 6, 1903, on Kennedy's application, verified April 21, 1903, and filed June 5, 1903. Thus the *prima facie* case is thereby established of complete conception by the patentee as of the date of his application (Robinson on Patents, §§ 132, 372, 380, 1024; Walker on Patents, §§ 69, 70, 510); and the right of the patentee is well recognized to carry the date back to the actual inventive act, as against rival claimants. (1 Robinson on Patents, § 132.) When the defense of anticipation is set up, it is unquestionable that the defendant is charged, not only with the burden of proof upon that issue, but priority of conception and reduction to practice must be clearly made out, by well-authenticated evidence, to defeat the patent. That burden, however, has been completely satisfied by the proof introduced for *prima facie* support of the present defense, in so far as evidence of priority in reduction to practice can meet these requirements; and the question thus arises: Is not the burden of anticipating this undisputed fact of priority in making and using the device, thereupon transferred to the claimant under the patent?

The established facts, at the stage of the case referred to, are substantially these: The patentee, Kennedy, and the witness Sherbondy (introduced for the defense) are rival claimants for priority in conception of the substantial features of the patent device. Both are engineers of recognized skill in electric equipment—Kennedy, as chief engineer of the complainant company, and Sherbondy, as chief electrician of the Pennsylvania Railroad—and each was engaged, in the course of duties, in devising improvements for the system of lighting cars by electricity. They were acquaintances, and in business relation for equipments in such line. Prior to 1903 Kennedy had obtained patents for several suspension devices—including one for so-called "outside suspension," in No. 699,187, issued May 6, 1902, on application filed August 17, 1901—and was soliciting, for his company, equipment of various railroads, including the Pennsylvania, with the outside suspension, which he hoped to improve, as none of his earlier devices were entirely satisfactory. Sherbondy (as we assume) was acquainted with these various patents, and with Kennedy's quest, both

for opportunity to equip with his means and to improve upon it. In 1901, however, Sherbondy undertook and carried out an equipment of cars for the Pennsylvania Company with the dynamo suspended outside the truck-frame, instead of inside, as theretofore practiced; and as completed in dining car No. 7,580 in December, 1901, it is unmistakable that the suspension means of this equipment responds in every substantial element to the means of the patent in suit. Moreover, it is conceded that Sherbondy, on the arrival of the car at Chicago, about January 3, 1902, exhibited and explained the structure to Kennedy, without comment by either as to the source of conception. Another car, then in the shops, was equipped with like device, and completed February 8, 1902; and drawings then made of the device are in evidence and clearly established.

With the above-mentioned facts of complete anticipation in construction and use—known to the patentee several months prior to his application for a patent—settled by the evidence, we are of opinion that the presumption of invention by the patentee, which arises from the patent, application, and grant, is overcome, *prima facie*, by such anticipation in Sherbondy's *prima facie* conception reduced to practice, so that the burden of proof is transferred to the patentee to establish priority in fact. *Westinghouse Electric & Mfg. Co. v. Catskill Illuminating & Power Co.*, 121 Fed. 831, 834, 58 C. C. A. 167. This view of shifting the burden of proof in such event is upheld in well-considered opinions at the circuit (*Webster Loom Co. v. Higgins*, 15 Blatchf. 446, Fed. Cas. No. 17,342; *Thayer v. Hart, Jr.* [C. C.] 20 Fed. 693; *Westinghouse Elec. & Mfg. Co. v. Saranac Lake Elec. L. Co.* [C. C.] 108 Fed. 221, 222; *Westinghouse, etc., v. Mutual Life Ins. Co.* [C. C.] 129 Fed. 213, 216), and stated in *Walker on Patents*, § 510. In *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 492, 11 Sup. Ct. 846, 851, 35 L. Ed. 521, however, the opinion by Mr. Justice Bradley states the rule in like case, in qualified form, as requiring "the plaintiffs, in rebuttal, to show, if not with equal certainty, yet to the satisfaction of the court, that the invention" claimed in the patent preceded the date thus shown with certainty, in respect of a device which anticipated the patent dates. For the purposes of the present case we deem it immaterial which of the rules thus stated is applied to the evidence for determination of the issue, as neither side furnishes satisfactory and convincing proof, consistent with other testimony, of a well-defined perfection of the alleged invention at any period prior to December, 1901, within the rule as stated in the last-mentioned opinion—bearing in mind, as there remarked (page 489), that "a conception of the mind is not an invention until represented in some physical form."

While it is true that drawings are introduced on behalf of the patentee, exhibiting the suspension means, with testimony which tends to fix their date, as stated in complainant's brief, "somewhere between July and the last of October, 1901," each exhibit rests on the recollection and credibility of witnesses for the alleged date, at best stated indefinitely; and the drawing, which is relied upon for complete representation of the device, shows erasures and changes, which are not

satisfactorily explained, as made before 1902. An exhibit "rough sketch," in a memorandum book of a witness (Sexton), is introduced, as tending to show disclosure of the patent-device to this witness, by Kennedy, about November 17, 1901. Expression of the means of an alleged invention, in a drawing or sketch, is frequently the best attainable evidence of the needful "representation in physical form," and may rightly be accepted as satisfactory proof of such fact, when fairly authenticated, definite, and reasonable under all the circumstances. The exhibits referred to, however, are not so authenticated in date, consistently with other facts, that they can be accepted, in our view of the circumstances, as satisfactory confirmation of the testimony of the patentee that he had perfected and communicated the device of his patent, prior to the alleged conception by Sherbondy, which was reduced to practice so long in advance of Kennedy's application.

Without attempting to detail the extended testimony in reference to the various efforts to provide for locating the dynamo outside the truck of the car, the following circumstances are pointed out as uncontroverted and anterior to the Kennedy application, filed June 5, 1903, namely: (a) When Sherbondy completed his equipment of cars, in December, 1901, the only device for like location of the dynamo, which had been made or applied by Kennedy, was that described in his patent of 1902 (No. 699,187) which was applied to Grand Trunk cars about June, 1901, and later was placed on a Santa Fé car, and reported satisfactory. (b) Assuming that he was then contemplating and working out an improved device, Kennedy had neither applied nor made one which embodied the simple adaptation of the present patent, before his attention was called to the device operating on Pennsylvania car No. 7,580. (c) Nor does it satisfactorily appear from the testimony that any portions of equipment, specially adapted for the device of this patent, were actually made by Kennedy or his company prior to 1902—as the shop orders in evidence are equally referable to the earlier devices—while it does appear that Kennedy's directions (January 4, 1902), for Santa Fé cars to be "equipped with the outside suspension" (theretofore ordered by that company), were written after his examination of the Pennsylvania car. (d) Kennedy's application for the patent (No. 699,187) of 1902 was filed August 17, 1901, and he was absent in Europe after that date until about October 8th. He testifies that upon his return he "took up the question of improving the outside suspension generally, and working out the details particularly." (e) While Kennedy testifies that Sherbondy's device was made under Kennedy's conception, as communicated when they met at Ft. Wayne, November 28 or 29, 1901, his statement of what was said is insufficient for such communication, namely: "I told him what I was doing, in a general way, in the design of a new outside suspension, which would overcome" objections to the earlier device. This is expressly denied by Sherbondy; but, aside from the dispute of fact, no clear communication appears of the single feature on which patentability must rest, simple as that element is when disclosed. (f) In Kennedy's version of the conversation with Sherbondy, November 28th or 29th, in which it was understood that each was working out a method of outside suspension for practical use, no claim or suggestion

appears on the part of either that patentable invention or application for a patent was in contemplation; nor was interference claimed or suggested by either when Sherbondy exhibited his device as completed on car No. 7,580.

Under the state of facts thus appearing, we are of opinion that the patentee fails to establish such priority in conception over the Sherbondy device as must be required to uphold patentability, within either of the above-mentioned definitions of the rule to be applied. No circumstance in the case authorizes acceptance of the patentee's testimony as outweighing that of Sherbondy upon such issue, while the witness Sherbondy appears to be disinterested in so far as concerns the present controversy, and his testimony is consistent with the undisputed facts. In no view of the record are we impressed with the sufficiency of the evidence to carry Kennedy's alleged invention back of 1902, so that the undeniable anticipation of that date by Sherbondy leaves the decree without support.

The decree of the Circuit Court is reversed accordingly, with direction to dismiss the bill for want of equity.

MURRAY v. D'ARCY.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1908.)

No. 1,769.

PATENTS—INFRINGEMENT—SPRING SEAT.

The Murray patent, No. 692,535, for a spring seat, if conceded validity, discloses patentable invention only in the particular means shown for attaching the springs to their support. As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

W. F. Murray, for appellant.

F. L. Chappell, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

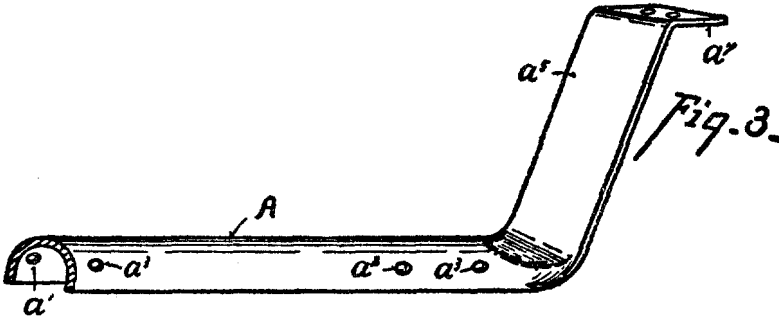
SEVERENS, Circuit Judge. The appellant, who was complainant below, charges the defendant in this bill with infringing the rights secured to him by letters patent No. 692,535, issued February 4, 1902, for improvements in spring seats. The claims which are said to be infringed are the first, third, and fifth, as follows:

"1. In a spring seat, the combination of a seat-frame, metal cross-strips having inturned edges with perforations, and flat upturned hangers at the ends to be secured to the frame, and coiled springs whose ends engage the perforations in the cross-strips, substantially as shown and described."

"3. As a new article of manufacture, a cross-strip, having both its edges inturned to within a short distance of its ends, with perforations in the inturned edges and the ends upturned to form hangers, substantially as shown and described."

"5. The combination of a frame, cross-strips secured at their ends to the frame and having inturned edges having perforations therein, and coiled springs whose ends engage the perforations in the cross-strips, substantially as shown and described."

As is seen, the first and fifth are for combinations of elements going into the construction of a spring seat, and the third is for one of the elements of such a combination; that is, for the spring support. As all the other elements were confessedly old, or clearly proven to have been so, the novel feature of all these claims is the spring support described in this third claim; and it is upon the merits of the invention of this part of a spring seat that the controversy turns. Enough of this support for the springs to enable one to understand the form of its construction and adaptations is exhibited by Fig. 3 of the drawings, which shows about one-half of it; the other section corresponding in all particulars.



The letters, a^1 , a^2 , a^3 , show the perforations through which the lower coil of an inverted conical spring is turned or screwed. There are four of such perforations, two on each side of the support, and it is contemplated that the spring will be turned in until it shall pass through the fourth perforation; "the spring being locked thereby securely in place because of the rise in the spiral." Much importance is attached by the patentee to the fact that in his invention he turns the edges of a flat metal strip in. What he means is shown in Fig. 3, which we have reproduced. Of this he says:

"It is seen that a cross-strip thus formed offers a greater resistance to any bending strain without increasing the amount of metal in it."

It is, indeed, readily seen. The property in a metallic strip that it offers a greater resistance to a downward pressure, in proportion to the amount of metal in it, when set on edge than when laid flat, is a matter of common knowledge, and by consequence that any approximation to a vertical position would proportionately afford the same advantage. Hunt, in his patent for improvements in spring bed bottoms, granted January 9, 1900, made use of this property by putting his metallic strips for spring supports in a vertical position, instead of laying them flat, as others had done. We may note here, also, that Hunt made perforations in this spring support through which he turned the lower coil of the spring. This secured the spring in an upright position in the longitudinal direction of the spring support, but not laterally; this being provided for by a cross-strip. And Hoey, in his patent of 1901, had employed the same principle when he made his spring supports of a tube perforated at the top and bottom, and

taking down the straightened end of his springs through these perforations. This held the spring rigidly upright. Murray took the upper half of Hoey's tube and claims the same advantage from it, namely, that turning some parts of it into a vertical position makes it stronger than if it lay flat. This same idea was pressed upon us as one of novelty in *American Carriage Co. v. Wyeth*, 130 Fed. 389, 391, 71 C. C. A. 485. But it was answered that the idea was old and familiar. D'Arcy takes the lower half of Hunt's tube. He prefers to make it in a V-form, but says it may also be made in a U-form, which is undoubtedly the same in principle. We think there was nothing patentable in the material or shape of complainant's spring support.

There is nothing left in which to find invention, except his peculiar device for attaching the springs to their support. This was done by making round "holes," as he calls them in his specifications and shows them in his drawings, adapted to the size of the wire of his coils, and turning the lower end of his coil around through the holes, as he says, "in a manner similar to that used in driving a screw." We have already noticed that Hunt made like perforations in his spring support; but that was quite vertical, and not partly so, as in Murray's. In a patent granted to Cloyes in 1898, flat metallic strips were used, and "tongues were struck up from the body of them and bent down over the coil of the spring, closely upon the strip." Entire loops were struck up from the spring support in Fortney's patent of 1896, through which the lower coil of the spring was turned. Van Cise, in his patent of 1896, shows a "long wide loop" struck up from his flat metal spring support. "These loops," he says, "are of suitable length to take one coil of the spring inside the slot so formed." This is similar to the slot in the spring support of the defendant, to be noticed later on. Other similar forms of spring supports are shown in patents earlier than Murray's. None of them, however, shows exactly the same construction. But enough has been recited to indicate that Murray's invention stands on very narrow grounds. Other and earlier modes of securing the springs in such structures upon their supports crowd his invention on every side, and the best that can be said for it is that it may be valid for the particular means which he devised and explains in his specifications. And so much we are inclined to concede to it, in view of the presumption afforded by the grant of his patent, notwithstanding it would seem that, upon adopting the principle of strengthening his spring support by turning down its edges, the old art would naturally suggest to him this manner of seating his springs.

Construed, as we think the Murray patent must be, as extending in respect of patentable novelty only to his particular method or means of attaching the springs to their support, it follows that there is no infringement. The springs of the complainant are attached by turning them through the holes on opposite sides, and they become fixed in their position by friction induced by the rise in the spiral of the coils. In the defendant's, they are first collapsed at the lower end and pushed in under tension through slots in the support. There the provisional tension is released, and the resiliency of the collapsed coil of the spring expands it against the ends of the slot, and the position

of the spring is thereby secured and maintained. Murray's spring support has no adaptation for D'Arcy's method of seating the springs upon their base, nor could D'Arcy seat his springs upon Murray's base without altering it into a different structure from that which Murray described and claimed. It was precisely upon this distinction that the examiner of the Patent Office distinguished D'Arcy's invention from Murray's, and upon which the patent to the former was allowed. Judge Knappen founded his conclusion in the court below upon the same ground in a well-reasoned opinion.

The decree of the Circuit Court must be affirmed, with costs.

BLAIR et al. v. JEANNETTE-McKEE GLASS WORKS.

(Circuit Court, W. D. Pennsylvania. April 10, 1908.)

1. PATENTS—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION—PROCEEDINGS FOR CONTEMPT—NEW CHARACTER OF INFRINGEMENT.

Where a defendant has been enjoined generally from infringing a patent, it is incumbent on him, not only to cease the infringement then practiced, but to be careful to avoid other infringement; and where he immediately enters upon a different practice, which the court holds also infringes, he is guilty of a real contempt of court, and will be treated accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 613.]

2. SAME—INFRINGEMENT—MAKING GLASS ARTICLES.

The Owens patent, No. 628,027, for the art of making glass articles, construed, and *held* infringed.

3. SAME—DEFINITION OF TERM IN PATENT—"PLASTIC."

Where a term is defined in a patent, that is the construction to be given it, rather than the definition found in the dictionaries; and *held*, therefore, in a patent for the interior fire-finishing of the glass article which provides that it is to be subject to the fire blast when in a "plastic" condition, by this term according to the patent is meant before the imperfections imparted to the inner surface of the mold by the plunger have become permanent by the formation of a glaze.

In Equity. Suit for infringement of letters patent No. 628,027, for art of making glass articles, granted to Michael J. Owens July 4, 1899. On motion for attachment for contempt for violating preliminary injunctions.

Marshall A. Christy, for complainants.

Paul Bakewell and James K. Bakewell, for defendants.

ARCHBALD, District Judge¹ (orally). The validity of this invention is not open to question at this time. Not only has it been adjudicated, but adjudicated in a prior case between the same parties. Notwithstanding this, however, it would be more satisfactory if the exact construction to be given to it had been discussed and declared in a formal opinion after due hearing. But the defendants virtually dispensed with that by consenting to a decree against them. I might hesitate, without the aid of this, to express an opinion upon it, except for the fact that the patent does not seem to me difficult to con-

¹ Specially assigned.

strue, and I have also had the benefit of the arguments here to-day, as well as those at the time when I allowed the preliminary injunction.

The defendants claim to avoid infringement upon two grounds: (1) That the patent calls for the glass articles being subjected to fire-finishing while still held in a mold or form; and (2) that the glass must be in a plastic condition—neither of which, it is claimed, is fulfilled by the defendants in their present practice. There is nothing in the patent, in my judgment, except in the third claim, which requires the article to be supported in a mold at the time it is subjected to the fire-finishing blast; neither is there anything in the patent or the prior art which requires this to be read into the other claims. The first, second, and fourth not having any requirement of that kind, the fact that the defendants do not make use of it, but carry the article, after allowing it to cool for a few seconds in a form or mold, to a platform, where it is allowed to stand unsupported, except as jets of air are made to play upon it, does not, therefore, take them out from under the patent. I agree with counsel for the defendants that, if such a support were required, it would be what might be called a physical or mechanical support, and not simply the means employed by the defendants to prevent the glass article from collapsing because of its heated condition; that is to say, the jets of air that are made to play upon it cannot be said to support it, as it would be supported by a mold or form, so that, if a mold was required by the patent, the defendants, not making use of it, would not, therefore, infringe. But I cannot read the patent that way. It is true that in the specifications the use of a mold is spoken of, but there is nothing to confine the inventor to it; and the other claims, outside of the third, not calling for it, it seems to me that it is not an essential to the process.

The other position taken is that the glass, when subjected by the defendants to the blast, is not in a plastic condition. By a plastic condition, as it is contended, is meant that the glass is capable of being molded, and not merely that it is pliable, or able to be indented or bent; plasticity differing from mere pliability, and referring to a much more mobile condition. But the word "plastic" is not to be construed altogether by reference to dictionary definitions. The patent itself indicates what is meant by it. Not only is it expressly defined in the fourth claim, but all through the patent, and particularly in the second column of the first page of the specifications, at the sixty-second line, where, after speaking of the glass article as being in a plastic condition, the inventor goes on to say:

"In other words, before the imperfections imparted to the inner face of the mold by the plunger have become permanent by the formation of a glaze."

This, therefore, must be taken as the character of plasticity meant, when spoken of in the patent. The construction to be given to the term is thus simply that condition which enables the article to be successfully subjected to the blast by which the superficial imperfections are removed; the glass article not being so far set that this cannot be readily done. If this be the correct view to be taken, the fact that this is successfully effected in any given instance certainly would go

far to persuade that the glass was of that condition of plasticity which is contemplated by the patent.

There is another consideration, as it seems to me, which operates in favor of this construction, and that is the ease with which the patent is able to be evaded unless it be insisted on. The defendants contend that they allow the article a few more seconds to cool than the patent does, conceding that glass cools very rapidly under the circumstances; that is to say, there is only the difference of a few seconds between the actual practice of the patented process and the avoidance of it. It may be that, if there is an infirmity of this kind in the patent, we cannot save it. But a construction is not to be given to it that will absolutely invalidate it in this way, unless we are driven to it. It is easy to see to what the opposite conclusion would lead. The defendants, although apparently pursuing the exact steps of the process, if they allow the blank or article to remain a few seconds more before putting it under the blast, avoid infringement; while if they allow it a few seconds less they infringe. A patent left open to that construction would hardly be worth the paper on which it was printed. I do not mean to say that this is controlling, but incidentally it certainly has weight. But, aside from that, I put my decision squarely upon the exact terms of the patent; the inventor, as I have already stated, having clearly defined what he means, and the intention being simply that the glass article shall be still so plastic or mobile, or so open to the effect of the hot blast, that the imperfections shall be removed by means of it. The imperfections, in other words, must not be so set that they cannot be removed; and that is all, as I take it, that is required to realize the process. This is a method or process patent, as it is to be observed, and not an apparatus; and in the practice at present pursued, equally with that which was shown at the time the injunction issued, it seems to me that the defendants offend against and infringe upon it.

The only question in my mind is as to whether—this process not being exactly the same as that employed at the time when the preliminary injunction issued, which it is claimed that the defendants have violated—I should treat the acts of the defendants as done in disregard of the writ. I can see that under some circumstances like this the alleged offending operations might be so different as not only to require new injunction proceedings, with a new consideration of the infringement charged, but even a new bill. I am myself on record to that effect in the case of *Walker Pivoted Bin Co. v. Miller* (C. C.) 146 Fed. 249.

There is this, however, to be said, in the present instance, on that point. It does not appear that the new method adopted by the defendants was taken after submitting the matter to counsel in order to see whether it was justified. In other words, it was an entirely independent step on the part of the defendants, without any such sanction, upon which, as it seems to me, the defendants entered, not only inadvisedly, but altogether too readily. It was assumed on their own responsibility that the new method which they had devised was all right, and so they went on with it.

Mr. James K. Bakewell (interrupting): "May it please the court, that is a mistake. The defendants did consult me with regard to this, and I advised them that it did not infringe."

The Court: I did not so understand the matter, and had intended in the course of the argument to inquire with regard to it. Nor, without questioning your statement, does it altogether comport with the letter which I got from Mr. Smith immediately after the last hearing. But, putting that aside, and without being moved by it, I am inclined to hold that not only is the practice at present being pursued an infringement, as to which I am well satisfied, but that it violates the injunction under which the defendants rest. While it may be that no presumption is to be entertained against them, and that we are only to take the evidence which is here, and not something that might possibly be shown outside of it, at the same time, this being a clear infringement, it violates the injunction with which the defendants were served, which was not particularly that they should not do a particular thing, but that they should not infringe the patent. It enjoins them in terms from practicing the invention, and it was particularly incumbent upon them, after being warned by it, not only to avoid what they were doing at the time, but to see that their skirts were kept clear against otherwise infringing upon it. And the prompt manner with which, immediately after the last hearing, the present practice was entered upon, as well as some other things which have been alluded to, incline me to feel that there is a real contempt of court here, and a too ready inclination on the part of the defendants to assume that they are outside of the patent, while merely pursuing the same practice in a modified form, to have me pass it by. The complainants, under the circumstances, seem to me to be entitled to something that will be impressive, and prevent anything further being done in disregard of the rights which they possess in this patent. A substantial fine should therefore be imposed, with the costs of these proceedings. I do not want to make it oppressive, but I do want to have it sufficient, so that the construction which the court has put upon the patent and the rights of the complainants under it shall be respected.

The defendants are therefore directed to pay a fine of \$500 and the costs.

HARDSOGG et al. v. HIBBARD, SPENCER, BARTLETT & CO.

(Circuit Court, N. D. Illinois, E. D. April 22, 1908.)

No. 28,419.

PATENTS—INFRINGEMENT—SQUARE.

The Nicholls patent, No. 672,455, for a square having columns of figures thereon to facilitate the cutting of rafters, in view of the prior art and the proceedings in the Patent Office, is limited to the peculiar arrangement of figures shown. As so construed, *held* not infringed.

In Equity. On final hearing

Munday, Evarts, Adcock & Clarke, for complainants.

George A. Mosher, for defendant.

KOHLSAAT, Circuit Judge. Suit is brought to restrain infringement of patent No. 672,455, for square, granted April 23, 1901, to Moses Nicholls, and afterwards assigned to complainants. The patent relates to the ordinary steel carpenter's square, having impressed upon its surface the usual measuring scale, consisting of figures and lines designating the inches and their fractional parts. In addition to this usual scale, certain words and tabulated figures are stamped upon the body of the square, designed to give to carpenters engaged in roof framing information to enable them to rapidly and easily compute the length of various rafters used in roofing constructions, and to quickly and accurately place the square to mark for cutting the various angles at which the ends of such rafters should be joined. These figures are placed in columns under the inch-mark figures, to which they bear a fixed relation; there being a column of seven sets of figures under each number designating the inches from 2 to 18, inclusive, on the body of the square. The inch-marks are extended, and pass between certain of the figures of each of the columns. Eight longitudinal lines, running from the tip of the body of the square to the point where the body joins the tongue or arm of the square, pass between the different sets of figures of the columns. These lines serve as guide lines for reference to the tables, and the spaces formed between them thus contain (at the intersection of each of the inch-marks from 2 to 18, inclusive, as before stated) all the figures of the tables. The signification of the horizontal rows of figures thus formed by the guide lines is expressed in words at the end of the square, between the last column at the 18-inch mark and the tip of the square (at 24 inches), the rows being labeled, respectively, as follows:

Length of common rafter per foot run.
" of hip or valley rafter per foot run.
Difference in length of jacks 18 inches centers.
" " " " " 2 feet "
Figures giving side cut of jacks.
" " " " " hip or valley rafters.
" " cut of sheathing in valley or hip.

The claims of the patent in suit are as follows:

"1. A square having numbered inch-marks upon each of its members, and one surface of one of its members being provided with longitudinally-arranged rows of figures, the figures on one side of each inch-mark in part of the rows referring to an inch-mark on one member of the square and the adjoining figures upon the other side of said mark in the same row referring to an inch-mark on the other member, substantially as described.

"2. A square having numbered inch-marks upon each of its members, and one surface of one of its members being provided with longitudinally-arranged rows of figures, the figures in the different rows having a fixed relation to the inch-mark numbers under which they are placed, the figures in a portion of the rows being arranged in independent sets under each inch-number, there being a set upon each side of the inch-mark in each of said last-mentioned rows, the figures of one set under each inch-number referring to an inch-mark on one member of the square, and the figures of the other set referring to an inch-mark on the other member, substantially as described."

The tables contained in the fifth and sixth rows (which relate to the side cut of jacks and the side cut of hip and valley rafters) are the only portions of the claims which complainants now contend are in-

fringed, and it is admitted by complainants' counsel that defendant's square would not infringe the patent in suit if such fifth and sixth horizontal rows were omitted. These rows contain, in each column, two numbers, one on each side of the extended inch-mark. For instance, in the fifth row, under the figure 8 (designating the 8-inch mark), the number 10 is found on one side of the inch-mark, and on the other side of the inch-mark the number 12. These figures are intended to indicate that, to make a side cut or bevel of a jack rafter in a roof having a rise of 8 inches to the foot run, the square should be placed so that the 10-inch mark of its body and the 12-inch mark of its tongue would touch the same edge of the timber to be cut; the cutting line being drawn along the tongue of the square.

Defendant's square, which is substantially the device of patent No. 841,666, granted to L. W. Cole, January 2, 1907, has no extended inch-marks and but one set of figures in its fifth and sixth rows. These single sets of figures are intended to give the same information as the double sets of complainants' square; i. e., the proper placing of the square to make the side cut of jacks and the side cut of hip and valley rafters. A printed circular accompanies defendant's square, informing the workman that only one number—the number 12—is to be used as the companion of any of the numbers of the single sets in the fifth and sixth rows. In other words, the single set of figures in these two rows are calculated in every instance in respect to the complementary number 12, and the workman is informed of this fact by circular, instead of stamping the number 12 in every instance as a companion to the single number on the square. The figures of these two rows are, of course, different from those of complainants'; but the ratio of the number 12 and the figures stamped on the square under any particular inch-mark is the same as that of the two numbers stamped on complainants' square under the same inch-mark.

Defendant denies infringement, insisting that the one set of figures in each of these two rows is not the equivalent of complainants' two sets, especially in view of the acquiescence of Nicholls in the rejection of claims broad enough, it insists, to have covered defendant's arrangement, presented during the pendency of his application in the Patent Office, and the limited nature of the claims as finally allowed. Defendant also denies the validity of the patent.

The idea of stamping figures on a steel square for the purpose of enabling the workman to calculate angles is not new. Such idea is disclosed in several prior patents, among which may be mentioned the Howard patent, No. 247,353, granted September 20, 1881, and the Paterson patent, No. 476,683, granted June 7, 1892. The claim of novelty of complainants' square is, therefore, very limited. It can only go to the peculiar arrangement of the figures. An examination of the file wrapper and contents shows that in the first instance the applicant claimed broadly "a square having a table of figures thereon indicating side cuts of jack rafters" and "a square having arranged thereon a table of figures indicating the lengths and side cuts of octagon and hip rafters. * * *" These claims were rejected by the examiner. Applicant acquiesced in the rejection, canceled the claims, and presented a claim for "a square having columns of figures arranged thereon be-

neath the inch gradations of the square, * * * and indicating the cut of rafters for roofs of the rises per foot indicated by the inch gradations." This was also rejected, and the claims again canceled. Three more times claims were submitted in the endeavor to cover broadly the basic idea of placing on a square tables having a relation to the inch-mark gradations by which the angle connections of rafters could be cut. One of these rejected claims reads as follows:

"2. A square having its surface provided with longitudinal rows of figures arranged under its inch-marks upon one edge, the numbers of the different rows having a fixed relation to the inch-mark under which they are placed, and the numbers in a portion of the rows referring to the inch-marks upon the two members of the square, respectively, substantially as described."

This would have more nearly covered defendant's square. Applicant's acquiescence in its rejection by the examiner, and the final allowance of claims limited to rows of figures on each side of extended inch-marks "in part of the rows referring to an inch-mark on one member of the square and the adjoining figures upon the other side of said mark in the same row referring to an inch-mark on the other member," and "the rows being arranged in independent sets under each inch-number, there being a set upon each side of the inch-mark in each of said last-mentioned rows, the figures of one set under each inch-number referring to an inch-mark on one member of the square and the figures of the other set referring to an inch-mark on the other member," would seem to bring complainant within the rule that:

"When a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it." *Roemer v. Peddie*, 132 U. S. 313, 317, 10 Sup. Ct. 98, 99, 33 L. Ed. 382; *Morgan Envelope Co. v. Albany, etc., Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; *Consolidated Store-Service Co. v. Seybold*, 105 Fed. 978, 45 C. C. A. 152.

The art is a very narrow one, as will be seen from the action of the examiner and an examination of the prior art. There is quite as marked a difference between the patent in suit and defendant's square as there is between the patent in suit and the prior art cited by the examiner and the said Paterson patent. The markings in any case are but mathematical calculations reduced to figures. It is only in the arrangement that invention can be asserted. Whether such claim be well founded or not need not be here determined. Certainly whatever of novelty the patent in suit possesses must be found, as above stated, in its peculiar arrangement of the results of calculations adapted to the purposes expressed. True, the patentee claims the benefit of all marks upon the square having the same ratio to each other; but defendant's square differs in other respects, as, for example, the star and caret characters used, and is not the physical equivalent of complainants'.

The prayer of the bill is therefore denied, and the bill is dismissed for want of equity.

E. L. WATROUS MFG. CO. v. AMERICAN HARDWARE MFG. CO.

(Circuit Court, N. D. Illinois, E. D. April 22, 1908.)

No. 28,071.

1. PATENTS—ANTICIPATION—LIMITATION BY PRIOR ART.

That the device of a patent never came into commercial use does not prevent such patent from being an anticipation of a later one, if it sufficiently embodies the elements and discloses the principle of operation of the latter or from narrowing its scope; nor is it material that the earlier patentee did not claim the particular device of the later patent as a part of his invention.

2. SAME.

That the device of a later patent is a mechanical improvement on that of an earlier one and produces a better result does not prevent the earlier from being an anticipation, where the principle and mode of operation are the same.

3. SAME—INFRINGEMENT—DOOR CHECK AND CLOSER.

The Bailey patent, No. 652,828, for a door check and closer, given the very narrow construction required by the prior art, *held* not infringed.

In Equity. On final hearing.

Orwig & Lane (Wallace R. Lane, of counsel), for complainant.

Pierce & Fisher (James H. Pierce, George P. Fisher, Jr., and Harry L. Clapp, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainant brings its bill to restrain infringement of patent No. 652,828, granted to Herbert L. Bailey July 3, 1900, for a door check and closer. The one claim reads as follows, viz.:

"In a door check and closer, the combination with a bracket, secured to the door near the upper edge thereof, and a pin or projection, depending from the top of the door-frame, of a bifurcated jaw, pivoted to the bracket and adapted and arranged to engage said pin, a spring secured at its ends, respectively, to said jaw and a bracket, so as to swing across the dead-center when the jaw is swung upon its pivot, and a stop for said jaw, substantially as described."

Defendant manufactures its device under the Wells patent, granted September 27, 1904, for a door check. The term "closer," of the patent in suit, refers to a means for drawing the door to, and holding it at a tightly closed position after it has been checked. The word is more often applied in the art to a means for springing the door from an open position to the check. The checking is merely the effect naturally attending the contacting of the pin depending from the top of the door-frame with one of the jaws of the so-called "bifurcated jaws" arranged upon the door itself, so as to engage it. "I take it, however," says complainant's expert, "that the door-closing function is the important function, and I would doubt whether the checking function would be found sufficient in practice to be at all noticeable."

The claim fairly describes the device. In the alleged infringing door check, the bifurcated jaws are replaced by a slotted disc centrally pivoted to a supporting casing mounted on the door-frame in such a manner as to co-operate with a staple on the door. This reversal of

parts seems to be the chief difference between the two. From the file wrapper and contents it appears that the claim of the patent in suit, as originally presented, was rejected by the examiner. It was then amended to read as it now stands. The amendment simply provided, first, that the door bracket be located "near the upper edge thereof" (meaning the door); second, that the pin or projection be described as "depending from the top of the door-frame," instead of "on the door-frame adjacent thereto," whereby it is apparently held that by changing the location of the device, without changing in any manner its operation, complainant injected novelty into the claim—a proposition which finds little support in the authorities. Robinson on Patents, vol. 1, p. 327, § 241, note 1.

The position of the parts, however, is not urged by complainant as a novel feature of the patent in suit. If valid, the patent is very narrow. Defendant urges the defenses of want of validity and of noninfringement. It is difficult to see how infringement can be denied, without relegating the claim in suit to the extremest verge of invention. The operation of the two are in all essentials identical, except for the reversal of the parts above alluded to.

In support of the defense of invalidity defendant sets up a number of patents in the prior art, only two of which it is deemed necessary to consider. There are, first, the English patent, No. 10,955, granted to Hans Henrik Schou, dated July 28, 1888, for a device to prevent the slamming of doors and permit them to close quietly; second, patent No. 512,202, granted to C. W. Mallory January 2, 1894, for a door check.

The Schou patent may fairly be described as the Bailey patent in suit plus a buffer. While the claims call for a device which shall act as a muffled stop to a slamming door—one drawn to by a spring or weight—they, together with the drawings and specifications, disclose clearly a closer in the sense of the Bailey patent as well, with the parts reversed, however, as with defendant's patent; but they are operated in exactly the same way and perform the same service. They are shown to close in exactly the same manner; i. e., by "a spring secured at its ends, respectively, to the jaw and bracket, so as to swing across the dead center, when the jaw is swung upon its pivot." Some of its claims call for "a combined door stop and closer." This closing device is merely a spring for returning the door from its open position into contact with the jaws. It is in no sense essential to the fast closing device. It operates entirely independently, and under the rules obtaining in our courts the two constitute nothing more than an aggregation. Clearly, if Schou's patent had been taken out subsequently to Bailey's, the latter, in the absence of the prior art, could have made out a case of infringement against it. The buffer may or may not be used. It has no appreciable effect upon the closer. This is demonstrable from the mounted model thereof in evidence. True, Schou does not in exact terms claim the Bailey closer; but he unmistakably describes it. The buffer is adjustable, and may be arranged in or out of position. Whether or not Schou has claimed the closer, he nevertheless has produced the mechanical means whereby the result is secured, and no one can now lay claim to what was disclosed by him and not claimed. Knapp v.

Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; E. M. Miller Co. v. Meriden Bronze Co. (C. C.) 80 Fed. 523.

Some contention is made that Schou's patent is a paper patent. If the model in evidence is correct, it is a working device. That it never came into actual commercial demand is not of moment for our purposes. Westinghouse Air Brake Co. v. Christensen Engineering Co., 128 Fed. 437, 63 C. C. A. 179. The case would indeed be otherwise, were it a mere alleged prior use. Dashiell v. Grosvenor, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025; Van Epps v. United Box Board & Paper Co., 143 Fed. 869, 75 C. C. A. 77. Even Schou's device may be improved by the patent in suit as to its more successful operation, yet, as said in Guidet v. Brooklyn, 105 U. S. 550, 26 L. Ed. 1106, it was said:

"Structural changes in form and proportions, although they improve the operation without changing the mode of operation, and produce a much better result, although one of the same kind, are only different and better forms of embodying the same idea, and illustrate the difference between mechanical skill and inventive genius." French v. Carter, 137 U. S. 239, 11 Sup. Ct. 90, 34 L. Ed. 664; Double Pointed Tack Co. v. Two Rivers Mfg. Co., 109 U. S. 117, 3 Sup. Ct. 105, 27 L. Ed. 877; Schweichler v. Levinson, 147 Fed. 704, 78 C. C. A. 92.

The patent is to be construed by those skilled in the art, so that any mere mechanical improvement would be readily conceived and applied. Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72. It does not appear from the evidence that the device of the patent in suit ever made any commercial mark; so that the destruction or injury of a flourishing business is not here involved.

The Mallory patent, No. 512,202, while different in form, operates upon the same principle as the patent in suit. The returning door strikes the tripping finger, M, and forces the crank, E, inwardly past its central position, thus allowing the spring to act upon the opposite side of the central position, causing a presser arm, I, to be thrown inward against the door, thereby shutting it and holding it in a closed position. The difference, if any, is rather one of appearance than reality.

In the light of these patents as herein disclosed, it must be held that defendant's device is practically that of the prior art. To hold that it is in law an infringement of the patent in suit must result in holding the latter to be invalid. As before stated, there are differences between the two which may or may not constitute novelty. Whether they do or not need not here be determined.

It is sufficient to hold that, in view of the prior art, defendant's device does not infringe the patent of complainant; and it is so decreed.

UNIVERSAL ADDING MACH. CO. v. COMPTOGRAPH CO.

(Circuit Court, N. D. Illinois, E. D. April 22, 1908.)

No. 28,528.

1. PATENTS—EFFECT OF ADJUDICATION OF ABANDONMENT—ESTOPPEL.

Where, in a suit for infringement, certain generic claims of the patent were held void for abandonment, on the ground that the broad invention was made by the patentee some eight years before the application was filed, the defendant, which owned a patent granted on an application filed six years after the date so found, is concluded by such finding, and cannot incorporate the same claims in a reissue of its own patent and maintain a suit thereon against the former complainant.

2. SAME—PRIOR INVENTION—COMPUTING MACHINE.

The Hiett reissue patent, No. 12,582 (original No. 580,863), for a computing machine, claims 55, 56, and 57, *held void* on the ground of prior invention.

In Equity.

Thomas F. Sheridan, George L. Wilkinson, and Walter A. Scott,
for complainant.

John W. Munday, for defendant.

KOHLSAAT, Circuit Judge. This cause is now before the court on final hearing on bill and cross-bill. Heretofore the defendant brought suit against the complainant for infringement of patent No. 628,176, issued to one Felt on July 4, 1899, for a tabulating machine. In that cause such proceedings were had in the Court of Appeals that this court, dismissed the bill for want of equity. Complainant herein was at that date claiming the right to manufacture under patent No. 580,863, issued April 20, 1897, to one Hiett, for improvement in calculating machine. Complainant in that suit undertook to carry its invention back of that of Hiett. In deciding the case (146 Fed. 981, 77 C. C. A. 227) the court says:

"One of two things in this case seems to us plain: Either the mechanism of 1890, upon which these broad claims are based, was a mere experiment, inoperative and impracticable, and as such supplanted by the Hiett patent, coming some six years later, or else, for the purposes of the broad claims allowed, the mechanism of 1890 was operative and practical, and therefore abandoned or lost through the eight years of inaction that followed."

Among the defenses set up in the amended answer of defendant in said former suit (complainant herein) are the allegations that the subject-matter of the patent then in suit had been in public use for more than two years, that the same had been disclosed in the columns of the Chicago Tribune, and that the device had been completed and capable of useful operation and abandoned, all more than two years prior to the filing of the application for said patent No. 628,176.

The bill herein sets up that "said letters patent No. 580,863, being afterwards considered to be inoperative or invalid by reason of an insufficient or defective specification, which insufficiency or defect arose from inadvertence, accident, or mistake, and without any fraudulent or deceptive intent on the part of the said De Kernica J. T. Hiett, were surrendered August 27, 1906, and duly canceled by the Com-

missioner of Patents," and that thereupon Hiatt made application for reissued patent, which was granted December 18, 1906, and numbered 12,582. By this proceeding the Patent Office awarded to complainant herein three additional claims, to wit, claims 1, 2, and 4, set out in defendant's original patent No. 628,176, transferring them literally from defendant herein to complainant as claims 55, 56, and 57 thereof, without notice to defendant as is the regular course of procedure in that office. It appears from the file wrapper and contents of the Hiatt original patent that the application as originally presented contained in claims 59 to 62 thereof, both inclusive, substantially the same subject-matter as that of said claims 1, 2, and 4 so added to the Hiatt patent. It further appears from said file wrapper that said claims 59 to 62 were all rejected by the examiner and were canceled by Hiatt—the first three on October 29, 1896, and the last on December 26, 1896. Upon this state of facts, the bill herein was filed, asking that: (1) Defendant's said patent No. 628,176 be adjudged null and void; (2) defendant be decreed to pay damages; (3) an injunction issue, restraining defendant and those under him from claiming any rights under said patent. To this bill defendant made answer, in a general way putting at issue all the material allegations of the bill, which in substance are the same as in any ordinary bill to restrain infringement, in addition to the other special features thereof. After answering, defendant filed its cross-bill, wherein it sets out that its grantor was the original first inventor of the subject-matter of the Hiatt patent, that by the said reissue patent its claims 1, 2, and 4 were allowed to complainant, and that said reissue was obtained by fraud, and prays that its patent be declared valid, that said reissue patent be decreed to be null and void, and that cross-defendant be enjoined, etc.

It is complainant's contention that the bill herein was filed under the provisions of section 4918 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3394), and that, such being the case, the court cannot declare either patent valid, but that it must declare one invalid, but cannot declare both invalid, that the decision of the Court of Appeals above set out is *res adjudicata* as to claims 1, 2, and 4 of the Felt patent, and that the only question properly before the court is that of priority of invention. In the view taken by the court, the question upon the original bill is broader than this. As will be seen from the reading of the opinion of the Court of Appeals above referred to, there was no intimation that the Hiatt patent was valid. All that the court decided was that the Felt patent No. 628,176 was not valid. While the basis of the finding was stated in the form of a dilemma, yet, considering the answer filed in said cause, the reasoning of the court, and the evidence, it seems clear that, if either horn of that dilemma was in fact established, it must be that which declared that:

"For the purposes of the broad claims allowed, the mechanism of 1890 was operative and practical, and therefore abandoned or lost through the eight years of inaction that followed."

If any doubt remained upon that point then, none now exists, in view of the present record. The facts bring the case within the rule laid

down in *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821, *Brush v. Condit*, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251, *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749, and *Hall v. Macneale*, 107 U. S. 90, 97, 2 Sup. Ct. 73, 27 L. Ed. 367. Manifestly, if the Hiett patent covered an invention which had been abandoned after being made public, as in the present case, more than two years before Hiett's alleged invention, the latter's patent must be invalid as to those subject-matters. Felt did not abandon it to Hiett, but to the public. The evidence in both suits utterly fails to show an abandoned experiment. If Hiett's patent was void, then he gained nothing by the reissue. In the former suit the defendant herein was relying upon the validity of claims 1, 2, and 4 of the Felt patent, and failed. Here the complainant must stand upon the validity of the Hiett reissue patent, and establish it affirmatively as to those same claims before he can obtain the relief sought. He fails for the same reason that obtained to defeat Felt's patent.

Thus, it will be seen, there are other questions involved than those of priority of invention. These identical claims have been held invalid in a prior suit between the same parties, and cannot be reinvested with validity by any change in the form of the suit or for any purpose, even though the bill may put them in issue. For the same reason it is evident the cross-bill will not lie. It is unnecessary to consider the other questions raised, as, for instance, laches, fraud upon the Patent Office, cancellation in the Patent Office, want of utility, etc.

The bill and cross-bill are dismissed for want of equity.

LEFKOWITZ et al. v. FOSTER HOSE SUPPORTER CO. et al

(Circuit Court, S. D. New York. May 5, 1908.)

COURTS—JURISDICTION OF FEDERAL COURT—FEDERAL QUESTION.

Complainants filed a bill in a federal court against a corporation of the same state as owner of a patent and the patentee who was a citizen of another state, alleging that such patentee obtained a decree against complainants in the same court adjudging the validity of the patent and enjoining its infringement; that complainants thereafter entered into a license contract with defendant corporation, giving them the right to manufacture and sell under the patent for a fixed term, with privilege of renewal, subject to the reservation of the right to such defendant to give notice by a time stated that it did not desire to renew, which notice the defendant had given; that, when the contract was signed, complainants were "orally assured" that no advantage would be taken of the reservation. The bill prayed that the decree in the infringement suit be set aside or suspended, that complainants' right to a renewal of the license contract be established, and that in the meantime defendants be enjoined from proceeding under the decree or bringing suit against complainants for infringement. The bill alleged no facts which would sustain a bill of review in the patent suit. *Held*, that the gravamen of the suit was a breach of the license contract by the refusal to renew and the relief sought a reformation or renewal of such contract, of which cause of action the court was without jurisdiction either on the ground that a federal question was involved or on the ground of diversity of citizenship, the patentee being neither a necessary nor proper party to such controversy, that the other relief sought was incidental and did not confer jurisdiction, and that, if jurisdiction be conceded, the bill did

not state a cause of action, as it did not allege that defendant agreed as a part of the contract that it would not act under the reservation therein.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

In Equity. On demurrer to bill.

W. P. Preble, Jr., for complainants.

Philipp, Sawyer, Rice & Kennedy, for defendant Foster Hose Supporter Company.

RAY, District Judge. Both the complainants and defendant Foster Hose Supporter Company are residents and citizens of the state of New York. Defendant Ella Foster is a citizen of the state of California. The object and purpose of this action are, and the relief sought is, (1) that a decree of injunction heretofore issued against one of the complainants here, Lefkowitz, in an action in equity to restrain infringement of United States letters patent No. 638,540, brought by the defendant here, Ella Foster Young, and which decree was entered in this court, Southern District of New York, October 9, 1903, be either vacated, modified, or suspended, and that defendants here be enjoined from availing themselves thereof from and after May 1, 1908, so far as complainants here are concerned; (2) that the defendant Foster Hose Supporter Company be decreed to renew and continue a license for the making, use, etc., of the patented device covered by said letters patent alleged to be outstanding; and (3) that defendants be restrained during the pendency of this action from bringing any suit against plaintiffs for infringement of such letters patent based on acts that may be committed during the pendency of this action or after May 1, 1908.

The bill of complaint alleges that the letters patent referred to for improvements in hose supporters were issued to said Ella Foster Young December 5, 1899, and that defendant Foster Hose Supporter Company is now the owner of such letters patent; that the suit for infringement referred to above was brought by Ella Foster Young, the patentee, and the final decree for injunction entered by consent against Lefkowitz. Complainants say the matter was then considered of slight importance. There is no allegation that the letters patent are invalid, or that such decree was obtained by fraud or deceit or duress. It is, of course, binding on Lefkowitz unless he has become a licensee. It is then alleged that about September 22, 1904, the complainants took a license for the making, use, and sale of the patented device from the Patent Holding Company, of which one Arthur Frankenstein was president, which license gave complainants the right to make, sell, and use the said patented device for the term of two years from November 1, 1904, subject to certain conditions and restrictions therein named, and which contained a privilege of renewal, which is alleged as follows:

"It was further provided in said agreement of license, to wit, in the sixteenth clause thereof, that your orators might renew said license from year to year upon the same terms as therein provided upon notice in writing to said Patent Holding Company three months prior to the expiration of said term of

two years, or of any renewal term thereof of its election to so renew the said license."

The bill of complaint then states that notice of renewal of such license was not given within the time specified, and, in substance, that the Patent Holding Company declined to accept or recognize the one that was given, and that, instead of going to law or resorting to a court of equity, a new license agreement was entered into October, 1906, in which most of the substantial provisions of the old license agreement were repeated, and whereby the license agreement was extended until May 1, 1908. In regard to this the bill of complaint alleges:

"Said new paper of license provided that your orators might renew the same from year to year by giving notice on the 1st day of March of their desire to renew subject, however, to the reservation by the Foster Hose Supporter Company of the right to give notice by the 1st day of February, 1908, that it did not desire to renew the license. That, believing that the insertion of this reservation was made in good faith and not as a trap to catch your orators, and being orally assured at the time of the execution thereof that no advantage would be taken of this reservation, your orators consented thereto, and the license was signed as above set forth.

"(13) But now so it is, may it please your honors, that contriving and intending to injure your orators in their said business, and to deprive them of the benefits and advantages which should and otherwise would accrue to them from the manufacture and sale of said licensed hose supporters, the defendant the Foster Hose Supporter Company has again notified your orators that it will not renew said license and has refused to give any reason for such refusal, and threatens to continue said refusal and to deprive your orators of the right to make and sell said licensed hose supporters from and after the first day of May, 1908, well knowing that such acts will cause irreparable injury to your orators' said business as aforesaid, all of which is contrary to equity and good conscience."

The bill of complaint sets out at length that the complainants have entered largely into the business of making and selling such devices as are covered by said letters patent and have invested large sums of money, etc., in the business, and that they will suffer great loss and damage if the said license agreement is not renewed. I am unable to find any allegation that the complainants abandoned any rights to obtain a renewal of the first license, if they had any, through fraud or misrepresentation, or that they did not enter into the second license agreement above referred to and quoted as it is alleged by complainants to be with their eyes wide open as to its terms and conditions, and with a full understanding of its legal effect and import. The whole question is reduced to this: Can a court of equity, under the circumstances, compel defendant Foster Hose Supporter Company, now controlling the patent, it being in fact the same as the Patent Holding Company with a change of name, to renew the license agreement on the ground the complainants at the time the present license agreement in writing was made and signed and assented to were assured "that no advantage would be taken of this reservation"; that is, the reservation by the licensor, Foster Hose Supporter Company, in the license agreement, that complainants might renew on giving notice March 1, 1908, of its election so to do, unless the said Foster Hose Supporter Company should give notice on or before February 1, 1908, that it did not desire to renew the license. In short, the Supporter Company insisted

that this limitation on the right to renew should go into the license agreement itself, but some one assured stated to the licensee that "no advantage would be taken of this reservation." It has given notice that it will not or does not desire to renew. The bill of complaint does not state who gave the assurance, or that it came from any one authorized to make it. The complaint says:

"And being orally assured at the time of the execution thereof [the license agreement] that no advantage would be taken of this reservation, your orators consented thereto, and the license was signed as above set forth."

The bill of complaint shows on its face that the second license agreement took the place of and superseded the first. Therefore the only right the complainants have to make, use, or sell the devices covered by the patent is derived from and under the second agreement. That is conditional as to renewal on the will of defendant company and its election to renew or not renew is to be evidenced by a notice to be served on or before February 1, 1908, and which was duly given and announced, that it elected not to renew. That is the written agreement. These complainants have no equitable grounds of relief, so far as the allegations of this bill are concerned or show, based on that first license agreement, or on the second license agreement, in effect extending some of the conditions and stipulations of the first agreement, so far as anything written in it, taken as a whole, is concerned. Complainants have no ground of relief, unless we do away with the written stipulation as to renewal, whereby complainants have no right to renew if defendant company gives notice in time it will not renew. The complaint shows on its face that complainants failed to give notice of renewal in time under the original license, and that it then made a new agreement. This was a clear abandonment of any equitable rights to relief from the consequences of its first neglect. They must stand or fall on the second agreement, and hence the main and only cause of action, if there be any stated, is to compel a renewal of the license under this second agreement. This is not incidental to some other relief. It cannot be questioned that, if this can be done, the court may incidentally enjoin all persons from enforcing the decree for injunction granted the patentee against the complainant Lefkowitz by the defendants, or either of them. That relief would be necessary in order to make the decree effective. This court has power over its own decrees. The proper and necessary parties are before the court if a cause of action is stated and jurisdiction shown. But defendant Foster Hose Supporter Company says that this court has no jurisdiction of an action to reform this license agreement or to compel an extension of the license, as there is not the necessary diversity of citizenship. It also says that the facts stated, conceding their truth, are not sufficient to warrant a decree extending the license agreement or compelling defendant company so to do.

Both complainants have recognized the validity of the letters patent referred to by taking a license from the owner of the patent, under which they are operating, making, selling, and using the patented device. Lefkowitz has also submitted to a decree adjudging their validity, and he has filed no bill in the nature of a bill of review. I do not see

that any question of patent law or other law of the United States is involved here. That the owner of a patent or sole licensee for the United States may grant licenses to others cannot be disputed. Defendant company has granted a license to the complainants for a limited time, with an agreement to renew, unless it gave notice by a certain specified date it would not renew. Complainants say it was orally agreed when the license agreement was signed that defendant company would not take advantage of that part of the agreement. In effect, this court is appealed to to write such a clause into the license agreement, reform it, compel its renewal, or treat it as renewed. The suit relates to a contract between two citizens of the same state in the United States granting a license to make, use, and sell a patented device. It does not involve the patent laws of the United States, or their force, effect, or construction. The validity of the patent is not in question, and cannot be tried under the allegations of this bill. The questions at issue are the terms, validity, force, and effect of the contract between the two parties, both residents and citizens of the state of New York, in the United States. I do not think this court has any jurisdiction of the cause of action stated. There are a great many facts alleged, but they go to the equities of this main cause of action attempted to be stated. They do not set up or state different causes of action. They go to the relief that should be given if the main cause of action attempted to be set up is sustained. If this cause of action cannot be sustained on the allegations of the bill, then the whole bill fails. No cause of action is stated against Ella Foster Young. The only propriety and necessity for making her a party are that she is the patentee, complainant in the suit in which Lefkowitz was enjoined, and may have some interest in the patent. The question or questions over the contract or agreement is, there being no necessary diversity of citizenship, solely cognizable by the state courts. This is settled by the following cases: *Excelsior W. P. Co. v. Pacific Bridge Co.*, 185 U. S. 282, 285, 286, 287, 22 Sup. Ct. 681, 46 L. Ed. 910; *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 257, 259, 18 Sup. Ct. 62, 42 L. Ed. 458; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357; *Standard D. Mfg. Co. v. National Tooth Co. (C. C.)* 95 Fed. 291, 293, 294. The complainants may sue in the state court to reform or to compel a renewal of this license agreement. Should that relief be granted, then no action for infringement of the patent could be maintained, and until such a suit, if brought, is decided, this court would doubtless stay all contempt proceedings and all suits for infringement of the patent; or, possibly, if complainants continue to use and an infringement suit is brought, this court might hold that, under the license agreement as in fact made, the complainants here are operating under a valid license.

The whole gravamen of this bill rests upon the force and effect of the license agreement between the complainants and the defendant company, and their rights under it. That agreement contains the conditions stated as to renewal. It does not contain the alleged "assurance" that no advantage would be taken by defendant company of its reserved right to refuse a renewal on giving notice of its purpose so to do. The main and controlling question is, was such "assurance" given by the defendant company, is it a part of

the license agreement, and, if so, is it valid and binding? If so, then complainants are entitled to a renewal of the license, and a court of equity having jurisdiction of the subject-matter may compel such renewal. But that question in no sense involves the validity, construction, or enforcement of the patent laws, or of any law of the United States, or the validity of the patent. If the complainants had brought suit in the state court to compel a renewal of the license, alleging sufficient facts to show them entitled to the relief, and proceedings to punish for contempt of the decree of injunction referred to had been instituted, or suits for infringement had been commenced or even threatened during the pending of such action in the state court, then the jurisdiction of this court to enjoin and restrain such a proceeding or such suits until the determination of such suit in the state court might properly be invoked, if necessary. However, with such a suit pending in the state court I think that court would have ample power to enjoin the defendant company from bringing any such contempt proceedings in the United States court, or any infringement suits therein. That court could not, and would not, enjoin the United States courts, but it could restrain or control the action of the defendant company. In no event, can the complainants draw to this court or confer upon it jurisdiction to settle the rights of the parties, both being residents and citizens of the state of New York, under the contract or agreement in question, by also praying relief enjoining the feared action of defendants here in bringing suits, etc., pending the determination of the main and vital question of which this court has no jurisdiction.

The complainants expressly allege in the bill of complaint:

"That your orators are advised and believe that said letters patent No. 638,540 are invalid and void in spite of the fact that said patent has frequently been sustained by different federal courts, and your orators allege that in the cases heretofore litigated in which the validity of said patent was sustained the defendants respectively did not set forth the entire state of the prior art, and that therefore, the decrees heretofore obtained sustaining said patent were based upon an insufficient disclosure of said prior art, and, had the several courts been fully informed as to said prior art at the time of said decisions, the said decrees would not have been granted, but, on the contrary, said patent would have been declared invalid. And your orators are advised and believe, and therefore allege, that they have a complete and perfect defense against the validity of said patent, and on the question of infringement, provided they are permitted to present the same in due course to the attention of the court."

It seems clear, under this averment, that complainant, Brody, will have a good and perfect defense to any action for infringement of the patent brought against him, as he was not a party to the former decree. If Lefkowitz is bound thereby, as he is, he alleges no discovery of new evidence, and no fraud or deceit practiced upon him in the suit by Mrs. Young, and no ground for vacating, suspending, or modifying that decree, except that, as he is entitled to an extension of the license under which he is operating pending the determination of that question, he should not be punished for contempt or subjected to a new action. As stated, such relief is incidental to the other, and this court with power over its own decrees

can either on motion in infringement suits if brought, or, in a suit to restrain such action, grant temporary or permanent relief if occasion demands. If Lefkowitz seeks to retry the validity of the patent, he should file a supplemental bill, or a bill in the nature of a bill of review containing proper allegations. As stated, it cannot be done in this action. If it be asserted that such is the object and purpose of this suit, then no cause of action is set out.

By statute it is provided:

"The Circuit Courts shall have original jurisdiction as follows: * * * Ninth, of all suits at law or in equity arising under the patent or copyright laws of the United States."

And again:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: * * * Fifth, of all cases arising under the patent right or copyright laws of the United States."

See 1 U. S. Comp. St. 1901, pp. 503, 504, 577, 578.

The act to determine the jurisdiction of Circuit Courts of the United States, etc. (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, pp. 507, 508]), provides:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," etc.

It is evident that the "matter in dispute" or question must arise under the Constitution or laws of the United States or between citizens of different states and exceed the sum or value of two thousand dollars, or arise under the patent laws of the United States.

Clearly this case does not arise under the Constitution or any law of the United States, unless it be the patent laws. We have no law of the United States regulating the making or granting or validity of licenses for the use, etc., of patented inventions of which I am aware. It is well settled that this case does not arise under the patent laws of the United States. *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 52, 53, 8 Sup. Ct. 756, 31 L. Ed. 683; *Wade v. Lawder*, 165 U. S. 624, 627, 17 Sup. Ct. 425, 41 L. Ed. 851; *Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344, 355, 356, 11 Sup. Ct. 798, 35 L. Ed. 413; *Wilson v. Sanford*, 10 How. (U. S.) 99, 13 L. Ed. 344; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357; *Standard Dental Mfg. Co. v. National Tooth Co.* (C. C.) 95 Fed. 291, 293, 294; *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 260, 18 Sup. Ct. 62, 42 L. Ed. 458; *Albright v. Teas*, 106 U. S. 613, 617, 618, 1 Sup. Ct. 550, 27 L. Ed. 295; *Walker on Patents* (4th Ed.) § 388, p. 328. In *Standard Dental Mfg. Co. v. National Tooth Co.*, *supra*, the complainant sought to have a patent license declared forfeited for nonperformance of conditions as of a prior date and infringement of the patent declared, and to recover damages for such

alleged infringement. All the parties resided in the state of Pennsylvania. Gray, Circuit Judge, held that the action could not be maintained for want of jurisdiction, as the main cause of action was to declare forfeited the license agreement; that the proper course was to sue in the state court to have the forfeiture declared, and then, if successful, sue for infringement of the patent.

In *Dale Tile Mfg. Co. v. Hyatt*, supra, the court held:

"An action upon an agreement in writing, by which, in consideration of a license from the patentee to make and sell the invention, the licensee acknowledges the validity of the patent, stipulates that the patentee may obtain reissues thereof, and promises to pay certain royalties so long as the patent shall not have been adjudged invalid, is not a case arising under the patent laws of the United States, and is within the jurisdiction of the state courts."

In *Wade v. Lawder*, supra, the court held:

"The general rule is that 'where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws.'" *Dale Tile Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683, and cases cited; *Wood Mowing Machine Co. v. Skinner*, 139 U. S. 293, 11 Sup. Ct. 528, 35 L. Ed. 193; *Ex parte Ingalls*, Petitioner, 139 U. S. 548, 11 Sup. Ct. 652, 35 L. Ed. 266; *Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413."

In *Marsh v. Nichols, Shepard & Co.*, the syllabus is as follows:

"A bill in equity in a state court, with jurisdiction over the parties, brought to enforce the specific performance of a contract whereby an inventor who, having taken out letters patent for his invention, agreed to transfer an interest therein to the plaintiff, and proceedings thereunder involving no question arising under the patent laws of the United States, and not questioning the validity of the patent, or considering its construction, or the patentability of the device, relate to subjects within the jurisdiction of that court; and its decree thereon raises no federal question for consideration here."

In giving the opinion of the court Mr. Chief Justice Fuller said:

"In this case the state court did not decide any question arising under the patent laws, nor did the judgment require, to sustain it, any such decision. Neither the validity of the patent nor its construction, nor the patentability of the device was brought under consideration, even collaterally. In the language of Mr. Chief Justice Taney (*Wilson v. Sandford*, 10 How. 99, 101, 13 L. Ed. 344), the dispute 'does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles.' * * * Thus in *Brown v. Shannon*, 20 How. 55, 15 L. Ed. 826, it was decided that a bill in equity in the Circuit Court of the United States by the owner of letters patent to enforce a contract for the use of the patent, and in *Wilson v. Sandford*, 10 How. 99, 13 L. Ed. 344, to set aside such a contract because the defendant had not complied with its terms, was not within the acts of Congress by which an appeal to this court was allowable in cases arising under the patent laws, without regard to the value of the matter in controversy."

In *Pratt v. Paris Gaslight & Coke Co.*, supra, the syllabus is as follows:

"To constitute an action one arising under the patent-right laws of the United States, the plaintiff must set up some right, title or interest under the patent laws, or, at least, make it appear that some right or privilege under those laws will be defeated by one construction, or sustained by the op-

posite construction of these laws. When a state court has jurisdiction both of the parties and the subject-matter as set forth in the declaration, it cannot be ousted of such jurisdiction by the fact that, incidentally to his defense, the defendant claims the invalidity of a certain patent."

In giving the opinion, the court said:

"While the question has never arisen in this court in the exact form presented in this case, we have repeatedly held that the federal courts have no right, irrespective of citizenship, to entertain suits for the amount of an agreed license or royalty, or for the specific execution of a contract for the use of a patent, or of other suits where a subsisting contract is shown governing the rights of the party in the use of an invention, and that such suits not only may, but must, be brought in the state courts."

See, also, the language of the court on pages 260, 261 of 168 U. S., page 62 of 18 Sup. Ct. (42 L. Ed. 458).

In *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910, it was held:

"If a bill be brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and the jurisdiction of the Circuit Court can only be maintained upon the ground of diversity of citizenship. Although the bill be an ordinary bill for the infringement of a patent, of which the Circuit Court would have jurisdiction, if the answer show that it is really a suit upon a contract, the court should dismiss the bill."

In view of the statutes and of these and other decisions, I must hold:

- (1) That the gravamen of this complaint is a breach of the license agreement by defendant company in refusing to renew the same; that the relief sought is the renewal of such license agreement, and incidentally an injunction restraining contempt proceedings on the decree heretofore rendered against Lefkowitz at the suit of Ella Foster Young and suits by defendants against complainants for the infringement of the letters patent referred to until it shall be determined whether or not complainants are entitled to a renewal of the license.
- (2) That, so regarded, there is not necessary diversity of citizenship to give jurisdiction, and that the case is not one arising under the Constitution and laws of the United States or the patent laws of the United States, and that the suit must be dismissed for that reason.
- (3) That the complainants are not entitled to maintain an action to have the letters patent declared invalid, and no cause of action entitling them to such relief is stated.
- (4) That regarding this as an action purely to set aside, vacate, or modify the former decree of this court adjudging the validity of the patent and enjoining Lefkowitz from infringing same no cause of action is stated.
- (5) That treating this as an action to compel a renewal of the license agreement, and assuming jurisdiction in this court, no cause of action is stated, as it is not alleged that the defendant company promised or agreed at the time of the execution and as a part of the license agreement that it would not avail itself of the provision inserted in the agreement, to the effect that a renewal should not be granted if it gave notice to that effect on or before February 1, 1908. It is claimed that by the general appearance all questions of jurisdiction are waived. It is not necessary to say that jurisdiction of the subject-matter of this controversy cannot be conferred on this court by consent. That question is always before the court which may itself

raise it and dismiss accordingly. See *Defiance Water Co. v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140, where it is held:

"The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error and appeal, and must be answered by the court whether propounded by counsel or not. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States upon the determination of which the result depends, it is not a suit arising under the Constitution or laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on that ground."

See, also, *Int. C. Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401.

The demurrer is therefore sustained, with costs.

PHIPPS v. OREGON R. & NAVIGATION CO.

(Circuit Court, E. D. Washington, E. D.)

No. 1,244.

RAILROADS—USE OF TRACK BY PEDESTRIANS—COMPANY'S LIABILITY FOR INJURIES.

One who, without objecting, knowingly, for a long time, permits the public to use his premises for the purpose of traveling across the same upon a well-established path cannot, without giving notice, render the same unsafe to the injury of those who have used such highway and have no notice of the changed condition without responding in damages for resulting injury. And where for 15 years the public used a railroad track in a city as a public walk with the railroad company's knowledge and permission and at its invitation, and plaintiff had so used it; and the track had been maintained in a safe condition for pedestrians; and on or about the day of plaintiff's injury the company removed earth from between the cross-ties and removed some of them, leaving the others fastened to the rails, thereby creating a dangerous excavation, which was left unguarded and unprotected in the nighttime and without lights, notice, or any warning to prevent those passing along from falling therein, and plaintiff in crossing the track, as he was accustomed to do in going and returning from his work, fell into the pitfall and was injured—it shows a cause of action in his favor against the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1228-1230.]

O. C. Moore, for plaintiff.

W. W. Cotton, Samuel R. Stern, and Snow & McCamant, for defendant.

WHITSON, District Judge. Defendant has demurred to the complaint upon two grounds. First. That the statute of limitations has barred the action, the same not having been commenced within two years. Upon the authority of *Robinson v. Baltimore, etc., Mining Co.*, 26 Wash. 484, 67 Pac. 274, it must be held that the position is not well taken. Second. That the complaint does not state facts sufficient to constitute a cause of action.

It is alleged that the defendant had maintained for 15 years prior to August, 1903, a certain railroad track within the corporate limits of the city of Spokane, upon premises particularly described; that this track afforded the most direct route for pedestrians passing between a large residence district and the business portion of the city, and that persons passing back and forth had, for 15 years, openly, notoriously, and continuously, at all hours of the day and night, traveled upon and walked along the same as a public walk or highway, and that the plaintiff had so used it, in common with the public generally, for a long time prior to that date; that defendant, although fully advised, never objected, but on the contrary permitted and invited its use; that the track had been maintained in a safe condition so that passing pedestrians would encounter no danger; that nevertheless, on or about the date aforesaid, the defendant, through its servants and agents, removed the earth from between and beneath a considerable number of the cross-ties, and removed some of the ties, leaving others fastened and clinging to the rails, thereby creating a dangerous excavation or pitfall, which was left unguarded and unprotected in the nighttime, and without lights, notice, or warning of any kind to prevent those passing along from falling therein; that the plaintiff in crossing said track, as he was accustomed to do in going to and returning from his work, fell into this pitfall and was injured.

Undoubtedly one who invites the public to come to his place of business owes a higher duty to persons entering upon his premises than one who silently acquiesces in travel across the same by failure to object; but the view founded in natural justice, which seems to have the approval of many authorities, is that one who knowingly, and for a long period of time, permits the public to use his premises without objection, for the purpose of traveling across the same upon a well-established and safe path or highway, cannot, without giving notice, render the same unsafe to the injury of those who have used such highway, and have no notice of the changed condition, without responding in damages for resulting injury. *Illinois Central R. Co. v. Waldrop*, 72 S. W. 1117, 1118, 24 Ky. Law Rep. 2127; *Matthews v. Seaboard Air Line Ry.*, 67 S. C. 499, 46 S. E. 338-339, 65 L. R. A. 286; *Rooney v. Woolworth*, 78 Conn. 167, 61 Atl. 366, 367; *Burton v. Western A. R. Co.*, 98 Ga. 783, 25 S. E. 736; *Etheredge v. Central of Georgia Ry. Co.*, 122 Ga. 853, 50 S. E. 1003, 1004; *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559, 560; *Graves v. Thomas*, 95 Ind. 361-364, 48 Am. Rep. 727; *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 45 Ohio St. 11, 12 N. E. 451-459, 4 Am. St. Rep. 507; *Thompson on Negligence*, § 1015. *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, and *Union Pacific Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, cited by counsel, related to passengers, and are therefore not in point; but in *Railroad Co. v. Stout*, 84 U. S. 661, 21 L. Ed. 745, in referring to the rule applicable to trespassers, it was said:

"There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: That while a railway company is not bound to the same degree of care in regard to mere trespassers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt

from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

It is true this language was used in relation to the injury of an infant received while playing upon a turntable, and it cannot therefore be considered as a decision upon the identical question involved in this case; but by analogy the language throws some light upon the question.

Attention has been called to the case of *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526, as sustaining the position of the defendant. As applied to the facts of this case that decision is open to construction. The court on page 62 of 35 Wash., page 529 of 76 Pac., distinguishes *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727, which certainly sustains the plaintiff's view, from the one before it. And the decision, fairly construed, would lead to the conclusion that in a case like the one at bar the holding would be for a liability upon the facts pleaded by the plaintiff. A brief quotation from the opinion will illustrate this suggestion:

"In *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727, the public had by permission traveled on foot for years over an open city lot. It was held that, upon making a cellar excavation in the pathway, with a view to erecting a building, it was the owner's duty to put up some guard or warning for public protection. The court based its decision upon the ground that, for a long period, the public using a nearby sidewalk had been permitted to use the path where the plaintiff fell as a part of the sidewalk. Knowing that it had been for so long a time traveled as a sidewalk in a populous city, the defendant's conduct may well have been classified as wanton neglect."

While it is true that the authorities are in conflict, the better reasoned cases, and those based upon sound principle, support the theory upon which the complaint was framed.

The demurrer will therefore be overruled.

FLANDERS v. CANADA, A. & P. S. S. CO.

(Circuit Court, D. Massachusetts. February 18, 1908.)

No. 197.

ACTIONS—SPLITTING CAUSES OF ACTION—CONTRACT OF EMPLOYMENT—PERIOD—SUCCESSFUL ACTIONS.

Plaintiff was employed by defendant for five years from May 1, 1904, at a salary of \$3,000 a year, payable monthly, and on December 1, 1904, was discharged. On December 28, 1904, plaintiff sued for breach of contract; the writ alleging that the suit was for damages sustained "to the date of this writ," and also up to the date of the trial of the action, without prejudice to plaintiff's right to bring subsequent suit or suits for damages accruing after the trial. The declaration pleaded performance and an offer to perform, and a readiness to perform up to and including the time the declaration was filed; and during the trial counsel for both parties agreed that, if plaintiff was entitled to recover, he should recover, up to the date of the trial, \$3,085.61. Plaintiff recovered such judgment, which was satisfied, after which plaintiff continued to offer his services to defendant, which were refused, when plaintiff brought another suit on July 24, 1906, for the subsequent damages sustained. *Held*, that plain-

tiff's cause of action was not so closely indivisible that the parties could not treat it as divisible, and that defendant, by consenting that the first action should be treated only for the recovery of damages up to the time of the trial, was thereafter estopped to object that plaintiff was not entitled to recover damages subsequently sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 617.]

George W. Anderson and Edward H. Ruby, for plaintiff.

Robert M. Morse and William M. Richardson, for defendant.

LOWELL, Circuit Judge. On April 28, 1904, the plaintiff entered into a certain contract with the defendant, whereby the latter agreed to employ the former as general agent for a term of five years from May 1, 1904, at a salary of \$3,000 a year, payable upon the first business day of each month. On May 1, 1904, the plaintiff accordingly entered the defendant's service. On or about December 1, 1904, the defendant informed the plaintiff that his services would not be required after December 1, 1904.

On December 28, 1904, the plaintiff brought an action of contract against the defendant. The writ set out that the plaintiff "brings this suit to recover such damages as he has sustained to the date of this writ, and also such damages as he may sustain up to the date of the trial of this action, but without prejudice to his right to bring subsequent suit or suits for damages accruing after the trial of this cause." The declaration set out the contract, and proceeded as follows:

"And the plaintiff further says that he entered upon his employment under said agreement, and duly discharged all the duties thereof until the 1st day of December, 1904, and although he has ever since been, and still is, ready and willing, and on said last-named day duly offered, to perform all the conditions of said agreement upon his part to be performed, the defendant has refused, and still refuses, to allow him to do so, or to pay him therefor, as defendant says, to his great damage."

The defendant's answer contained a general denial. It further set up that the contract was executed without authority, and that it was obtained by the plaintiff's fraud. At the trial in the Circuit Court the judge ruled as matter of law that the defendant's agent who made the contract was duly authorized thereto. He left to the jury the question of the plaintiff's fraud, and the jury found for the plaintiff. By agreement of counsel the court stated to the jury the amount of damages to be assessed, provided that the jury should find a verdict for the plaintiff. This amount was the salary at the contract rate from December 1, 1904, to the date of the verdict, November 22, 1905, viz., \$3,085.61. At that time the judge instructed the jury as follows:

"If the defendant does not satisfy you that this contract is vitiated by fraud, then you will consider the question of damages. Upon that there is no serious controversy. The amount has been agreed upon, I understand, between counsel, in order to save all possible trouble; and, as they may entirely properly do, counsel have agreed that the plaintiff is entitled to recover, if he recovers at all, a certain sum, which will consist of the wages they did not pay him, of his salary up to this time, and interest, and counsel have computed the interest, so you will not be troubled with doing over the figures."

Thereafter counsel for the plaintiff said in the presence of the court and of counsel for the defendant:

"I understand we have agreed that, if entitled to recover on the theory that the contract is valid, principal and interest to to-day would make a verdict of \$3,085.61."

There was a short discussion concerning a minor item of \$73.49, which was finally agreed by counsel on both sides to be due in any case. After reaching an agreement upon this point, counsel for the plaintiff said:

"I have figured it here, so that the jury will be relieved from any figuring. If the contract is valid, we are entitled to \$3,085.61; if it is invalid by reason of fraud, we are entitled to \$73.49."

To all this counsel for the defendant made no objection and said nothing. After an unsuccessful prosecution of a writ of error to the Circuit Court of Appeals, judgment for the plaintiff was entered on the mandate June 19, 1906, and was duly satisfied. At sundry times between December 1, 1904, and July 10, 1906, the plaintiff had offered himself to the defendant to carry out the contract; but the defendant refused to accept his services. After the satisfaction of the judgment the plaintiff renewed his offer, at first informally, and later by formal letter dated July 10, 1906. In this letter the plaintiff threatened suit if his demands were not agreed to. The defendant made formal refusal, and the plaintiff brought the present action July 24, 1906. The writ and declaration are identical with those in the first suit.

The case is before the court sitting without a jury upon an agreed statement of facts. The defendant, by its answer, has set up the judgment in the former suit, and the court has here to decide only this question: Is the plaintiff barred from his recovery in this suit by reason of his recovery in the earlier suit?

The defendant contends that the plaintiff had but one cause of action for the breach of the contract alleged in the first declaration, and alleged again in the declaration now before the court; that it was impossible to divide this cause of action between two suits; and that, however plaintiff and defendant may have agreed to the contrary, a recovery in the first suit necessarily exhausts the plaintiff's remedy.

Whatever may be the precise nature of the plaintiff's cause of action (and he contends that his first suit was for wages, rather than for a breach of contract), yet I cannot think that this cause of action is so clearly indivisible that plaintiff and defendant cannot between them agree to treat it as divisible. If this be true, the defendant's action throughout the first suit is equivalent to a waiver of its right to object to the maintenance of this suit. It therein denied that it owed the defendant any money, and it agreed with the plaintiff that, if it owed the plaintiff any money whatsoever, the verdict should be entered for a sum fixed, so as to cover compensation up to the time of verdict, and no more. This the defendant did with knowledge of the language of the plaintiff's writ and declaration. Under these circumstances, it appears to me that the defendant led the plaintiff to rely upon a right to bring another suit, which right was assumed by both parties to exist.

There will be judgment for the plaintiff for \$8,000, the payment of which will satisfy all the plaintiff's claims arising under the contract.

MORREAU GAS FIXTURE CO. v. COX.

(Circuit Court, W. D. Washington, N. D. April 14, 1908.)

No. 1,411.

HUSBAND AND WIFE—PARTNERSHIP—LIABILITY OF WIFE AS PARTNER.

Defendant, a married woman, signed articles of partnership with another in a business previously established and conducted by such other and her husband. The interest in the business was in fact her husband's, and she invested no capital in it, and took no part in its management. The firm was afterward dissolved, and she signed another agreement, as purchaser of the partner's interest, to assume and pay the partnership debts. *Held*, that a creditor of the firm, who dealt with it as one in which her husband was the partner, with no knowledge that she had or professed to have any interest in it, could not recover from her after the bankruptcy of her husband, especially in view of the laws of the state, which gave her husband control of the community personal property, under which she could not practically become a partner without investing her separate property in the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 373.]

At Law. Action against a married woman for the collection of money due from a firm of which the defendant is alleged to have been a member. Findings and judgment for the defendant.

Peters & Powell, for plaintiff.

Shank & Smith, for defendant.

HANFORD, District Judge. On the trial of this action, after both parties had concluded the introduction of evidence, a motion was made by each party for an instructed verdict, and, it then appearing to the court that the case must be decided on questions of law, the jury was discharged and the case taken under advisement.

The action is against a married woman for the collection of a debt contracted in the conduct of a retail mercantile business, which at the time was carried on by James S. Calderwood and the defendant's husband, under the firm name of Cox & Calderwood. The business was started without any formal organization of a partnership, and after it had been going for a time written articles were signed by Calderwood and the defendant, whereby they declared themselves to be partners. The defendant did not at any time invest any money in the business, nor did she, either before or after signing the articles, participate personally in the conduct of the business; but her husband was, at all times while the concern was going, active in the management as a partner or proprietor, and the plaintiff extended credit, in the belief that he was the responsible man in the business. Calderwood severed his connection with the firm while it was in debt, and at the time of doing so he required the defendant to sign a document which purports to be an agreement to purchase his interest in the business and to assume and pay all the firm debts. She also signed a notice, which was published in a newspaper, announcing that she assumed responsibility for the firm's debts. The defendant's husband was left in full possession as sole manager of the business, and, being unable to pay the debts, he became a voluntary bankrupt. All the com-

munity property of himself and wife, including the merchandise, store fixtures, and everything else pertaining to the business of Cox & Calderwood, was surrendered, and in due course of procedure he was granted a discharge from all his liabilities. The plaintiff, with full knowledge of the writings signed by the defendant above mentioned, appeared in the bankruptcy proceedings and proved its claim, on which a dividend was paid; and, after having received all that could be obtained from that source, this suit was brought to collect the balance of the debt, on the assumption that the defendant is legally liable on two grounds, viz.: (a) As an original principal debtor, by reason of having signed the articles of copartnership. (b) As successor of the firm of Cox & Calderwood, by reason of having signed the agreement to pay the debts of the firm.

The evidence proves that the several documents were signed by the defendant in compliance with requests made by her husband and Calderwood. The partnership agreement was a sham, intended to cover Mr. Cox's interest in the business, under the supposition that it would constitute a legal barrier to the levying of an execution on firm property for his personal debt. It effected no actual change in the relationship of the parties, or the rights of either, because they knew that there was no consideration to give it legal vitality and they intentionally ignored it. Neither the parties nor creditors were deceived. No person relied upon it in any transaction whatever. Therefore it created no estoppel, and it is void for the additional reason that the statutes of this state affecting the property rights of married persons make it impracticable for a married woman to become a member of a business copartnership, unless she makes a contribution to the firm's capital of money which is her separate estate. Money and property acquired by married persons, except by gift, devise, or descent, is community property, and to the husband is given the management and control of the community personal property. A husband's rights with respect to the community personal property are incompatible with the rights and obligations of a firm including his wife as a partner, for the reason that her proprietary interest, if not her separate property, would be legally under his control and management. Ballinger on Community Property, § 17, note 2.

The second document which the defendant signed was a sequence of the articles of copartnership. Calderwood exacted it as part of the consideration for relinquishment of his interest in the business, and the defendant signed it to accommodate her husband. She had no intention to supersede him in the control or responsibilities of the business. Liabilities might have attached in favor of creditors, if they had acted on the faith of her declarations; but the case must be decided according to the facts, and not controlled by mere possibilities, which did not become realities. The object intended to be accomplished by the writing was to abrogate the partnership agreement and to indemnify Calderwood against possible claims founded upon it. By its terms, expressed in the writing, the defendant's promise is restricted to the payment of the debts due by that firm of Cox & Calderwood, of which she was a member; that is to say, a firm which never had an actual or legal existence, and which never contracted any debt. The

principle that strangers to a contract, who are intended beneficiaries, may adopt it and enforce it, is not available to support this action, because the writing set up as a contract was not signed by the defendant for the plaintiff's benefit. 7 Am. & Eng. Enc. of Law (2d Ed.) 107; Sayward v. Dexter, Horton & Co., 72 Fed. 765, 19 C. C. A. 176.

It is the opinion of the court that the defendant is not indebted to the plaintiff, and that she is entitled to have the action dismissed, with costs. I direct that findings in accordance with this opinion be prepared for my signature, on which a judgment will be entered.

THE POKANOKET.

(District Court, E. D. Virginia. April 22, 1908.)

SHIPPING—LOSS OF FREIGHT—DELIVERY TO VESSEL—LIGHTERAGE.

Where goods were delivered at a steamboat company's dock for shipment, and it was thereafter found necessary to transport the goods to the steamer on a lighter, and they were damaged by the partial sinking of the lighter before reaching the steamer, the steamer was liable for the loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 411.]

In Admiralty.

Benj. H. Marks and Thomas H. Willcox, for libelant.
Henry Bowden, for respondent.

WADDILL, District Judge. The libel in this case was filed by the Norfolk Virginia Peanut Company to recover from the steamer Pokanoket for 137 bags of peanuts valued at \$1,295.70, a part of a shipment of 275 bags intrusted by the libelants to the owners of the Pokanoket for loading on said steamer, to be transported from the port of Petersburg to the port of Norfolk, Va. The facts are briefly these: The Petersburg, Newport News & Norfolk Steamboat Company were the owners and operators of the respondent steamer, the Pokanoket, engaged in the carriage of passengers and freight upon the waters of the Appomattox, the James, and the Elizabeth rivers, between Petersburg and Norfolk, and having duly solicited, through George B. Townsend, general freight and passenger agent of said company and of said steamer, for the freight in question, on the 5th day of September, 1906, the 275 bags of peanuts were delivered at the wharf of said company and of said steamer in Petersburg for shipment to Norfolk on the Pokanoket, and a bill of lading was issued therefor. On the evening of the delivery of the peanuts, the steamer Pokanoket could not reach the harbor of Petersburg by reason of a freshet which caused a sand bar to form some quarter of a mile below the city. Whereupon a lighter was engaged by the steamboat company to place the steamer's freight, including the 275 bags of peanuts, on the Pokanoket; and the general manager of the company and others of its employes were engaged in the navigation of the lighter, when it collided with an obstruction in the river, causing it to partially sink, damaging the peanuts, to recover for which this suit was instituted; the

peanuts being injured to such an extent that most of them were not placed on board the Pokanoket.

The defense interposed here is not that the damage was not sustained, but that technically, upon the facts stated, the Pokanoket is not liable in admiralty, because of the failure to actually place the peanuts in question upon the vessel. This question has been frequently considered by the courts, and seems well settled, especially so far as the courts of this circuit are concerned; that is, that this technical defense will not avail to permit the respondent to escape liability under circumstances such as exist here. This doctrine has been considered as settled since the case of *Bulkley v. Cotton Co.*, 24 How. 386, 16 L. Ed. 599. An early case on the subject in this circuit was that of *Campbell, Wiley & Co. v. Barque Sunlight*, 2 Hughes, 1, Fed. Cas. No. 2,368, a decision by Judge Bryan of the District of South Carolina, subsequently affirmed by Chief Justice Waite on circuit. In that case Judge Bryan said:

"It is well-settled law that the reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, binds the ship to the safe carriage and delivery of the goods. See 1 *Parsons on Shipping and Admiralty*, p. 183, and authorities cited. There is no necessary physical connection between the cargo and the ship as a foundation upon which to rest this liability. No well-founded distinction can be made as to the liability of the owner and vessel between the case of the delivery of the goods into the hands of the master at the wharf for transportation on board of a particular ship in pursuance of the contract of affreightment, and the case as made after the loading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession. We must look to the substance and good sense of the transaction, to the contract as understood and intended by the parties."

The case of *Pearce v. The Thomas Newton* (D. C.) 41 Fed. 106, a decision by Judge Seymour of the Eastern District of North Carolina, is to the same effect; and in the comparatively recent decision by Judge Morris of the Maryland District in *Insurance Co. v. North German Lloyd Co.* (D. C.) 106 Fed. 973, is a full discussion of the subject; the court saying:

"Since the case of *Bulkley v. Cotton Co.*, 24 How. 384, 16 L. Ed. 599, it has been conceded under circumstances such as are presented in this case—that is to say, where the contract is to carry goods from one port to another, and they cannot be loaded immediately on the vessel which is preparing for the voyage, and lighters are sent by the vessel to bring the goods from the warehouse to the ship—that, for the purpose of that service, the lighter is the substitute of the ship, and that the goods are in fact, therefore, delivered into the custody and care of the ship and her owners from the time that they are placed on the lighter. And for the purposes of this case, I shall take it that the bill of lading which was intended to be the contract for the carriage was applicable to these goods, and determined the rights of the parties from the time that the corn was put upon the lighter."

The case of *The City of Alexandria* (C. C.) 28 Fed. 202, decided by Judge Wallace of the Circuit Court of New York, upon an appeal in admiralty, also contains a full and interesting discussion of this doctrine.

The defense that the provisions of the Harter act would relieve from responsibility is not made in this case, the respondent's counsel con-

ceding that the same could not be maintained; but on that question reference may be had to the case of *Insurance Co. v. North German Lloyds* (D. C.) 106 Fed. 973-975, and to *Ralli v. N. Y. & T. S. S. Co.*, 154 Fed. 286, 287, 83 C. C. A. 290.

It being manifest that the lighter in this case was used as a substitute for the *Pokanoket* in the matter of the transportation of the freight in question from the wharf to the steamer, then made fast in the river from the causes aforesaid, the bill of lading which was intended to be the contract for the carriage of the lost goods applies as well to the goods while on the lighter as if actually placed upon the *Pokanoket*; and a decree may therefore be entered in favor of the libellants for the amount claimed, in the libel, with costs.

THE SUN.

(District Court, S. D. New York. April 20, 1908.)

SALVAGE—AMOUNT OF COMPENSATION—ASSISTING DISABLED STEAMSHIP TO PORT.

The ocean steamship *Sun*, on a voyage from Philadelphia to an English port, laden with oil, broke her rudder stock under water, and was unable to make any effective repairs. After drifting about for 13 days, endeavoring to steer by the wind, she signaled for and obtained the assistance of the British steamer *Norwood*, a smaller vessel bound for France. The scheme adopted was for the *Sun* to proceed under her own steam with the *Norwood* towing behind to act in some measure as a rudder, and in this manner they proceeded to New York, the *Norwood* losing about six days' time. She was of the value of from \$60,000 to \$70,000, while the *Sun*, which had jettisoned about one-third of her cargo, was with the remainder worth upwards of \$500,000. The *Sun* was a new and strong vessel, and while in peril it was not imminently extreme. *Held*, that the *Norwood* was not entitled to as large an award as though she had been under the risks and responsibility of towing, and that under all the circumstances, having been subjected to no perils, except those of ordinary navigation, she was entitled to a salvage award of \$13,500 and in addition the extra expenses incurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 70, 71.

Awards in federal courts, see notes to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

The American steamship *Sun*, built in 1907, about 400 feet long and 3,501 tons net register, left Philadelphia in February, 1908, bound for Avonmouth, Eng., with a cargo of 2,274,000 gallons of petroleum. On February 18th, at 7 p. m., the vessel's rudder stock broke completely in two. The fracture was something over two feet under water, and there was no ring or eye on the rudder nearer the water surface than about 16 feet. The rudder therefore hung, swinging from side to side by the action of the waves, useless for purposes of steering, and unusually difficult of control by temporary tiller or rope lashing. From the 18th to the 23d of February the crew of the *Sun* used every effort to secure and control the rudder, and in so doing expended with entire unsuccess a very large quantity of ropes, wires, and other gear. On the 23d the vessel, after having moved to the southward and eastward, had come back northward and westward to approximately the place at which she broke down, which was in the path of vessels bound from New York or Philadelphia to English Channel and North Sea ports. She was then for the first time spoken by a passing vessel (the German tanker *Phœbus*), and declined that vessel's proffered assistance. The *Sun* was new and staunch, and approximately one-third of her cargo had been jettisoned, partly for the pur-

pose of permitting a better examination of the broken rudder stock, and partly to increase the vessel's freeboard as she rolled in the heavy sea. It was found that the practically rudderless vessel would steer by the wind, and, the direction of the wind being favorable for the manoeuvre, the captain endeavored to get within signaling distance of the Nova Scotia coast. His course was therefore directed generally speaking northward and westward, until on February 26th he was within about a hundred miles of Nova Scotia. Being then on the banks and in soundings, he encountered a "heavy falling barometer, a southeasterly wind, and all indications of a heavy storm from the southeastward approaching. So I left the Banks where I could not stay during a gale without being in immediate danger of losing the ship entirely on the coast there. I steamed to the southward again, which I could do in the teeth of the gale, being able to go up close to the wind." The wind continuing in the main from the southeast, the Sun proceeded in a general southwesterly direction, until on March 1st she was again directly in the path of traffic between New York and English Channel ports, and her master concluded that further efforts to rig a jury rudder or to navigate without assistance were both useless and dangerous. During the night of March 1-2 a steamer was sighted bound west, and unsuccessful effort made to attract attention. At 11:30 a. m. on March 2d the British steamer Norwood, 290 feet long and 1,465 tons net register, bound from New York for Bordeaux, with a small cargo of general merchandise, was encountered. The Sun at that time was flying signals stating that she was disabled and wanted assistance.

The Sun is much the larger and more powerful vessel. Her engines were unimpaired, and after a conference between the masters of the two snips it was decided that the Norwood should tow behind the Sun, and act as a species of rudder for the latter vessel. This arrangement was perfected (after one failure) by the evening of March 2d. The material used in effecting junction belonged to the Sun, except that certain hawsers of the Norwood's were used to prevent chafing and assist fastening on board the latter vessel; and all the boat work necessary in passing lines was done by the Sun's crew. At the time this arrangement with the Norwood was completed the vessels were approximately 390 knots from Sandy Hook. During all the time that the Sun had been practically rudderless, the weather had been heavy, and she had lived through at least three distinct gales. Her log shows she had begun to leak, but not dangerously. Considering the region where she broke down and through which she steamed after her disaster, she met singularly few vessels, but by the 1st of March, when she concluded to ask for assistance, she was in a comparatively crowded portion of the high seas, and was reasonably certain to be seen and assisted within a few days. After the Sun had received the Norwood's assistance the weather continued unpleasant, but moderated somewhat, and without serious event the two steamers arrived off Sandy Hook light vessel, and the Sun there anchored, at 8:45 a. m. of March 6th. The Norwood employed the tug Reliance, which was in the neighborhood, to assist in towing the Sun into Harbor. This effort failed, and finally the Norwood came up alone, communicated the condition of the Sun to the owners of the latter, and a sufficient fleet of tugs was by them sent down to bring the Sun to port. The Norwood recoaled and provisioned, and again departed on her voyage to Bordeaux, having lost an aggregate of about six days' time, and having been in attendance on the Sun nearly four days. The value of the Sun in her injured condition and of her remaining cargo is agreed upon as upwards of \$500,000. The Norwood is worth between \$60,000 and \$70,000.

The scheme of assistance was obvious enough, but such devising as was necessary was that of the Sun's master. The crew of the Norwood led their usual sea lives, with the exception of the master, who very properly supervised the steering of his own vessel, and was on duty continuously from the time he was made fast to the Sun until he got into port. The Norwood was not injured, nor were her engines subjected to the strain of towing, and her actual expenditures for recoaling, reprovisioning, and all other expenses incident to this service are certified to amount to no more than \$672.38. The Sun was rescued from an undoubtedly perilous condition. She could not have lived indefinitely while helplessly rolling in winter storms on the North Atlantic. Her ability to keep off shore depended entirely on the direction of

the wind, and it was imperative that she should receive assistance, though I do not think that there is any reason to suppose that she would not have continued to make as good weather of it for several days after the 2d of March as she had done for 13 days before.

Mr. Burlingham, for salvors.

Mr. Kirlin, for owners.

HOUGH, District Judge (after stating the facts as above). In my opinion these salvors encountered no dangers other than those incurred by all who go to sea; nor was the Norwood herself in any greater peril than she would have been upon her contemplated voyage; neither was any remarkable skill or extreme labor required on the salvors' part, except from the master of the Norwood, whose watchfulness exceeded that which would have been required of him in the ordinary prosecution of his voyage, and is to be commended.

The peril from which the Sun was rescued was actual, but not imminently extreme. It is observable that the comparative values of the Sun and the Norwood show a great discrepancy. A smaller vessel would have done the work just as well, but, as was said in *La Hesbaye* (D. C.) 71 Fed. 743, this does not much affect the question, as no other vessel was at hand. The Norwood is entitled to a generous reward, but not so large as she should receive had she herself been the towing vessel; for it is upon the towing vessel that the greater responsibility rests, and that vessel also runs the greater chance of injury to hull and machinery. The principal considerations, therefore, are the degree of peril from which the Sun was rescued, the value of the salvaged property, and the amount of time consumed in the service.

Upon a comparison of *La Hesbaye*, supra, *The Wisconsin* (D. C.) 30 Fed. 879, and *The Alaska* (D. C.) 23 Fed. 597, I think a salvage award of \$13,500 will be sufficient. For this amount, with \$672.38 expenses and costs, libellant may take a decree. Of this award let the master, officers, and crew of the Norwood receive one-fourth in proportion to their wages, the Norwood's master, however, getting a double share, his extra award to come out of the owner's three-fourths.

In re HALE.

(District Court, D. Connecticut. May 6, 1908.)

No. 2,014.

BANKRUPTCY—JUDGMENT—EXECUTION—STAY.

A bankrupt had been agent for M. & Co. for the sale of coal, under an arrangement by which the bankrupt agreed to pay M. & Co. \$6.20 for each ton sold; he to retain for his services the balance received above such sum, and the title to the coal to remain in M. & Co. until sold. The bankrupt not having accounted to M. & Co. for some of the coal, they recovered judgment against him in conversion in the state court. *Held*, that such judgment was a provable debt in the bankruptcy proceedings, from which the bankrupt would be released by a discharge, and that he was therefore entitled to a stay of execution until 12 months after adjudication, or until the bankrupt's application for a discharge shall have been determined, if made within that time.

In Bankruptcy. On petition for a stay of execution on a judgment of the state court. Granted.

Frank H. Foss, for bankrupt.

James A. Marr, for Frank Miller & Co.

PLATT, District Judge. The bankrupt was a coal dealer in Hartford, and it appears that prior to adjudication he entered into a contract with Frank Miller & Co., of Bridgeport, to act as their agent to sell their coal. The title to the coal was to remain in said Miller & Co., and the bankrupt was to pay them \$6.20 for each ton of coal which he sold and obtained pay for, retaining as commission any balance paid to him above the \$6.20 per ton for the coal delivered into the possession of the bankrupt in Hartford. Some of the coal he sold the bankrupt paid for, and some he did not. Said Miller & Co. sued the bankrupt in the proper state court, in trover, claiming that he had converted the money received to his own use. The bankrupt entered a general denial, and upon that issue the jury returned a verdict for Miller & Co., and judgment has been entered thereon, but no execution issued. The bankrupt prays that said action in the state court shall be stayed until 12 months after the adjudication, or, if within that time the said bankrupt shall apply for a discharge, then until the question of such discharge shall be determined, and that the said Frank Miller & Co., their attorneys, agents, and servants, shall be during that time prohibited from arresting said bankrupt on execution of judgment in said suit.

If the claim in question is a provable debt, and of such a nature that it would be released by a discharge in bankruptcy, the prayer ought to be granted. It is certainly a provable debt. Would it be released by a discharge? The facts seem to me to present a plain case of an ordinary mercantile transaction, wherein one acts for another in the sale of any commodity. In all such cases the title to the property remains in the principal, and it is the duty of the agent to account for his sales. His profit lies in what he gets above the agreed amount which he must turn over to his principal. If he fails to account, he can be sued in assumpsit or for a conversion. It is necessary to be too technical if one tries to distinguish this case from the common ones with which the country teems. It must be assumed that the contractual relation was one which required the bankrupt to separate the money received by him for each ton of coal into two piles, one containing \$6.20 multiplied by the number of tons sold, and to hasten to his principal with that amount. Commission business is not done in that way, or in any way at all like that, as I understand it.

I think the case of Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, is precisely in point. That was a broker's case; but it is beyond my capacity to draw a logical line between agents, brokers, factors, auctioneers, conditional vendees, and the like. The facts before us do not impute positive fraud, involving moral turpi-

tude or intentional wrong. There was neither a technical trust at the beginning of the contractual relation nor moral turpitude in its breach.

The right to a stay, as prayed for, is clear. Let it be issued.

MOTLEY, GREEN & CO. v. DETROIT STEEL & SPRING CO. et al.

(Circuit Court, S. D. New York. May 9, 1908.)

1. ACTION—NATURE—HOW DETERMINED.

The complaint in an action determines whether the action is at law or in equity; it being immaterial whether the complaining party is described as plaintiff or as complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 143.]

2. SAME.

An action, wherein complainant alleges the execution of a conspiracy to break a contract made with him by one of the defendants, and claims money damages only, is an action at law, and not a suit in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 124-143.]

3. CONSPIRACY—INJURY TO PROPERTY RIGHTS—CIVIL LIABILITY.

Though individuals or corporations may conspire with impunity if they do nothing to execute the conspiracy, if they conspire to do a wrong to the person or property or property rights of a third person, and execute the conspiracy to such person's injury, they are liable jointly or severally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 4, 14.]

4. SAME—SOLVENCY OF DEFENDANTS—MATERIALITY.

It is immaterial to one's right to recover, in one action, damages for the execution of a conspiracy to break a contract made by one of the defendants, whether defendants are solvent.

5. SAME—MALICE.

The existence of malice on defendants' part is not essential to their liability to complainant for executing a conspiracy to break a contract, made with complainant by one of the defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 3.]

6. SAME.

That complainant in good faith entered upon performance of a contract with defendant company, expending large sums of money legitimately in obtaining customers for defendant's product, it being agreed complainant should receive large commissions; that defendant organized codefendant company, the officers of the two being in the main identical; that both companies well knew of the contract; that the companies conspired to injure complainant and deprive it of the benefits of the contract and to prevent performance thereof by making a pretended sale of defendant's properties and business to codefendant; that they conspired that codefendant should pretend to run the business, refusing to recognize complainant's rights; that they further conspired to make codefendant a mere sales agent for defendant, giving to it the rights, etc., previously enjoyed by complainant; that the companies conspired to break complainant's contract; that the conspiracy was executed; and that complainant was thereby damaged by the loss of commissions, money expended in advertising, etc.—shows complainant's right to recover against the companies.

On Demurrers to Complaint.

Luce & Davis (Robert L. Luce, of counsel), for complainant.
Joline, Larkin & Rathbone (Arthur H. Van Brunt and Henry V. Poor, of counsel), for defendant Detroit Steel & Spring Company.
Simpson, Thacher & Bartlett, for defendant Railway Steel Spring Company.

RAY, District Judge. The name of the complainant company was originally Thornton N. Motley Company, and was duly changed to Motley, Green & Co. It is a resident, citizen, and inhabitant of the southern district of the state of New York. The defendant the Detroit Steel & Spring Company is a foreign corporation, organized and existing under the laws of the state of Michigan. The defendant Railway Steel Spring Company is a foreign corporation, organized and existing under the laws of the state of New Jersey. The complaint then charges that on or about November 18, 1901, the complainant and defendant the Detroit Steel & Spring Company duly made and entered into a written contract, which is attached to the complaint and made a part thereof, whereby the Detroit Company constituted the complainant its sole sales agent for the sale of engine and car springs to steam and street railways whose purchasing departments are located in certain specified territory. The complaint gives the commissions which complainant was to receive upon net sales made by it as such agent, and stated that such commissions were to be paid when settlement of invoice was made by the buyer. The complainant agreed to act as such sales agent within such territory, and look after the sale of such property with due care and energy and for the best interests of the Detroit Company. The commissions were to be in lieu of all other compensation, and included expenses incurred by the complainant. The agreement was to be in force from November 18, 1901, to November 18, 1902, subject to a provision reading as follows:

"To cancellation upon sixty days' notice in writing by either party at their option for such cause as would amount to a breach of contract upon the part of the party to whom such notice is given."

The complainant began to act as such sales agent immediately, and faithfully kept and performed all of its covenants and agreements, and expended over \$2,500 in advertising, etc. January 4, 1902, the agreement was changed by the addition of the following, as stated in the complaint:

"It is to be understood that Motley & Company (meaning this complainant) are to use their best endeavors to promote the welfare of the D. S. & S. Co. (meaning the said defendant the Detroit Company) without regard to the question of commissions. On our part (meaning the said defendant the Detroit Company) and as an offset to the work which you (meaning this complainant) do for us (meaning the said defendant the Detroit Company) without remuneration we (meaning the said defendant the Detroit Company) give you (meaning this complainant) the benefit of all sales made by our (meaning the said defendant the Detroit Company) company to the trade in your province (meaning the territory referred to in said agreement of November 18, 1901) whether the orders come direct or through your (meaning this complainant's) office."

Thereafter the complainant continued to act as such sales agent to the satisfaction of the Detroit Company, and secured many large and valuable orders for goods made by the Detroit Company, and referred to in the agreement. The complaint then charges that the Detroit Company had a large and complete plant, and was able to manufacture its goods and products so as to sell same at a price less than its competitors for similar goods, and that such fact was well known throughout the United States. The complaint then alleges that thereafter, and on or about the 27th day of February, 1902, the defendant Railway Steel Spring Company was organized, with a capital of \$20,000,000, and that immediately upon its organization it proceeded to take over "under the terms of a pretended purchase" the property, plant, and business of the Detroit Company and the property, plants, and business of several other corporations, firms and individuals named, and that the most skillful and experienced officers of the Detroit Company were made officers of the Railway Company. The complaint then charges, in substance, that the Railway Company took over under said purchase, all the lands, personal property, good will, etc., of the Detroit Company, and occupied it and proceeded to carry on the business and to manufacture the same class of goods, and that the Detroit Company thereafter refused to quote prices to the complainant, or to fill orders for goods obtained by the complainant under the said contract and agreement making complainant its sole sales agent for such territory.

The complaint then charges that such pretended sale and transfer by the Detroit Company to the Railway Company was made for the express purpose of injuring the complainant, and that it did injure complainant, and rendered fruitless all the labors and efforts theretofore made by the complainant in the execution of the said contract, and caused to the complainant a total loss of all the money it had expended in the execution of said contracts and agreements. The complaint then charges that such transfer from the Detroit Company to the Railway Company was a part and the result of a conspiracy, entered into by and between the said defendants for the purpose of injuring and damaging the complainant, and with the design, purpose, and effect of preventing the complainant from performing its said contract with the Detroit Company, and rendering performance impossible, and that, by reason of such conspiracy and the transfer to the Railway Company pursuant thereto, the complainant suffered the loss of commissions upon the goods which it had sold, or might have sold, within the territory mentioned. The complaint also charges that the purpose and result of the conspiracy was that the defendant the Detroit Company failed to keep and perform the said agreement on its part, and failed and refused to comply with the provisions thereof. The complaint also charges that, as a result and part of the conspiracy and of the pretended sale, an arbitrary and uniform price for engine and car steel springs was fixed, whereby the complainant in its competition with other corporations, firms, and individuals was deprived of the benefits and advant-

ages which it would have derived under its contract with the Detroit Company. The complaint further charges that thereupon the Detroit Company, arbitrarily and without just cause, compelled the complainant to withdraw all the quotations and prices which it had previously authorized the complainant to submit to its customers, and which it had submitted as a basis for sales, and that complainant was thus deprived of its commissions, which it would have fully earned but for the conspiracy and its consummation.

The complaint further charges that the Railway Company from and after February 27, 1902, quoted prices of goods made at the plant of the Detroit Company, and proceeded to sell such goods to the customers of the complainant, and that pursuant to the conspiracy the Railway Company refused to quote prices to the complainant, and refused to permit and prevented the Detroit Company from quoting prices or furnishing goods upon orders obtained from complainant company. The complaint then charges that, when the two defendant companies entered into such conspiracy, they and their respective officers, agents, and employes knew of the said contracts and agreements existing between the Detroit Company and the complainant, and—"that the object and result of the said conspiracy was to work a breach of the said contract by the said defendant the Detroit Company, and absolutely to prevent the performance of said several covenants and terms in said contracts to be performed, kept, executed, and operated by the said defendant the Detroit Company, and that the said pretended sale and transfer, by the said defendant the Detroit Company, of its lands, buildings, plants, fixtures, machinery, tools, patents, trade-marks, business and good will to and the said pretended purchase of the same by the said defendant Railway Steel Spring Company was to prevent this complainant from the performance and execution of and reaping and enjoying the benefits accruing to it by the terms of the said contracts and the substitution of the said defendant Railway Steel Spring Company as the sales agent within the said described territory of the said defendant the Detroit Company in the place and stead of this complainant."

The complaint then charges other acts done by the two companies pursuant to the said conspiracy, which it is alleged prevented complainant from performing the contract on its part, all to its great damage and loss. The complaint then charges as follows:

"Thirteenth. That, as the result and effect of said conspiracy, entered into by and between the said defendants as aforesaid, this complainant has suffered great and serious loss of commissions, earned by it pursuant to the terms of said contracts and agreements, and has suffered serious loss to its credit and standing in the business community, and with its customers, and has been discredited among its said customers within the territory mentioned and described in said contracts."

The complaint concludes by demanding judgment for the sum of \$100,000.

It is unnecessary to recite the grounds of the demurrers. The demurrers treat this complaint as a bill in equity. It is nothing of the kind, and does not purport to be such. The action was brought in the Supreme Court of the state of New York, and removed thence to this court. It is evident that the amended complaint, which is the only one appearing in the record, was made and filed after such removal. It is true that in such complaint Motley, Green & Co. are spoken of

as "complainant," a term usually applied to describe the complaining party in an equity suit. In actions at law the complaining party is usually known as "plaintiff." I am of opinion that the complaint itself determines whether the action is at law or in equity. The complainant is certainly the plaintiff when he brings suit, and a plaintiff is always a complainant.

This complaint charges diversity of citizenship, shows on its face that more than \$2,000 is involved, exclusive of interests and costs, sets out a valid and legal contract between complainant and the Detroit Company; that plaintiff entered on its performance in good faith, and did considerable business, and expended large sums of money legitimately in building up a business and obtaining customers for the goods of the Detroit Company, from which sales plaintiff was to receive large compensation by way of commissions. To show the value of this contract to complainant many allegations, to which I have referred, are inserted. The complaint then charges, in substance, that the Detroit Company took part in organizing the other company, known as the "Railway Steel Spring Company," the officers of the two being in the main identical, and that both companies well knew of the contract between the complainant company and the Detroit Company. That thereupon the two defendant companies, being in fact but one, operating together for a purpose, and that purpose being the injury of the complainant company, and to deprive it of the benefits of its said contract, and to prevent performance thereof, and to deprive it of commissions which it had partly earned, and had laid the foundation for earning, and which it would have earned but for their subsequent acts, entered into a conspiracy to make a pretended sale of the properties and business of the Detroit Company, including its franchise to the Railway Company, and that the Railway Company should thereupon pretend to take charge of and run the business, refusing to recognize the complainant or his rights, and refusing to quote prices or allow him to supply his customers, and to procure the Detroit Company to refuse to recognize complainant or its rights. The complaint charges that the conspiracy was, further, simply to make the Railway Company a mere sales agent for the Detroit Company, giving to it the rights and privileges and benefits previously conferred upon the complainant company, and that this was a device and conspiracy between the two companies to break the contract, and substitute the defendant Railway Steel Spring Company in place of the complainant company. The complaint alleges that this agreement and conspiracy was fully carried out and executed, the two companies uniting and acting for each other, and playing into each other's hands to break the contract and deprive plaintiff of his rights and earnings, actually and prospective; the two companies being run and managed by the same persons in point of fact. The complaint charges that these two wrongdoers, corporations run and managed by the same persons, to the same end, and for the same wrongful purpose, have mutually aided each other in violating this contract with complainant, and have mutually aided each other to make performance by complainant impossible, all to the great damage of complainant. One item of damage alleged is the loss of over \$2,-

500 expended by complainant in advertising, etc., to build up the business and secure customers. Another item of damage is the loss of commissions, etc., some only partially earned, true, but which would have been fully earned but for the wrongful acts of the two companies working hand in hand, by mutual agreement, to prevent complainant from earning the commissions and profits; the Railway Steel Spring Company taking same for the benefit of both defendants.

If this complaint does not allege a cause of action against both these defendant companies, it seems to me impossible to frame a complaint against two corporations for a single wrongful act committed by both, the two acting in concert, knowingly and willfully, to perpetrate a wrong. It is quite true that individuals or corporations may conspire with impunity, provided they do nothing to carry their conspiracy into execution. If, however, they conspire to do a wrong or injury to the person or property or property rights of a third person, and execute the conspiracy through their authorized agents, and do damage to such third persons, they may be sued jointly or severally, and must answer for the consequences of the wrong.

This is an action at law. Money damages alone are sought and demanded. There is no prayer for equitable relief. It is entirely immaterial whether these defendants are solvent or insolvent. The complaint charges that they have united and acted together to perpetrate a wrong, viz., to enable the Detroit Company on its part to break and repudiate a valid contract; to pretend to be in a position where it could not perform; to pretend to have sold out its property and business, when in fact it had not; to enable the other party to act as sole sales agent for the sale of the goods under pretense simply of being the owner of the property and business, and of having charge of it and control of it when in fact it did not. The same men hold office in and manage the two companies. This complaint charges much more than a mere breach of contract by the Detroit Company. This is a single cause of action against both companies for a wrongful act which they conspired to perpetrate, and which the complaint alleges they did perpetrate, acting together to a common end; their joint acts resulting in damage to the complainant. If the defendants desire to know the particulars of the damages sustained by the plaintiff company, a bill of particulars, if ordered by the court, will give the necessary information.

The complaint is somewhat inartificially drawn. The terms and objects or purposes of the conspiracy, and the acts done in execution thereof, are not properly segregated. It is also true that the complaint does not state, in words, that the defendants "maliciously conspired," but still the facts stated show that, if the conspiracy was made as charged and carried out by the doing of the overt acts as charged, the conspiracy was in fact malicious. But I do not think actual malice was necessary. If the purpose of the conspiracy, confederating together, was to do the complainant company an actual injury by wrongfully and without justifiable cause depriving it of its employment, property, and property rights by deception, and wrongfully breaking a valid contract of employment for their own advantage and gain, and the purpose was accomplished, a cause of action is stated.

2 Cooley on Torts (3d Ed.) 592, 593, 594; 2 Addison on Torts, 739; Angle v. Chicago, St. Paul, etc., Railway, 151 U. S. 1, 10-15, 14 Sup. Ct. 240, 38 L. Ed. 55; Gregory v. Brunswick, 6 M. & G. 205; 1 Cooley on Torts, 209-212; Lumley v. Gye, 2 El. & Bl. 216.

Says Cooley (2 Cooley on Torts, 592-594 [3d Ed.]):

"Action for inducing breach of contract. One who maliciously or without justifiable cause induces a person to break his contract with another will be liable to the latter for the damages resulting from such breach. As to what will constitute justifiable cause cannot be satisfactorily defined, and must be left to the determination of the court in each case. Some of the authorities hold that the action will not lie unless unlawful means are employed, such as fraud, deceit, or intimidation.

"Conspiracy to prevent employment. By conspiracy is here intended a combination of two or more persons to accomplish, by some concerted action, an unlawful end to the injury of another. It was shown in a preceding chapter that the conspiracy was not in itself a legal wrong. It is a thing amiss, when it has an unlawful purpose in view, but it does not become a legal wrong until the unlawful purpose is accomplished, or until some act, distinctly illegal, is done towards its accomplishment. Nor is it perceived that the end itself can be unlawful if it can be accomplished by perfectly lawful means.

"There may be a difference in the law between breaking up a service, actually entered upon or contracted for, and inducing a person by any species of inducements, not unlawful in themselves, to refuse to contract for service. The latter may be wrong in morals, but not illegal; the former is an actionable wrong, standing upon exactly the same footing as the wrong by which the master loses his servant's assistance through his being wrongfully disabled. This general subject was recently so fully considered by the Court of Queen's Bench, in an action brought for maliciously procuring an actor to break his contract of service with the plaintiff, that a reference to the case, and to the authorities upon which it was decided, seems to be all that is important in this connection. It was held in that case by the majority of the court that the action will lie whether the service had actually been entered upon or not, provided a valid contract for it was in existence."

It is unnecessary to say that, if it is an actionable wrong for a third party to maliciously interfere in a contract between two parties and induce one of them to break that contract to the injury of the other, then it is an actionable wrong for a fourth party to conspire with and aid and assist such third party in perpetrating the wrong. In such case the conspiring parties would both be liable as joint wrongdoers. Now, if one of the contracting parties devises a scheme to avoid his contract and escape performance and, perhaps, liability, by combining and confederating with a third person to pretend to transfer to him his property and the business to which the contract relates, making known to such third person his contract obligations and his object and purpose, such third person to pretend to be the owner and to have the possession of and the management of the business and refuse to give employment or business to the other contracting party pursuant to the contract, and deprive him of gains, profits, and advantages already partially earned, and prevent his full performance so as to deprive him of what he is entitled to, and such third party enters into and becomes a party to the scheme, and for a consideration aids to carry it into full effect to the damage of the other party to the contract, can it be said that here is not a conspiracy to commit a wrong by deception and wrongful acts, and that it has

been consummated by the joint action of both parties? If so, and the third party is liable for the wrong, why are not both parties liable? Can the contracting party escape by saying:

"I have broken my contract, true, and your only remedy is an action for the breach of the contract?"

Can the third party escape by saying:

"All I have done is to aid one of the parties in violating his contract—a thing he might have done in any event—and the sole remedy of the injured party is an action in damages for a breach of the contract against the party violating same?"

This sophistry in this class of cases has been repudiated by the Supreme Court of the United States and by the courts of many of the states and by those of England.

In *Angle v. Chicago, etc., Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, the court held:

"If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. When a man does an act which in law and fact is a wrongful act, and injury to another results from it as a natural and probable consequence, an action on the case will lie."

In giving the opinion of the court, Mr. Justice Brewer said:

"That which attracts notice on even a casual reading of the bill, the truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer, is the fact that, while Angle was actively engaged in executing a contract which he had with the Portage Company (a contract whose execution had proceeded so far that its successful completion within the time necessary to secure to the Portage Company its land grant was assured, and when neither he nor the Portage Company was moving or had any disposition to break that contract or stop the work) through the direct and active efforts of the Omaha Company the performance of that contract was prevented, the profits which Angle would have received from a completion of the contract were lost to him, and the land grant to the Portage Company was wrested from it. Surely it would seem that the recital of these facts would carry with it an assurance that there was some remedy which the law would give to Angle and the Portage Company for the losses they had sustained, and that such remedy would reach to the party (the Omaha Company) by whose acts these losses were caused. That there were both wrong and loss is beyond doubt. And as said by Croke, J., in *Baily v. Merrell*, 3 Bulst. 94, 95: 'Damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth.' * * * That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such defense were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract; for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company. It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability. * * * It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer."

If it be an actionable wrong for a third person to interfere in a contract and induce one of the parties thereto to break it to the injury of the other, can it be said it is not equally a wrong for one of the parties to the contract to invite a third party to unite with him and aid him in breaking the contract in such a way as possibly to escape liability in an action for nonperformance and, gaining his consent, to act together in consummating their agreement? There are many refinements in the law, necessarily so, but courts should be as astute in applying well-known principles of justice to remedy wrongs as the wrongdoers are in devising schemes to perpetrate them.

The acts of the Railway Steel Spring Company clearly constituted an actionable wrong, as damage resulted to the complainant company. The acts were done without justifiable cause. It is immaterial that it was invited to commit these wrongs by the other party to the contract. All this is clear under the authority of *Angle v. Chicago*, etc., *supra*. If what the Railway Steel Spring Company did was an actionable wrong, how can it be said that the same acts, done and aided by the Detroit Company, did not constitute an actionable wrong on its part? As the two defendant companies acted in concert, and took part in the several acts constituting the wrong and in consummating it, to my mind both are liable on precisely the same grounds. When two parties unite and act in concert by agreement to commit a wrong, and it is consummated, the injured party may sue one alone, or both in one action, or each in a separate action.

In 2 Addison on Torts, 739, 740, the author says:

"A conspiracy to do an unlawful act and the doing of the act in pursuance of the conspiracy to the damage of the plaintiff create a good cause of action against all the parties to the conspiracy. A criminal proceeding by way of indictment lies for the mere act of conspiring, but a civil action is not maintainable unless the plaintiff had been aggrieved, or has sustained 'actual legal damage' by some overt act done in pursuance of the conspiracy. Where the plaintiff's declaration of his cause of action set forth that he exercised the profession of an actor, and was engaged to perform in the character of Hamlet, in Covent Garden Theater, and that the defendants and others maliciously conspired together to prevent the plaintiff from so performing, and from exercising his profession in the theater, and in pursuance of the conspiracy hired and procured divers persons to go to the theater and hoot the plaintiff, and the persons so hired did, in pursuance of the conspiracy, go to the theater and hoot the plaintiff, and interrupted his performance, and prevented him from exercising his profession, and thereby caused the plaintiff to lose his engagement and divers gains and emoluments, and to be brought into public scandal and disgrace, it was held that the declaration disclosed a good cause of action."

He cites *Gregory v. Brunswick*, 6 M. & Gr. 205.

Suppose that the employer of the actor, desiring to drive him out of his employment and cause him to abandon or refuse to perform his contract, had invited these parties to come to his theater and hoot and hiss the actor without justifiable cause, and they had done so and prevented him from acting, etc., would not the action have been sustained against all, including the employer? Would it have been a defense to the employer to say that he was the em-

ployer and had only broken his contract and must be sued on the contract for a breach thereof?

In 8 Cyc. 650, the law is thus stated, citing many cases:

"Intentionally to do that which is calculated, in the ordinary course of events, to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a 'malicious wrong.'"

This complaint states a good cause of action against both the defendants, and one cause of action only.

The demurrers are overruled, with costs.

McGILVRA et al. v. ROSS, State Land Com'r, et al.

BRESSLER v. SAME.

(Circuit Court, W. D. Washington, N. D. September 9, 1907.)

Nos. 1,545, 1,547.

1. "NAVIGABLE WATERS"—WHAT CONSTITUTES.

Though by the English common law "navigable waters" are tidal waters only, in the United States those waters are navigable in contemplation of law which are navigable in fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5-16.

For other definitions, see Words and Phrases, vol. 5, pp. 4675-4684; vol. 8, p. 7728.]

2. SAME—SHORES AND BEDS OF TIDAL WATERS—OWNERSHIP.

Under the English common law, the crown owns the shores and beds of all tidal waters, and in the United States the states through their sovereignty take like ownership, at least in the absence of any prior disposition made by Congress before their admission into the Union. In both countries the littoral owner may be deprived of access to navigable waters, and the opportunity to reach them may be cut off by the assertion of this sovereign right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 239-252.]

3. SAME—FRESH WATER LAKES AND STREAMS.

States may assert the same ownership to the beds and shores of navigable fresh water lakes and streams as they may properly assert to the beds and shores of tidal waters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 239-252.]

4. SAME—WASHINGTON TIDEWATER LANDS, ETC.—OWNERSHIP.

Pursuant to an express assertion of ownership, by Const. Wash. art. 17, the state of Washington owns the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in tidal waters, and up to and including the line of ordinary high water within the banks of navigable rivers and lakes.

5. SAME.

Owners of land abutting upon inland navigable bodies of fresh water in Washington, though holding by patents from the United States antedating the admission of the state, do not and never did own the land below ordinary high water, since the Oregon country, of which the state of Washington is a part, came within the rule that the general government holds the title to such lands in trust for the future states to be created

out of territory acquired by it, at least in the absence of prior disposition by Congress during the territorial condition.

Charles K. Jenner (William Martin, of counsel), for complainants.

John D. Atkinson, Atty. Gen., and E. C. MacDonald, Asst. Atty. Gen. (John W. Roberts, of counsel), for defendants.

WHITSON, District Judge. These suits have been argued together. Lakes Washington and Union are inland, navigable bodies of fresh water, and the complainants are owners of abutting lands. They hold by patents from the United States which antedate the admission of Washington, and they contend that by virtue of those patents they are the owners of shore lands now claimed, and soon to be offered for sale by the state. It is to enjoin the proceedings looking to the sale, and the threatened sale thereunder, that they seek injunctions to protect them in the full enjoyment of the lands to which they claim title; and it is alleged that their boundaries extend to and include "the ownership of those portions" of said lakes "immediately in front of the respective tracts described, out into said lakes to the deep waters thereof." The bills are necessarily of considerable length, but the allegations need not be recited; it may, however, be remarked that matters are set forth, which, if sufficient in law, present causes of equitable cognizance.

Objection is made by demurrer to the jurisdiction of the court, and to the bills for want of equity. While jurisdiction is always of the first importance, yet it being clear that matters are presented which are proper for the consideration of this court, the reasons will not be assigned in view of the conclusions upon the other branch of the case. The following propositions have been so often decided by the Supreme Court that there seems no ground left for discussion: (1) By the English common law navigable waters are tidal waters only. (2) With us the rule has been extended until it may be considered as settled that those waters are navigable in contemplation of law which are navigable in fact. (3) In England by the common law the crown is the owner of the shores and beds of all tidal waters, and here, the states by virtue of their sovereignty, take like ownership, at least in the absence of any prior disposition made by Congress before their admission into the Union. Here, as there, the littoral owner may be deprived of access to those waters which are navigable, and the opportunity to reach them may be cut off by the assertion of this sovereign right. (4) The rule of navigability having been extended to fresh water lakes and streams in this country, the ownership, by analogy, follows the rule, so that the states are entitled to assert the same ownership to the beds and shores of navigable fresh water lakes and streams as they may properly assert to the beds and shores of tidal waters. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Kibbe*, 14 Pet. 353, 10 L. Ed. 490; *The Genesee Chief v. Fitzhugh*, 12 How. 443, 454, 13 L. Ed. 1058; *Den v. Jersey Company*, 15 How. 426, 14 L. Ed. 757; *The Daniel Ball*, 10 Wall. 557, 560, 19 L. Ed. 999; *Barney v. Keokuk*, 94 U. S. 325, 336, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 667, 11 Sup. Ct. 210, 34 L. Ed. 819; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Shively v. Bowlby*,

152 U. S. 1, 11, 14 Sup. Ct. 548, 38 L. Ed. 331; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714; *Baer v. Moran Brothers Company*, 153 U. S. 287, 14 Sup. Ct. 823, 38 L. Ed. 718; *Water Power Company v. Water Commissioners*, 168 U. S. 349, 361, 18 Sup. Ct. 157, 42 L. Ed. 497; *The Robert W. Parsons*, 191 U. S. 17, 25, 24 Sup. Ct. 8, 48 L. Ed. 73.

As late as May of the present year, in *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, in discussing the proprietorship of the beds and shores of such waters, this language from *Barney v. Keokuk*, *supra*, was quoted with approval:

"It properly belongs to the states by their inherent sovereignty and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

The court also quoted from *Hardin v. Jordan*, *supra*, as follows:

"Such title being in the state the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress in regard to public navigation and commerce.

* * * This right of the states to regulate and control the shores of tide waters, and the lands under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

After citing with approval the numerous cases which have received its attention from time to time, and which have been referred to in argument here, speaking of state control, the court concludes as follows:

"It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control, and Congress cannot enforce either rule upon any state."

This state has asserted, by article 17 of its Constitution, the ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." The Legislature in pursuance of and in recognition of state ownership has provided for the control and sale of such lands, and the question has been repeatedly before the Supreme Court of the state, which has affirmed and reaffirmed the state ownership until it can no longer be doubted that a fixed rule of property has become firmly established. *Eisenbach v. Hatfield*, 2 Wash. St. 236, 26 Pac. 539, 12 L. R. A. 632; *Commissioners v. State*, 2 Wash. St. 530, 27 Pac. 550; *McCue v. Bellingham Bay Water Co.*, 5 Wash. 156, 31 Pac. 461; *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *West Coast Improvement Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; *Transportation Co. v. Dalles Portland & Astoria Navigation Co.*, 27 Wash. 490, 68 Pac. 74; *Madson v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A.

(N. S.) 257; *Kalez v. Spokane Valley Land & Water Co.*, 42 Wash. 43, 84 Pac. 395.

Such being the rules applicable to the matter in hand, the conclusion is self-evident that the complainants are not and never were the owners of the land below ordinary high water by virtue of their patents, and that their boundaries do not extend below that line. The rule that the general government holds the title to such lands in trust for the future state to be created out of territory acquired by it, in the absence of any prior disposition by Congress during the territorial condition, has become a doctrine of universal acknowledgment. The argument that the Oregon country, of which this state is a part, came in upon a different basis does not have the sanction of the Supreme Court. On the contrary, in *Shively v. Bowlby*, *supra*, involving the title to a donation claim which was a part of that acquisition, the rule was reaffirmed. If any ground ever existed on principle for the theory which counsel have propounded, it has been settled by that case contrary to their contention. The expectations raised by the suggestion that a question was to be presented which has not heretofore received the attention of any court have not been realized. Counsel has with much ability differentiated and distinguished, and has in part taken direct issue with the Supreme Court as to the soundness of the views expressed by it, a privilege which as to the latter at least this court is not permitted to indulge. It has been argued that many of the announcements of that court are dicta, but if it be borne in mind that its discussions were in view of the rules prevailing in the states in which the cases originated rather than to the announcement of a doctrine of its own, it will appear that the expressions which counsel criticise are not dicta, but were made in passing upon questions which were squarely before the court, and in pursuance of its oft-repeated rule of construction, that the control of water and water rights, and those lands so intimately connected with the water as to be hardly distinguishable from it are matters with which the general government, aside from its control of navigation and commerce, has no concern.

As the bills fully disclose the extent of the complainants' claims to relief, it results that the demurrers must be sustained, and the suits dismissed for want of equity.

THE MAINE.

THE MANHATTAN.

(District Court, S. D. New York. March 17, 1908.)

1. SHIPPING—CONTRACT AS PRIVATE CARRIER—VALIDITY OF PROVISIONS—EXEMPTION FROM LIABILITY.

Under a contract between a lighterage company and a manufacturer, by which the company agreed to transport property of the latter in New York Harbor and vicinity, and for such purposes furnished it the full capacity of lighters or barges when such transportation was required, as between the parties the company was a private and not a public carrier, and a provision of the contract, by which in consideration of the making of a lower rate the shipper agreed to exempt the carrier from liability for loss or injury to cargoes from negligence, was not within section 1 of the

Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), but is valid and enforceable.

[Ed. Note.—Statutory exemptions of shipowners from liability, see notes to *Nord Deutscher Lloyd v. Insurance Co. of North America*, 49 C. C. A. 11; *Ralli v. New York & T. S. S. Co.*, 83 C. C. A. 294.]

2. COLLISION—DAMAGES RECOVERABLE—RELEASE OF ONE OF TWO VESSELS IN FAULT.

The steamers *Maine* and *Manhattan* were both held in fault for a collision between the *Maine* and the barge *Collard* in tow of the *Manhattan* by which a portion of the *Collard's* cargo was lost. The entire cargo was owned by libellant, and was being transported by the claimant under a contract with it as a private carrier, which provided that libellant should have no claim upon the claimant or its equipment or boats which it might charter or control for any loss of cargo. The *Collard* was owned by the claimant, and the *Manhattan* was demised to it by charter. *Held* that, it being a private carrier, the agreement for exemption from liability was valid, and the *Manhattan* being chartered by it as a towing vessel was within its terms and exempted; that libellant having contracted for such exemption was not entitled to recover more than half damages against the *Maine*, the joint tort-feasor rule not being applicable.

In Admiralty. On exceptions to commissioners' report.

Kneeland & Harrison, for libellant.

Wing, Putnam & Burlingham, for the *Maine*.

Carpenter, Park & Symmers, for the *Manhattan*.

ADAMS, District Judge. This was an action arising out of a collision between the barge *Abram Collard*, in tow of the steamer *Manhattan*, and the steamer *Maine*, which struck the *Collard* and caused her to lose her deck load of pigs of lead and boxes of vitriol. The damages were divided between the *Maine* and the *Manhattan*, and a reference ordered to ascertain the damages (153 Fed. 635).

In the answer of the *Manhattan* a further defence was pleaded:

"VIII. That at the time of the collision herein alleges, and the loss consequent thereupon, there was a written contract existing between the Commercial Lighterage Company and the libellant, the original of which the claimant will produce upon the trial of this action, the terms of which, Article Sixth, are as follows:—

"The Lighterage Company is to be held responsible for the full actual value of all material short-delivered at Perth Amboy or in New York Harbor, unless such short-delivery is caused by fire, or perils of the sea. It is understood, however, that the Lighterage Company is responsible for all receipts given and taken by their barge captains in the dealings with steamship lines, consignees, or the shipping plant. Insurance will be effected by the Smelting Company at their expense and no underwriter claiming through the Smelting Company is to have any claim upon the Lighterage Company, or upon their equipments or boats that they may charter or control, in case of loss. Should the Smelting Company fail to effect the necessary insurance, no claim for such loss will be made upon the Lighterage Company owing to such failure, neither will the Lighterage Company be held liable for any such loss no matter how occurring because of the failure of the Smelting Company to insure."

The correctness of these allegations was admitted by the libellant.

This defence, as well as the ascertainment of the amount of damages, was duly referred to a commissioner, who has reported:

"The interlocutory decree in the above cause referred it to me, the undersigned, to ascertain and report the amount of libellant's damages, with instructions to take and receive such proof as might be offered in respect to the

separate and distinct defense alleged in article VIII of the answer of the claimant of the Manhattan, and report the same with my opinion thereon.

I report that I was attended by the proctors for the respective parties, who offered testimony and exhibits which are filed herewith; and I further report as follows:

1. The cargo of the barge Collard, at the time of the collision, consisted of lead in pigs and copper sulphate or vitriol, which had been shipped by libellant to fill contracts of sale. The greater portion of the cargo was recovered by the Merritt & Chapman Derrick & Wrecking Company, under a contract made by that company with underwriters on the cargo, who paid for the services at the contract rate. In addition there were various incidental expenses connected with saving cargo. No question has been raised as to the reasonableness of the charges.

I find that the damages, exclusive of interest, were \$10,305.29, made up as follows:

141 Boxes Vitriol 20,135 lbs. at 4½¢	\$ 906.08
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Domestic Lead.

960 Pigs 100.091 lbs. at 5.10	5,104.64
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949 " 100.031 " at 4.85	4,851.50
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Export Lead.

1838 Pigs, 190.452 lbs. (at 3.0875)	
£1208. 6. 1. at 4.8665	5,880.21

1058 Pigs, 112.035 lbs. (at 3.1472)	
M. 14,104.30 at 25¢	3,526.08

Value of shipment	\$20,268.51
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Recovered.

Domestic Lead.

836 Pigs, 87130 lbs. at 5.10	4,443.63
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947 " 99820 " at 4.85	4,841.27
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Export Lead.

1775 Pigs, 183.888 lbs. at 3.0875	5,677.54
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1012 " 107.142 " at 3.1472	3,371.97
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4570 477,900 lbs.	\$18,334.41
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Less freight at 50¢ per ton,	119.50
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	\$18,214.91
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Value shipped	\$20,268.51
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" recovered	18,214.91
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	\$ 2,053.60
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Paid Merritt & Chapman Co. for wrecking services	8,045.89
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Paid Commercial Lighterage Co.	125.77
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Paid expenses rehandling	70.03
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Paid Custom House,	10.00
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	\$10,305.29
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2. The cargo was covered by three policies insuring libellant against loss, including loss by negligence, one policy being issued by the Federal Insurance Company, and two by the Marine Insurance Company, limited, of London, all dated April 29, 1905. Each policy also contained the following:

'And Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a Bill of Lading containing a stipulation that the carrier may have the benefit of any insurance thereon; and that any insurance granted herein, shall not cover where any carrier or other bailee has insurance (whether prior or subsequent in date to this policy) which would attach if this policy had not been issued.'

After the completion of the salvage operations, libellant made claims under these policies, received from the underwriters \$2,134.38, the amount of its loss, January 29, 1906, and signed and delivered to the underwriters two receipts, one for \$1,234.38 and the other for \$900, in each of which the amount was described as a loan 'repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to Bge Abram Collard colliding with Str Maine in East River on or about Sept. 1st, 1905, or from any insurance effected by any carrier, bailee or others on said property, and as security for such re-payment we hereby pledge to the said Marine Insurance Company, L'td., the said recovery and deliver to them duly endorsed the Bills of Lading for said property and we agree to enter and prosecute suit against said Railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Marine Insurance Company, Limited.' The underwriters also paid the above mentioned bill of the Commercial Lighterage Company. When the policies were issued, and when the contract was made with the wrecking Company, the underwriters knew nothing of a transportation contract between the Commercial Lighterage Company and libellant which contained the provision set forth in the 8th article of the answer of the Manhattan, and which was made on or about March 11, 1904, was in force at the time the cargo was shipped and lost, and under which the cargo was carried. The Manhattan was owned by Moses W. Collyer, general manager of the lighterage company, and he is the claimant of the Manhattan. At the time of the collision and loss, the Manhattan was under charter to, and under the control of, the lighterage company, in towing barges in New York harbor on which were laden goods of libellant. The barge Collard, on which the cargo was laden, was owned by the lighterage company, libellant had her full capacity, its goods alone were being carried, and the prices stipulated in the transportation contract were less because of that clause. The lighterage company was a West Virginia corporation, engaged in the lighterage and general transportation business in New York Harbor, on the Hudson River, and on Long Island Sound. Its contract with libellant was set forth in a letter from libellant, on which the acceptance of the lighterage company was noted at the foot. It in terms covered 'the handling of lighterage business of the American Smelting & Refining Company between points within the lighterage limits of New York Harbor and Perth Amboy,' specified rates and various details in connection with the services to be rendered, and besides the clause referred to, contained the following:

'Seventh: On all business moving from Perth Amboy to points in New York Harbor lighterage limits, the Lighterage Company's boats shall receive full loads, provided the tonnage is ready for shipment and the required deliveries can be satisfactorily made to the connecting steamship lines.'

'Ninth: All rates mentioned shall include the hiring of all barges, necessary tools and equipment, and towing, also the shifting to and between different deliveries, and the rates shall cover deliveries at docks. The Lighterage Company also attend to the loading and unloading and handling, except at Perth Amboy, at which latter place the labor of loading and unloading shall be taken care of by the Smelting Company, it being understood, however, that the bargemen shall tend guys at Perth Amboy when necessary. This clause is not to conflict with provisions of clause No. 4 regarding slag, except that bargemen are to tend guys at Perth Amboy when handling slag.'

'Fourteenth: The boats used by the lighterage company are to be good, sound and seaworthy, and are to be acceptable to the insurance company.'

The action was brought and has been prosecuted for the benefit of the underwriters, who are alone entitled to the recovery, and at whose expense the suit is maintained under the above receipts. Libellant's counsel dwells upon the fact that the lighterage company is not a party, but the libel is against the Manhattan, which the lighterage company did not own. But the lighterage company would be bound to respond to the owner of the Manhattan for any damages for which the vessel might be condemned, and therefore is the real party in interest, although not a party of record. Assuming that the contract would be a good defense if the suit were against the lighterage company, then if the owner and claimant of the vessel were required to pay in

this suit, he could compel the lighterage company to make good the amount and that company, it seems to me, could in turn compel libellant to reimburse it. To avoid this circuitry of action, the claimant of the vessel should be permitted to plead the contract to the same extent as the lighterage company. The mere fact that the vessel was chartered by the lighterage company, instead of being legally owned by it, should make no difference when the lighterage company was owner *pro hac vice*. If the claimant had brought the lighterage company into the cause by petition, as he might have done, the court would have been compelled to exonerate the company; and under such circumstances, it surely would not have condemned the vessel, as between whose owner and the company the liability, if any, rested upon the latter. Therefore the case is to be considered in all respects as if the lighterage company were sued and had interposed the defense.

It is conceded by libellant, that if the goods had been aboard the Manhattan, the Harter Act would have been a defense as against that vessel, because the loss arose through errors of navigation, and it is conceded by the claimant that if the lighterage company were a common carrier as to libellant in the transportation of the goods, the contract would not furnish a defense, because void as against public policy so far as it sought to relieve the carrier from liability for negligence; but it is maintained that the lighterage company was not a common carrier, but a private carrier for hire, and *The Fri*, 154 Fed. 333, 83 C. C. A. 205, is cited. In that case it was said, referring to stipulations whereby vessel and owners are exempted from liability for loss due to negligent navigation:

'When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire. *Hutchinson, Carriers* (2d Ed.) 73. See, also, *Sumner v. Caswell* (D. C.) 20 Fed. 249, and the authorities there referred to. It has not yet been decided by any court that a condition in such a contract, to which the Harter Act has no application, relieving a shipowner from liability on account of the carelessness of its employes, is contrary to public policy.

The decisions which deny the validity of such stipulations proceed upon the ground that the carrier is exercising a public employment, and cannot by such stipulations relax his obligations to the public. Private carriers are not subject to the exceptional or extraordinary duties and liabilities of common carriers, and they may carry for whom they choose, and for such compensation and upon such conditions of liability as may be agreed upon. The contracting parties stand upon equal terms, and can make such a contract as they think reasonable. *Angell, Law of Carriers*, 59.'

Under this decision and the testimony above referred to as to the relations between the lighterage company and libellant, it is clear that the lighterage company was a private carrier, and that the contract was valid. The contract was manifestly intended to prevent any such claim as is now made, since it provides that 'no underwriter claiming through the Smelting Company is to have any claim upon the Lighterage Company, or upon their equipments or boats that they may charter or control, in case of loss.' No contracts or transactions between libellant and its underwriters, to which the lighterage company was not a party, could defeat or impair the lighterage company's rights under this contract with libellant. I find, therefore, that the defense referred to in the order of reference should be sustained.

3. The remaining question is whether the Maine should be held liable for the whole damages. Had there been no such transportation contract between libellant and the lighterage company, and had the Maine alone been libelled, although the decree would have been for full damages, the owner of the Maine would have had the right to enforce contribution against the lighterage company in a suit in admiralty (*Erie R. R. Co. v. Erie Transportation Company*, 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450); and in the absence of the contract, the decree to be entered in this action would, under settled practice, provide that each vessel bear one-half of the damages, and that if libellant should be unable to collect from either vessel, the other should bear the whole amount. But this inability to collect refers to an inability not produced by the libellant. If libellant should execute a release to one party, or with its eyes open take any other step that would discharge one of the par-

ties, it would not be permitted to exact the whole amount from the other. I do not see that the situation is changed by the mere fact that libellant took such steps before the collision occurred. In *The George W. Roby* (D. C.) 103 Fed. 328, it was said to be clear that 'in a suit for collision the rule of mutual liability when both vessels are in fault cannot be defeated by the contract of affreightment of their respective cargoes.' As libellant has by its voluntary act prevented the Maine from obtaining contribution, I do not consider that libellant should be allowed to recover more than half its damages against the Maine. Libellant could not, by contract with the lighterage company, extinguish the legal rights of a third party, and should be deemed to have contemplated the present situation as a consequence of its contract.

Conclusions.

I therefore find:

1. That the libel should be dismissed as against the Manhattan.
2. That libellant is entitled to a decree against the Maine for one half of the total damages as hereinbefore set forth, as follows:

1/2 the value of lost cargo	\$1,026.80
1/2 Merritt & Chapman's bill	4,022.89
1/2 Commercial Lighterage Company's bill	62.88
1/2 Expenses of rehandling	35.02
1/2 Custom House expenses	5.00
	<hr/>
	\$5,152.59

Libellant is also entitled to interest on the above \$1,026.80 from September 1, 1905, the date of the collision, on \$3,500 of Merritt & Chapman's bill from November 16, 1905, when \$7,000 of the whole bill was paid, on \$522.95 of the same bill from January 29, 1906, when the balance of the whole bill was paid, on the above \$62.88 from January 11, 1906, when the whole bill of the lighterage company was paid, and on the above items of \$35 and \$5 from January 29, 1906."

The libellant excepted to the report, as follows:

"First Exception: In that the Commissioner found that the Commercial Lighterage Company, the owner of the Barge 'A. J. Collard,' upon which libellant's cargo was laden, was not a common carrier, but a private carrier for hire.

The ground for this exception is that the evidence does not justify this finding.

The following is all the evidence introduced here upon this point.

Clarence Thorn Snyder, called as a witness for the Manhattan, being duly sworn, testified as follows:

Direct Examination by Mr. Park:

Q. What is your business? A. Lighterage business.

Q. For whom and by whom? A. Now vice-president of the Inter State Lighterage Company.

Q. Do you remember the collision of the steam lighter Manhattan? A. I do.

Q. What was your business at that time? A. Sort of an agent of the Commercial Lighterage Company.

Q. Do you know the barge Collard? A. Yes, sir.

Q. Do you remember the goods she carried? A. I do. Lead and copper.

Q. Shipped by whom? A. The American Smelting & Refining Company.

Q. Did the American Smelting & Refining Co. have the full capacity of the barge Collard? A. Yes, sir.

Moses W. Collyer, called as a witness for the Manhattan, being duly sworn, testified as follows:

Direct Examination by Mr. Park.

Q. What was your occupation in 1906? A. I was general manager of the Commercial Lighterage Company.

Q. Do you know the Collard? A. Very well.

Q. Who owned her in 1906? A. The Commercial Lighterage Company.

Q. And the Commercial Lighterage Company is under a contract with the American Smelting & Refining Company relative to goods to be carried on the barge Collard? A. Yes, sir.

Q. Did you make that contract? A. Yes, sir.

Q. I want to ask that if the price stated in your contract was greater or less on account of the American Smelting & Refining Company assuming the risk of transportation? A. It was less.

Q. Do you remember the collision between the barge Collard and the Manhattan and Maine in 1906? A. Yes, sir.

Q. Do you know what goods she had loaded on her at the time? A. Yes, sir.

Q. Is this the contract which I now hand you between the American Smelting & Refining Co. and the Commercial Lighterage Company (hands paper to witness)? A. That is the original contract.

Same offered in evidence and marked Manhattan's exhibit A.

Cross Examination by Mr. Kueeland:

Q. Was the Commercial Lighterage Company a corporation? A. Yes, sir.

Q. Organized where? A. In the State of West Virginia.

Q. Have you a copy of the Certificate or Articles of Incorporation? A. No, sir.

Q. Have you a charter? A. I didn't organize it and I would have to find that out from one of the officers, may be the president. Soon after this accident happened the company went into dissolution and there were some papers sent back to West Virginia. Whether this particular paper was sent back or not I don't know.

Q. Who is the president? A. Mr. Gear.

Q. What business was the Commercial Lighterage Company in? A. In the lighterage business.

Q. It took contracts from different firms like the American Smelting & Refining Company? A. Yes, sir.

Q. For the general transportation of merchandise on lighters from different points through the harbor of New York? A. Yes, sir.

Q. Did you advertise? A. No, sir.

Q. No advertisement at all? A. No, sir.

Q. Are you sure of that? A. We didn't advertise in any newspapers.

Q. Did you advertise in any of the shipping papers? A. We went around and got contracts from different people like the American Smelting & Refining Company and others.

Q. Will you look at the papers which I show you (hands paper to witness), is that a letter written by your company? A. I think so.

Q. That is the usual letter head which your company used? A. Yes, sir.

I ask to have it marked in evidence.

Same marked libellant's exhibit 9 of this date.

Q. Is that one of the bill heads which the company used (shows witness paper)? A. Yes, sir.

Q. Those were in general use in your business? A. Yes, sir.

Same offered in evidence and marked Libellant's exhibit 10 of this date.

Objected to by Mr. Park as being immaterial. Objection overruled.

Q. Did the Commercial Lighterage Company own a number of vessels? A. Yes, sir.

Q. Such as lighters, barges and steamtugs? A. Yes, sir.

Q. You had no particular contract with the American Smelting & Refining Company in regard to the barge Collard? A. No more than to any other barge that we had.

Q. In other words, you had a contract to carry their goods, and in the performance of that contract you sent whatever boats you had available, is that right? A. Yes, sir. They had the exclusive use of that boat.

Q. Do you mean that when you sent a boat to carry their goods that that particular boat carried only their goods? A. Yes, sir.

Q. And you sent just as many boats as were necessary to carry the goods that they offered you? A. Yes, sir.

Charles Johnson, called as a witness for the Manhattan, being duly sworn, testified as follows:

Direct Examination by Mr. Park:

Q. By whom are you employed at the present time? A. Southern Pacific Company.

Q. By whom were you employed in 1906? A. By the Southern Pacific Company.

Q. Were you on the Collard at the time of the collision with the steam lighter Manhattan in the East River in 1906? A. Yes, sir.

Q. What was your position at that time? A. Captain.

Q. Was she loaded? A. Yes, sir.

Q. Where did you get the goods? A. From the American Smelting Company.

Q. Was she fully loaded? A. Not quite fully loaded.

Q. Did you receipt for the goods put on board? A. Yes, sir.

Q. Any other goods excepting the American Smelting & Refining Company's on board or not? A. No others.

Q. When did you first go to work for the Southern Pacific; how many months ago? A. 25 months ago.

Q. Two years ago? A. Yes, sir.

Q. How long after the collision between the Collard and the Manhattan did you go to work for the Southern Pacific? A. Three months afterwards.

(Manhattan's exhibit A. and libellant's exhibits 9 & 10).

Second Exception: In that the Commissioner found that the agreement set out in the Eighth article of the answer of the claimant of the 'Manhattan' and forming part of the contract dated March 11, 1904, between the libellant and the Commercial Lighterage Company (Manhattan Exhibit A.) and reading as follows,—

(Here follows the special agreement pleaded.) "was a valid contract.

The ground for this exception is that in so far as such contract purports to require the libellant to insure its cargo for the benefit of the Commercial Lighterage Company or to exempt the Lighterage Company from liability for losses caused by the negligence of its employees or agents, it is void.

Third Exception: In that the Commissioner found that the agreement set out in Article Eighth of the answer of the claimant of the 'Manhattan' constituted a defense to the libellant's claim against the 'Manhattan.'

The grounds for this exception are,—

(1) That if such agreement is valid, it relates and applies only to claims against the boats on which the libellant's cargo should be loaded and carried, and against the Commercial Lighterage Company as owner or charterer of such boats, and does not relate or apply to claims against steamers employed or chartered by the Lighterage Company to tow such carrying boats.

(2) That the contract does not relieve the Commercial Lighterage Company or its boats from liability for losses due to negligence of its servants or agents.

Fourth Exception: In that the Commissioner found that the libel should be dismissed as against the 'Manhattan.'

Fifth Exception: In that the Commissioner found that the libellant by its contract with the Commercial Lighterage Company, has prevented the 'Maine' from recovering contribution from the 'Manhattan.'

Sixth Exception: In that the Commissioner found that the libellant was entitled to recover only one half of its damages against the 'Maine.'

Seventh Exception: In that the Commissioner did not find and report that the libellant is entitled to recover the whole amount of its damages (\$10,305.29) with interest, against the 'Maine,' and that the claimant of the 'Maine' was entitled to recover half of such damages from the 'Manhattan.'

Eighth Exception: In that the Commissioner did not find that the libellant is entitled to recover its whole damages amounting to \$10,305.29, with interest and costs,—one half to be paid by the 'Maine' and one half by the 'Manhattan,' and that any balance of either of said halves not collectible against either of said vessels, be paid by the other."

No other exceptions have been taken to the report.

Upon the proceedings before the commissioner, the contract (in the form of an accepted letter from the libellant) between the Commercial

Lighterage Company and the libellant was admitted in evidence and contained the clause quoted above.

The first point made by the exceptant is that the evidence establishes that the Commercial Lighterage Company was a common carrier. The evidence relied upon is fully set forth in the exceptions and it appears thereby that the Collard was owned by the Lighterage Company which was under a contract (mentioned above) relative to goods to be carried by the boats owned or employed by that company, of which the Collard was one. It was shown that the price for transportation was less on account of the Smelting Company assuming the risks incident to transportation; that the company was in the lighterage business and took contracts from different firms like the Smelting Company for the general transportation of merchandise on lighters from different points through the Harbor of New York; that the company did not advertise in the newspapers but went around and obtained contracts from different people like the Smelting Company and others; that the usual letter head of the company contained the following: "General Transportation: New York Harbor, Hudson River and Long Island Sound"; that the bill heads of the company, which were in general use by it, contained the same; that the company owned a number of vessels, such as lighters, barges and steamtugs; that there was no contract in regard to the Collard, no more than any other barge that it had; that it had a contract to carry the Smelting Company's goods and in the performance thereof, it sent whatever boats that were available; that the Smelting Company had the exclusive use of the boat sent.

The argument advanced is that the company was a common carrier because:

"* * * it was a corporation engaged in the lighterage business, holding itself out as doing the business of General Transportation in the waters in this vicinity, seeking and carrying on the business of transportation for hire of the goods of such persons as chose to employ it; and that in the absence of any special contract it would be held liable for all losses for which common carriers are not exempted at common law or by statute."

While the Lighterage Company held itself out to the public as a carrier for hire, it did not offer to carry for all who might apply and was not under an obligation to take the goods of the public generally without discrimination at reasonable and common rates. On the contrary, it is evident that it reserved the right to carry for whom it pleased at such rates as should be agreed upon. The law upon the matter is discussed and the differences between common and private carriers pointed out in the recent work of Moore on Carriers, pp. 10 to 23, inc. The principle was adopted by the Circuit Court of Appeals in this district in the case of *The Fri*, 154 Fed. 333, 83 C. C. A. 205, cited, and extracts quoted therefrom by the commissioner. The libellant cites some language from *Railroad Company v. Lockwood*, 17 Wall. 357, 376, 21 L. Ed. 627, which it deems favorable to its contention. But, even if so, it can have no effect here because the point in question was not under consideration by the court. Mr. Justice Bradley, in writing the opinion, said (page 359 of 17 Wall. [21 L. Ed. 627]):

"The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

It was decided in that leading case, that a common carrier cannot lawfully stipulate for exemption from responsibility for negligence. That a private carrier may do so is held in *The Fri*, supra.

The determination above also determines the libellant's second exception adversely to it.

The next exception is to the effect that even if the Lighterage Company was a private carrier and the agreement therein contained a provision against liability, such agreement does not constitute a defence to the libellant's claim against the Manhattan, because (a) the contract does not cover or relate to anything but the boats carrying the libellant's goods, and has no application to the liability of another boat engaged in towing the carrying vessels, even though chartered and controlled by the Lighterage Company, and (b) the contract does not in terms cover losses resulting from negligence, more particularly does not cover losses from the negligence of a towing boat.

The contract, containing the provision quoted above, seems to be a reply to the contention. There is nothing specifically mentioned about negligence, but when it is said that no underwriter, claiming through the Smelting Company, is to have any claim upon the Lighterage Company, or upon their equipment or such boats as it may "charter or control," it seems to be sufficient to prevent the underwriter here, though using the name of the Smelting Company, from enforcing the claim in question against the Manhattan, which was "towing" one of the Lighterage Company's boats, and in that sense may be considered as a part of the equipment or boats chartered and controlled by the company. The ninth paragraph of the contract provided:

"All rates mentioned shall include the hiring of all barges, necessary tools and equipment, and towing, * * *"

The fourth exception, with succeeding ones, claims that even if the agreement is valid and constitutes a defence to any suit by the libellant against the Manhattan, the libellant is nevertheless entitled to recover the whole of its damages from the Maine and that vessel is entitled to recover contribution thereto from the Manhattan.

The libellant contends that the admiralty moiety rule has no effect upon the rights of innocent cargo owners, citing *The Alabama* and *The Game-Cock*, 92 U. S. 695, 697, 23 L. Ed. 763, and *The Atlas*, 93 U. S. 302, 317, 23 L. Ed. 863. In the former, it was said:

"In short, the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties."

And in *The Atlas*, it was said:

"Contributory negligence on the part of the libellant cannot defeat a recovery in collision cases, if it appears that the other party might have prevented the disaster, and that he also did not practice due diligence, and was guilty of negligence, and failed to exercise proper skill and care in the management of his vessel. Proof of the kind will defeat a recovery at common law; but the rule in the admiralty is, that the loss in such a case must be apportioned between the offending vessels, as having been occasioned by the fault

of both; but the rule of the common law and of the admiralty is the same where the suit is promoted by an innocent party, except that the moiety rule may be applied in the admiralty, if all the parties are before the court, and each of the wrong-doers is able to respond for his share of the damage. Subject to that qualification, the remedy of the innocent party is substantially the same in the admiralty as in an action at law, the rule being, that in both he is entitled to an entire compensation from the wrongdoer for the injury suffered by the collision."

In *The Chattahoochee*, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, it was held that notwithstanding the exemptions given by the Harter Act, an innocent cargo-owner is entitled to recover his entire damages from the carrying and non-carrying vessel, and that the latter's right, set-off or recovery of contribution from the carrying vessel is not affected.

These, and other authorities, only leave the question here, was the libellant, in effect, a wrong-doer in the sense applied in those cases? It was not a wrong-doer but it had stipulated away its rights so far as the Manhattan was concerned, and cannot be deemed an innocent party.

The libellant cites and relies upon the greatly litigated cases arising out of the New York-Conemaugh collision in 1891, viz: *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *Ex parte Union Steamboat Company*, 178 U. S. 317, 20 Sup. Ct. 904, 44 L. Ed. 1084; *The Conemaugh*, 189 U. S. 363, 23 Sup. Ct. 504, 47 L. Ed. 854; *Erie R. R. Co. v. Erie Transportation Co.*, 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450. In the beginning of the opinion in the last named case, Mr. Justice Holmes described the litigation as follows:

"This is a libel in admiralty brought by the petitioner as successor in corporate identity to the Union Steamboat Company, to recover a part of a sum paid by it to the respondent as the result of previous admiralty proceedings which came before this court several times. The former proceedings were begun by the respondent, as owner of the propeller *Conemaugh* and bailee of her cargo, to recover for damages to both by a collision between her and the propeller *New York*. After hearings below (*The Conemaugh* [D. C.] 53 Fed. 553; *The New York*, 82 Fed. 819, 27 C. C. A. 154; *Id.*, 86 Fed. 814, 30 C. C. A. 628), it was decided by this court, on certiorari, that both vessels were in fault, and that the representatives of the cargo could recover their whole damages from the *New York*. *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126. Thereupon the District Court entered a decree dividing the damages sustained by the steamers, requiring the *New York* to pay to the *Conemaugh* on that account \$13,083.33 and interest, and further required it to pay all the damages to the cargo of the latter—the insurers on cargo who had intervened receiving their share, and the *Conemaugh* receiving the residue as trustee. The owners of the *New York* then applied to this court for a mandamus directing the District Court to divide the damages to cargo. This was denied on the ground that if the court below erred the remedy was by appeal. *Ex parte Union Steamboat Company*, 178 U. S. 317, 20 Sup. Ct. 904, 44 L. Ed. 1084. Upon that intimation an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit and after a motion to dismiss had been denied (*The New York*, 104 Fed. 561, 44 C. C. A. 38), the decree was affirmed, 108 Fed. 102, 47 C. C. A. 232. On a second certiorari that decree was affirmed by this court. *The Conemaugh*, 189 U. S. 363, 23 Sup. Ct. 504, 47 L. Ed. 857. The *New York* paid the damages and brought this suit."

A careful examination of these authorities fails to reveal any decision or intimation that a doctrine exists in admiralty which would prevent a full application of the equitable rule that a wrong-doer must,

if possible, bear the loss for which he is responsible but not that of another party. Admiralty has always sought to impose the liability for damages where it belonged. Of course at common law, any one of several joint tort-feasors can be held for all of the damages to which he was a party and this has been applied in admiralty where only one was sued. It was said by Mr. Justice Brown, in *The New York*, 175 U. S. 209, 210, 20 Sup. Ct. 67, 75, 44 L. Ed. 126:

"4. The final question arises upon the insistence of the underwriters of the *Conemaugh's* cargo, that they are entitled to a recovery to the full amount of their damages against the *New York*, notwithstanding the *Conemaugh* may also be in fault for the collision. They are correct in this contention. Indeed, this court has already so decided in the case of *The Atlas*, 93 U. S. 302, 315, 317, 23 L. Ed. 863. This was a libel against the *Atlas* by an insurer of the cargo of a canal boat in tow of the steamtug *Kate*, whereby the canal boat and her cargo were lost. It was insisted by the claimant that, as the libellant had failed to make the *Kate* a party, and as both vessels were found to be in fault for the collision, there could be a recovery of only a moiety of the damages. The case of *The Milan*, Lush. 388, was confidently relied upon as an authority. This court, however, was of opinion that a plaintiff, who has suffered a loss by the negligence of two parties, was at liberty, both at common law and in admiralty, to sue both wrong-doers or either one of them at his election, and 'it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately. * * * Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libellant, nor is it a question in this case whether the party served may have process to compel the other wrongdoers to appear and respond to the alleged wrongful act.' A like ruling was made in *The Juniata*, 93 U. S. 337, 23 L. Ed. 930, in which a libel was filed by the United States as owner of the cargo of a flat-boat in tow of one of two vessels."

That language does not apply here. If the *Maine* had alone been proceeded against, a full recovery could properly have been adjudged against her. In the beginning, she would have had the right under Rule 59, to bring in the *Manhattan* and require her in the end to contribute to the recovery. Such a course was not necessary here because both vessels were proceeded against and in holding both in fault, each was liable for her respective share. The libellant, as it appeared when the *Manhattan's* relations to the libellant were pressed, was not entitled to recover against her because it had disqualified itself, by a lawful stipulation from doing so. It was thus not the case of a joint tort-feasor, in the full sense of the word, but of a proceeding against two vessels, each of which contributed to the collision, but in which one of the vessels was exempted from liability by stipulation. This should not affect the other vessel, either to increase or diminish her responsibility, and the commissioner's determination is, therefore, correct.

All of the exceptions are overruled and the report confirmed.

THE GERRY.

(District Court, D. Maryland. March 17, 1908.)

1. COLLISION—STEAM VESSELS MEETING—OBSERVANCE OF RULES.

A vessel which undertakes in a narrow channel to pass on the starboard side of a meeting vessel, in violation of the rule, if she receives no assenting response to her signal, is bound to stop and reverse until the course of the other vessel has been ascertained, and she takes the risk of her signals not being heard and of her not having heard the signals of the other vessel.

2. SAME—COLLISION IN BREWERTON CHANNEL—VIOLATION OF RULES.

The steamship Barnstable and the tug Gerry met and came into collision at night in the Brewerton channel of the Patapsco river; the tug being sunk. The vessels approached each other head on, and the channel was 600 feet wide. The preponderance of evidence showed that, when from one-fourth to one-third of a mile apart the tug gave a signal of one whistle and ported her helm. Receiving a signal of two whistles from the steamship, she repeated her own signal and reversed. It was admitted by the steamship that she gave the two-whistle signal and starboarded her helm, but she claimed to have heard only the last signal from the tug. *Held*, that she was in fault, in any event, for violating the narrow-channel and head-on meeting rules for passing to the right without any sufficient excuse, and for not reversing when she did not receive an answer to her signal; and that the tug was not in fault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 187-192.]

In Admiralty. Suit for collision.

Foster & Foster, Robert H. Smith, Jacob France, William Colton, and Beverly W. & George T. Mister, for libelants.
George Whitelock, for respondent.

MORRIS, District Judge. This litigation grows out of a collision in the Brewerton channel of the Patapsco river, off Steelton, about 11 o'clock at night, on August 25, 1907, between the steamtug Gerry and the steamship Barnstable, as the result of which the steamtug Gerry was so injured that she sank immediately, and five persons of those on board of her were drowned. The Gerry was a seagoing steamtug of 133 tons net register, drawing about 12 feet, chartered by the Standard Dredging Company, and used in connection with the dredges engaged in the deepening of the channels of the Patapsco river. The collision happened on Sunday night while the tug was proceeding from Baltimore to the dredge Standard, which was lying in the cut-off channel near Seven Foot Knoll, and had on board her crew of fifteen men, nine dredge operators, two United States government inspectors, and some supplies for the dredge. The men employed on the dredge Standard had come up to Baltimore on Saturday and were returning to begin work again at midnight, Sunday, as was customary. The tug made a short stop at Ft. Carroll to enable Government Inspector King to get the exact state of the tide, and then proceeded.

The case stated in the libel for the steamtug Gerry, which was filed two days after the collision, is that the night was clear, with bright moonlight, smooth water, and a light breeze from the westward; that, after leaving Ft. Carroll, she was proceeding down Brewerton channel, when the pilot in charge discovered directly ahead the red and

green and masthead lights of an approaching steamer a considerable distance off, and, at the proper distance, the tug blew a passing signal of one blast, and the helm was ordered ported; that, after a distinct interval, the approaching steamship blew two blasts, upon hearing which the pilot of the tug immediately ordered her engine reversed full speed astern, and ordered the helm hard aport, and again blew a signal of one blast to indicate her intention of passing port to port; that the steamship continued to approach at a high rate of speed, and, disregarding the tug's whistle, again blew two blasts, all the time her bow swinging to port across the channel, shutting in her red light and showing only her green light to those on the tug; that, although the tug's headway had been stopped, the steamship crushed into the tug just forward of the pilot house, doing such damage that the tug sank immediately, and five of the persons who were on her were drowned; and that the place of collision was about the middle of the Brewerton channel, and there was ample depth of water, not only in the channel, but outside of it, in which the steamship could have safely passed the tug.

On behalf of the steamship *Barnstable*, the case stated in the pleadings is that the steamship was a fruit steamer of 745 tons net register, 230 feet in length, 32 feet beam and 17 feet draft, on a voyage from Jamaica to Baltimore with a cargo of fruit, and carrying several passengers; that the navigation of the steamship was in charge of a licensed Chesapeake Bay pilot, who, with the master and first officer, were on the bridge, with a competent quartermaster at the wheel; that the steamship was proceeding up the Brewerton channel, steering by the range lights N. W. by W. $\frac{3}{4}$ W., the proper course of the channel; that there was a dredging machine, called the "*Mascot*," anchored in the middle of the channel, and, when about one-eighth of a mile from the dredge, the steamship stopped her engines in order to slowly pass the dredge; that, shortly before giving the order to stop her engines, those on the steamship sighted a steamtug about a point off the starboard bow showing both her red and green lights; that the steamship immediately blew two whistles to indicate that she would direct her course to port and permit the tug to pass on her starboard side; that, owing to the channel being only about 600 feet wide and the position of the dredge *Mascot*, which by the lights she displayed required the steamship to pass her on the north side of the channel, it was not possible for the *Barnstable* to pass the tug port to port, and the wheel of the steamship was starboarded, and her head went off to port; that the tug did not reply to the two blasts, but, immediately after said two blasts, the tugboat changed her course so as to shut in her red light and show her green light, indicating that the tug was passing to starboard in accordance with the two signals of the steamship; that the two vessels kept their respective courses until within 200 feet of each other, when the tug blew one whistle and suddenly changed her course and showed a red light; that immediately those on the steamship ordered her engines full speed astern and blew danger whistles; and that the vessels were so close that almost immediately thereafter they came together, the stem of the steamship striking the tug on the port side and injuring her so that she sank soon afterwards.

The Brewerton channel is 600 feet wide, of the depth of 35 feet, and at the edges is not less than 17 feet in depth, gradually shoaling beyond.

From the case stated in the pleadings, it is obvious that the steamship has the burden of justifying her conduct by clear proof showing that it was not safe and practicable for her to obey the statutory rule (article 25), which requires that:

"In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the far way or mid-channel which lies on the starboard side of said vessel."

It is in narrow channels, such as the Brewerton channel, that there is most risk of collision, and obedience to this rule is essential to safety. Also, by article 18, rule 1, it is required that:

"When steam vessels are approaching each other head and head, end on or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give as a signal of intention one short and distinct blast of her whistle which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head either vessel shall immediately give two short blasts of her whistle which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other."

The foregoing only applies to cases "in which by night each vessel is in such position as to see both the side lights of the other."

"Rule 11. If, when steam vessels are approaching each other either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

Taking the statements in the steamship's pleadings to be exact, it appears that her pilot came to the conclusion that he could not safely keep to the north side of the channel, which was on his starboard side, for fear of touching the bottom, and that he gave two blasts, and, without getting an answer, steered across the channel intending to pass the tug starboard to starboard, instead of port to port. There is, however, direct conflict in the testimony as to the facts which were relied upon by the steamship to justify this course.

First, as to the signals. On behalf of the steamship, it is claimed that she blew the first signal, and that the tug did not blow any signal until the vessels were only 200 feet apart.

For the reason that the tug was carrying the men employed on the dredge Standard back to their work, there was on board her an unusual number of persons not engaged in her navigation, and who have been called as witnesses.

King, the United States inspector from the dredge Standard, testified that he heard the tug blow one long blast, and then heard two whistles from the steamship, and then another long blast from the tug, and then engine room signals to stop and reverse.

Simpson, blacksmith of the Standard, sitting on the pilot house steps of the tug, states that he saw the steamship right ahead, showing both side lights, and, when she was from one-fourth to one-third of a mile off, the tug blew one whistle and he heard the tug's pilot say to the

wheelman, "Port your helm"; that the steamship answered with two whistles, still showing both side lights; that, in about a minute, the tug again blew one whistle, and the tug's pilot ordered the helm hard aport and gave the engine room signals to reverse full speed astern.

Sutton, operator of the dredge Standard, who was standing at the engine room door on the tug, heard the tug blow one whistle, then the steamship blow two whistles, and then the tug blow one, and then heard the engine room signal to reverse.

Of those employed on the tug, Bergman, the wheelman, testified that, when the steamship was about 1,000 feet off, right ahead, showing both side lights, Capt. Boyd, the pilot, blew one whistle, and said, "Port your helm," which was done; that the steamship blew two whistles, and then the tug again blew one whistle, and the pilot gave him the order, hard aport, and rang signal to the engine room to reverse.

The tug's pilot, Capt. Boyd, was drowned. Murray, chief engineer of the tug, testified that he heard the tug blow one whistle, and then heard two from the steamship, and then he reversed the engines full speed astern.

Capt. McCoy, master of the tug, who was sitting on the port side, outside the pilot house, testified that he heard the tug blow one whistle, and then the steamship blow two whistles. Then he heard the engine room signals to reverse, and heard the tug again blow one whistle.

There was a dredge, called the "Mascot," anchored on the southernmost side of the channel, about abreast of which and about 200 feet off from which the collision took place, and an important witness was Nelson, a deck hand employed on that dredge, who was standing on its easternmost end, on the side next to the channel, where he could see both vessels as they approached. He testified that the tug blew one whistle, and then the steamship replied with two whistles, and then the tug again blew one whistle, and then the steamship blew short blasts, and that soon after the tug blew one whistle the second time he heard her engine signals to reverse.

On behalf of the steamship, on the question of the signals, the licensed pilot in charge, J. H. Hebb, testified that he blew two whistles when he was about a quarter of a mile from the tug, but he heard no answer from the tug for two or three minutes, and not until he was about 100 to 200 feet off; that he then reversed full speed astern and blew danger whistles; that the one blast he heard from the tug was almost at the same moment with the collision, not over one or two seconds between; and that he heard no other signal from the tug.

Burton Davison, first officer of the steamship, testified that he saw both side lights of the tug from one-fourth to one-half of a mile off, and blew two whistles, but heard no whistle from the tug until she was 100 to 150 feet off on his port bow, when she blew one whistle; that it was about three minutes between the steamship's signal of two whistles and the tug's one whistle.

The testimony of Hermanson, the quartermaster, is to the same effect as to the signals, and he also states that when the pilot blew two whistles he gave the order to starboard, and the wheel was put starboard, and he got no order to change up to just before the collision, when the order was hard astarboard. Bosse, the lookout on the

steamship, testified to the same effect as to the signals. Wilmer Davison, master of the steamship, testified to the same effect as to the signals.

It thus appears that all those from on board the tug who survived and were in a position to hear, and also the man on the dredge Mascot, testify that the tug blew a signal of one whistle when from a quarter to a third of a mile away, and those engaged in the navigation of the steamship testify that the first whistle was given just before the collision, and when she was only distant from 100 to 200 feet. To my mind, the testimony on behalf of the tug preponderates in probative force. It is also aided by the rule that the witnesses who testify as to what occurred on their own ship are to be preferred to those who contradict them from their observations made on the approaching vessel. It is also fortified by the fact that the course of the tug was in fact directed in accordance with the signals she claims to have given, and not in obedience to the signals claimed to have been given earlier on the steamship. The steamship, by her own showing, was violating the rules both in directing her course to port and in taking the south side of the channel before she had an agreement with the tug by an interchange of signals.

Moreover, I think it appears from the testimony that the pilot on the steamship was mistaken in several particulars with regard to the situation. He supposed the dredge Mascot, which he had to pass on her north side, was lying in the middle of the channel, and that there was only 200 feet between her and the northern edge; whereas, it is established, as I find, that the Mascot had been moved over, on Saturday night, to the southward, outside the third cut of the channel, and was 420 feet away from its northern edge, the total width of the channel being 600 feet. Although he saw both side lights of the tug, and, as her witnesses testify, those on the tug saw both side lights of the steamship, the pilot thought the tug was to the northward of the channel and intended passing the steamship by continuing outside of the channel on the north side and on her starboard. This was an erroneous assumption which the pilot endeavored to make good by blowing two whistles and forcing the tug to take that course. If the tug was as far to the northward of the channel as those on the steamship took her to be, they could not have seen both her side lights. That the pilot's intention was to force the tug to pass to starboard and on the north side of the channel is made evident by his having, when he was one-fourth of a mile from the tug, given the order to his quartermaster to starboard the wheel and pass the Mascot as close as possible.

The witnesses from the steamship testify that, after they blew the two-whistle signal, they observed that the lights of the tug changed, and she shut in her red light and showed only her green, from which they concluded that she assented to their signal and was shaping her course to the northward under a starboard helm. But in the face of the convincing testimony that the tug did not so change her course, I think it must have been that the change of course of the steamship under a starboard helm brought her where she could only see the tug's green light until the hard aport helm of the tug brought her red light into view again.

As to the probabilities as to which of the two pilots was most likely to fail of giving attention to the other vessel, we have, on the one hand, the pilot of the tug accustomed daily to use the channel and very familiar with the location of the dredge, engaged in navigating a vessel of moderate draft, with nothing to divert his attention; on the other hand, we have the pilot of the steamship devoting his attention to getting the steamship past the dredge in what he took to be a narrow space of 200 feet.

The absence of the tug's pilot is, of course, the absence of an important witness; but as the steamship by the violation of a rule brought about the risk of collision, the fact that as a result of the collision the tug's pilot was drowned overcomes any presumption that might be drawn from his absence.

I find that the steamship was in fault. She had no right, under the circumstances, to assume, until she got an assenting answer to her two blast signals, that the tug was going to proceed contrary to the rule and pass her starboard to starboard and on the wrong side of the channel.

I had occasion to speak of the strict adherence to the rules of navigation required of vessels passing each other in the channels of the Patapsco river in the case of *The Acilia* and *The Crathorne*, reported in 108 Fed. 975 (affirmed 120 Fed. 455, 56 C. C. A. 605), and to cite the authorities. Among other cases of collisions in the same channels caused by want of adherence to the same rules may be mentioned: *The Frostburg* (D. C.) 25 Fed. 451, *The Virginia* and *The Louise* (D. C.) 49 Fed. 84, and the same case on appeal, 52 Fed. 885, 3 C. C. A. 330.

It is next to be considered whether the tug is shown to have committed any fault or disregarded any rule which contributed to the disaster.

The testimony on her behalf establishes that the steamship's signal of two blasts was not heard until quite an interval after the tug's signal of one blast, and that the tug at once repeated her one blast and immediately reversed her engines full speed astern, and was at a standstill when the collision occurred. On board the steamship, when they heard the tug's second signal of one blast (which was the first they heard), the pilot of the steamship at once ordered her engines full speed astern, but the vessels were then only from 100 to 200 feet apart, and it was too late. The tug had a right to be cautious in coming to the conclusion that the steamship intended to violate the rule and take the wrong side of the channel. Up to the time when they received the two-blast signal, they had a right to suppose the steamship meant to obey the rule. When they received notice by the two blasts that she did not intend to obey the rule, they immediately reversed full speed astern. This she was bound to do, and it was all she could do. *The New York*, 175 U. S. 187-201, 20 Sup. Ct. 67, 44 L. Ed. 126.

The vessel which undertakes to proceed contrary to the rule, without an assenting signal from the approaching vessel, takes the risk of her signals not being heard and of her not having heard the signals of the other vessel. Not having heard the first signal of two blasts

which those on the steamship claim to have given, those on the tug had reason to suppose that at least as soon as the steamship was clear of the dredge Mascot she would go to the starboard, and that the pilot of the steamship had concluded that with her speed she could do it, knowing, as the pilot of the tug did from his familiarity with the location of the dredge, that there was plenty of room for the steamship to pass in the channel to the northward of the dredge.

The learned opinion of the Chief Justice in the leading case of *The Victory and The Plymothian*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, settles many points which can be well applied to the present case. The rule is also sanctioned that, where one vessel has caused a collision by disregarding a statutory rule which the other vessel had a right to rely upon being obeyed, the proof of fault on the part of that other vessel should be clear and convincing to justify the court in holding her also in fault, and doubts about her management should be resolved in her favor.

The attempt of the steamship to take the wrong side of channel is sought to be justified by the risk she would have run of touching bottom if she had not directed her course as close as she could to the dredge. But the real distance was 420 feet between the dredge and the northern side of the channel, which was ample for both the steamship and the tug to have passed in safety, and, if the pilot of the steamship did not think so, he could have stopped the steamship before she was abreast of the dredge until the tug had passed, or until he had an assenting signal from the tug showing that she understood that the steamship purposed to pass starboard to starboard, and the tug assented to it. It is well settled that when a vessel which has signaled by two blasts that she intends passing to starboard, instead of to port, and gets no assenting response, it is her duty to stop, reverse, and, if necessary, come to a standstill, until the course of the other vessel has been ascertained with certainty and the risk of collision removed. *The New York*, 175 U. S. 189-201, 20 Sup. Ct. 67, 44 L. Ed. 126.

I do not find any sufficiently clear proof of any fault committed by the tug.

ST. LOUIS & S. F. R. CO. v. HADLEY, Atty. Gen., et al. (18 cases).

(Circuit Court, W. D. Missouri. March 31, 1908.)

Nos. 2988-3004.

1. STATUTES—RETROACTIVE EFFECT—REPEALING ACT—PENDING ACTIONS—SAVING CLAUSE.

The repeal of a statute fixing railroad rates by a new statute, which enacts substituted rates, and provides that penalties incurred for violation of the repealed law may still be enforced, does not abate pending suits to enjoin the enforcement of the old statute, and supplemental bills may be filed therein to enjoin the enforcement of the new rates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 374.]

2. INJUNCTION—SUIT TO ENJOIN ENFORCEMENT OF STATUTE REGULATING RATES—PARTIES.

Under the Constitution and statutes of Missouri relating to the Attorney General, and especially Laws 1907, p. 13, c. 1, § 61, which appropri-

ates \$20,000 per year to be drawn by the Attorney General and expended under his direction "in the prosecution or defense of suits heretofore brought or that may hereafter be brought by or against any railroad company wherein the validity of any act of the General Assembly may be involved," the Attorney General is charged with the duty of defending the validity of the state statutes regulating railroad rates, and both he and the members of the State Board of Railroad Commissioners are proper parties defendant to a suit to enjoin the enforcement of such statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 202-220.]

3. COURTS—JURISDICTION OF FEDERAL COURTS—SUITS AGAINST STATE.

A suit against the Attorney General and Board of Railroad Commissioners of a state to enjoin them from enforcing state statutes regulating railroad rates, on the ground that they are confiscatory and unconstitutional, is not one against the state of which a federal court is denied jurisdiction by the eleventh constitutional amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 844½; vol. 44, States, §§ 191, 192.

Federal jurisdiction of suits against state, see note to 13 C. C. A. 165.]

See 155 Fed. 220.

Frank Hagerman and others, for complainants.

Herbert S. Hadley, Atty. Gen., John Kennish, Asst. Atty. Gen., F. W. Lehmann, and S. B. Ladd, for defendants.

SMITH McPHERSON, District Judge. Here are 18 cases, brought by as many railway companies of the state, against the Attorney General, Railroad Commissioners of the state, county judges, county treasurer, and shippers. The purpose of the bill in each case is to enjoin the enforcement of state railway rate statutes, on the ground that the rates thus fixed by legislative enactment are not remunerative, but are confiscatory. The original bill of complaint in each case was filed in 1905 assailing an act approved April 15, 1905 (Laws 1905, p. 102 [Ann. St. 1906, p. 1005]), fixing rates. In June of that year temporary injunctions were issued. In December of that year answers were filed, and on defendant's motion the cases were referred to a special master, before whom the cases are still pending. That statute was enacted in lieu of certain sections of the Revised Statutes of the state. In 1907 the Legislature enacted a statute which was approved March 19, 1907. This statute, after referring to the one of 1905, declared that the same "be and hereby are repealed, and the following to be known as sections 1194, 1194-a-1, 1194 b-1, and 1194 c-1 of said Revised Statutes, are enacted in lieu thereof." Then follow four sections designated as above. By still another statute passenger fares were fixed at two cents per mile, heretofore three cents per mile. In June, 1907, each company filed another bill, concerning which, see the opinion by this court in this case in 155 Fed. 220. Since that time the cases have been pending before the master, the delay occasioned in part at least by an awaiting of a decision of the Supreme Court in what are known as the Minnesota and North Carolina cases. This court declined to grant a temporary injunction as to the passenger rates, but granted such writ as to the freight rates. Both statutes of 1907

provide for penalties for a violation of the enactment, and expressly recite that any liability or penalty incurred under the statute of 1905 may still be enforced. It is now claimed that the original cases are at an end because the statute of 1905 has been repealed. The court cannot so hold. As has been noticed, for the statute when repealed there was a substitute enacted. One rate was cut and another fixed, with the penalties under the prior statute remaining. This does not overthrow the original cases. They are rightfully pending with part of the subject-matter still in existence, and a new alleged grievance in place of the old. This new grievance, if one, should be brought forward by a supplemental bill; that being the office of such a bill.

Two shippers on each road are made defendants. That it is proper to make them parties cannot be in doubt, as they have a direct interest. Whether a decree herein will be binding on other shippers is a question not now for decision. And that the county judges and prosecutors have to do with these laws is plain. But these matters are exceedingly technical. The real question as to parties is as to making the Railroad Commissioners and Attorney General parties defendant. As to the right to make the Attorney General and the commissioners parties defendant is a question that has been argued for and against with much earnestness and by the citation of many authorities. At common law the office of Attorney General was the highest law office of the crown. He represented the crown in all legal matters, and was the responsible officer as to the legal duties and prerogatives, appearing in the courts of record and the House of Lords in all matters affecting the public, to the end that justice might be done in the name of the King. The duties of that office are not less in this country, and the specific mention of many things that he must do in behalf of the public and the state are not to be regarded as exclusive in the full performance of his duties. The Constitution and statutes of Missouri make special mention of many things that he is required to do. He is upon a salary, and cannot receive fees. He is a member of the State Board of Equalization and of Education, as well as other boards. He prosecutes suits on official bonds. He prosecutes railroads for refusing to grant proper rates to shippers. He must appear before the Interstate Commerce Commission when residents of the state are being wronged. He asks for, and receives, the aid of additional counsel. He sees to the enforcement of the banking laws, and proceeds against express companies and railroad companies, and looks after forfeitures. These and a great many other things he is specifically required to do. And the importance and dignity of his office are such that in most instances he is relieved from making oath to papers that he is permitted or required to file. And then, out of apprehension, because certain things are specifically mentioned, that the conclusion would be arrived at by construction that all other matters were excluded, section 4943 of the Revised Statutes was adopted (Rev. St. 1899 [Ann. St. 1906, p. 2635]) requiring that officer to institute and prosecute all suits and other proceedings at law and in equity requisite or necessary to protect the rights and

interests of the state and to enforce any and all rights, interests, or claims of the state against any and all persons and corporations. It would seem that from the foregoing there could be no doubt but that it is the duty of the Attorney General to enforce the statutes in question presented by these cases, if valid, not only by virtue of the duties pertaining to that office by common law, but as well by the statutes just alluded to.

But there is a further statute which counsel on both sides have overlooked. Chapter 1, p. 13, Laws 1907, by section 61 thereof eliminates all doubt by appropriating \$20,000 per year to be drawn by the Attorney General from time to time, "which said sum shall be expended under the direction of the Attorney General in the prosecution or defense of suits heretofore brought, or that may hereafter be brought by or against any railroad company, wherein the validity of any act of the General Assembly may become involved or contested." It will be noticed that this appropriation of this large sum of money is made, not only to the end that the Attorney General may seek to maintain the validity of any statute brought in question by any case hereafter brought, but likewise covers cases heretofore brought. And in the light of that section appropriating \$40,000 for the biennial period of two years, to be drawn by the Attorney General and expended under his direction, leaves no room for argument that it is the duty of the Attorney General to enforce all statutes enacted by the General Assembly, and see to it to the best of his ability that no court by decree or judgment holds the state enactments void. Without scheduling the different statutes, the duties of the commissioners are likewise plain. They are vested with authority to fix rates, and, should the statutes in question be overthrown as being void, they will at once fix some other rate in their judgment valid. The question as to making the commissioners parties defendant has been put at rest by the case of *Railroad v. Hickman*, 183 U. S. 53, 22 Sup. Ct. 18, 46 L. Ed. 78.

Again, as when the cases were brought and first argued, it is urged that the state in effect is being sued in violation of the eleventh amendment, and the question has again been argued with force, logic, and eloquence. That a determined effort has been made by the use of words, phrasing, and forms within the past two years, regardless of substance, effect and meaning by the states to deprive the United States courts of jurisdiction vested by the Constitution and laws enacted by Congress is known by all. The argument is to the effect that all litigation of and concerning the fairness, and validity as well, of state statutes, shall be in the courts of the state whose legislation is assailed, leaving the right and the only right of carrying questions of law to the United States Supreme Court by writ of error, but likewise insisting that in cases as to the reasonableness of rates, dependent wholly upon facts, that a writ of error shall be unavailing, and that the state courts of the state whose state legislation is assailed shall alone and finally decide the case. And that this will be so in a chancery case as well as in an action at law by the only remedy by writ of error to a state Supreme Court, when the case depends upon questions of fact, has been held by the

Supreme Court in *Egan v. Hart*, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680. There are others who believe that all matters both of fact and law arising under the Constitution of the United States should in the end be decided by the only court created for that purpose. So it is that a sharp conflict is presented. Almost from the beginning of our government this question at short recurrent periods has arisen, but generally concluded by the Supreme Court holding that this is a national government with a national judiciary, and that the national Constitution is and shall forever remain the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. When our government was organized, every one of the 13 states was in debt, and some of them well-nigh hopelessly so. In and out of both the national and state conventions the arguments were for and against whether a state could be sued in a national court. Hamilton and Marshall and Madison said it could not be done. Patrick Henry with his numerous doubts and opposition was filled with fear. Others, like James Wilson and Edmund Randolph, said the state would and ought to be suable by a citizen of another state for wrongs done. Near the end of Washington's first term, the famous suit of *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, was decided; the holding being that *Chisholm*, a citizen of South Carolina, could recover judgment for money that the state of Georgia justly owed him. It is said that within two days from that decision a resolution was offered in the Senate to amend the Constitution to prevent such suits by declaring that the judicial power shall not extend to any suit against a state by a citizen of another state. But that failed because it was urged that, notwithstanding the decision in the *Chisholm* Case, such jurisdiction had never extended nor existed. Thereupon new phrasing was adopted, and a new resolution was offered, reciting that "the judicial power of the United States shall not be construed to extend to," etc., shortly ripening into the eleventh amendment. The only purpose of that amendment was to prevent a state from being sued by its creditors, and history furnishes the proofs conclusive of the correctness of the statement. Those who are doubtful of this need only read what Chief Justice Marshall said in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257. At common law from time immemorial a public officer was not allowed to justify under a void law or void order, but was compelled to make restitution of the property taken or to pay damages therefor. And such has been the uniform holdings in this country, and for the reasons that a void statute or void order is utterly without effect, and is wholly unavailing as a defense. Such has been and is the law of England, and such has been and is the law of this country. And why such should not be the law on the equity side of the docket by preventative remedies against threatened wrongs is difficult to conceive.

But the Supreme Court has held in the cases of *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216, and *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, that in cases where-in the state as a state is affected that a suit against the officers is in effect one against the state, in contravention of the eleventh amend-

ment. It is to be noted that both the cases above referred to would have been decided as they were decided, if taken to the Supreme Court by writ of error to a state Supreme Court, or by appeal from a Circuit Court, if the eleventh amendment had never been adopted. This is so because in the Ayres Case a full, adequate, and complete remedy at law existed, and in the case of *Fitts v. McGhee* the sole purpose was to enjoin criminal proceedings. But it is now too late to object to the jurisdiction of a Circuit Court to enjoin the enforcement of a rate statute alleged to be void because confiscatory, although concededly the holdings now are that the test is not whether the state is a party to the record by name, but is the state in effect a party? But in the case at bar the state as a state has no interest. And the state as a state is not attempting to confiscate property. It is the government of the state, first by its Legislature, and then by its officers, who, according to the allegations of the railways, are attempting to confiscate property. Whether such acts will amount to confiscation if carried out relate to the case on its merits. But the point to the whole matter is that the state is not seeking to act, and no effort is made to enjoin the state, either by name or in effect. And this distinction is not metaphysical, but is a substantial distinction, clearly and unmistakably pointed out by Justice Matthews in *Poindexter v. Greenhow*, 114 U. S. 270, 290, 5 Sup. Ct. 903, 914, 29 L. Ed. 185, wherein he said:

"In the discussion of such questions, the distinction between the government of a state and the state itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of the delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative, but outside of that it is a lawless usurpation. The Constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a state, as was said in *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010, that the maxim, 'that the King can do no wrong,' has no place in our system of government, yet it is also true, in respect to the state itself, that whatever wrong is attempted in its name is imputable to its government, and not to the state, for it can speak and act only by law—whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the state, but it is the mere wrong or trespass of these individual persons who falsely speak and act in its name."

So that it follows that the state of Missouri is not a party either by name or in effect. And this court has jurisdiction both of the subject-matter and of the parties, to inquire into the questions in the case, and on a final hearing decree whether the rates fixed by statutes are remunerative or confiscatory. On what basis the master shall report is not clear. Every person, whether a passenger or shipper, is entitled to have efficient service at reasonable rates, which the company must give for such compensation. Whether such charges for every person can be fixed by a decree is doubtful, and, in any

event, will be attended with much difficulty. But, if all earnings in the state for state business are to be taken in the aggregate, less expenses, the question is attended with difficulties, because of the matter of expense; it being difficult to apportion the expenses between the state and interstate business. If the parties cannot agree, the master should be directed by a supplemental order. These cases should be brought to a final decree, and that decree such as can be carried to the Supreme Court for final determination, and not for a reversal because of an error of the master or the court in determining the expenses. What would be still more to the point would be for the master to determine the expenses from the standpoint of both the railway company and the Attorney General. And there is no valid reason why the cases should not be brought to a conclusion within the next 90 days. And, if this is not done, the delay will not be chargeable to the court.

This memorandum opinion was written many weeks since, but withheld by request, awaiting the decisions of the Supreme Court in the Minnesota and North Carolina cases. Those cases were decided on the 23d instant adversely to the state officers. And it is deemed unnecessary to await the opinion, which this court has not yet seen.

UNITED STATES v. HEINZE.

(Circuit Court, S. D. New York. March 2, 1908.)

1. BANKS AND BANKING—NATIONAL BANKS—OFFENSE—STATUTES—CONSTRUCTION.

Rev. St. § 5208 (U. S. Comp. St. 1901, p. 3497), declares that it shall be unlawful for any officer, agent, or clerk of any national bank to certify any check when the drawer has not on deposit with the bank an amount of money equal to the amount specified in the check; and Act Cong. July 12, 1882, c. 290, § 13, 22 Stat. 166 (U. S. Comp. St. 1901, p. 3497) declares that any officer, clerk, or agent of a national bank who shall certify checks before the amount thereof shall have been regularly entered to the credit of the drawer on the books of the bank shall be guilty of a misdemeanor. *Held*, that section 5208 does not create any criminal offense, but that such section should be read with section 13, and that the two create one offense, viz., the certification of a check when the drawer has not sufficient money to cover it, or before the amount shall have been regularly entered.

2. INDICTMENT—DIFFERENT OFFENSES—JOINDER.

Where a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable as separate and distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one action as constituting one offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 403.]

3. CRIMINAL LAW—EVIDENCE—JUDICIAL NOTICE—MEANING OF WORDS.

Courts are bound to take judicial notice of the meaning of the word "certify" as applied to bank checks.

4. BANKS AND BANKING—DEPOSITS—CHECKS—"CERTIFY."

The word "certify," as applied to bank checks, indicates that certain words have been written or printed on a check, and that the check has

passed from the custody of the bank into the hands of some other party, and that thereby the person certifying created an obligation of the bank.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1033, 1034.]

5. SAME—NATIONAL BANKS—CERTIFICATION OF CHECKS—OFFENSES—INDICTMENT.

An indictment against an officer of a national bank, alleging unlawful certification of checks, was not fatally defective for failure to set out totidem verbis the written certifications, under the rule that in an indictment in federal courts it is not necessary to allege the tenor of an instrument, unless it touches the gist of the crime.

6. INDICTMENT—ALLEGATION OF WRITTEN INSTRUMENTS.

The rule which requires a setting out of an entire instrument or its tenor in an indictment in the federal courts is limited mainly, if not wholly, to cases of forgery, counterfeiting, and sending threatening letters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 283.]

7. BANKS AND BANKING—NATIONAL BANKS—OFFENSES—CERTIFICATION OF CHECKS.

Where an indictment against a national bank officer charged him personally with illegally certifying certain checks, it was necessary for the government, in order to sustain such charge, to prove that the individuals who actually executed the certification indorsement were but the physical instruments of the defendant and acted in accordance with his orders.

8. SAME—"WILLFUL MISAPPLICATION."

In a prosecution of a national bank officer for "willful misapplication" of the moneys, funds, and credits of the bank, the indictment properly alleged facts showing how the misapplication was made and the illegality thereof; the words "willful misapplication" having no settled technical meaning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 973.

For other definitions, see Words and Phrases, vol. 8, pp. 7482, 7483.]

9. SAME—OVERDRAFTS.

An overdraft on a national bank may be legal or criminal, according to the intent of the person committing it, inferred from the surrounding circumstances shown by the evidence.

10. SAME—INDICTMENT—DEMURRER.

It was no ground of objection, on demurrer to an indictment against a national bank officer for willful misapplication of the bank's funds, that the jury might draw from all the testimony the inference that the transaction amounted to no more than a legal overdraft.

11. SAME—WILLFUL MISAPPLICATION—DESCRIPTION.

Where, in a prosecution against a national bank officer for willful misapplication of the moneys, funds, and credits of the bank, the indictment definitely charged the value in lawful money of the United States of the misapplied property, it was not defective for failure to specify the exact thing misapplied, whether moneys, funds, or credits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 973.]

On Demurrer to Indictment under Rev. St. § 5208, Act July 12, 1882, c. 290, § 13, 22 Stat. 166 (U. S. Comp. St. 1901, p. 3497), and section 5209 (U. S. Comp. St. 1901, p. 3497), and on Motion to Quash.

Wm. J. Wallace, Edward Lauterbach, and John C. Tomlinson, for demurrer:

Henry L. Stimson, U. S. Atty., opposed.

HOUGH, District Judge. 1. The first 15 counts, are said to be bad for duplicity, in that they state two distinct offenses, each requiring different proof to establish it, viz.: (1) An offense under section 5208 (U. S. Comp. St. 1901, p. 3497); i. e., the certification of a check when the drawer has not on deposit with the bank "an amount of money equal to the amount specified in such check." (2) An offense under Act July 12, 1882, c. 290, § 13, 22 Stat. 166 (U. S. Comp. St. 1901, p. 3497); i. e., the certification of a check "before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association."

Section 5208 does not create any criminal offense. That section and the act of 1882 must be read together, and when so read they denounce but one crime, and not two crimes. The one crime that is denounced is certifying a check under either (a) two sets of circumstances, or (b) one set of circumstances described in two ways. Regarding the descriptive words used in section 5208 and those used in the act of 1882 as setting forth different acts:

"It is well settled that in a criminal pleading, where a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable as separate and distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense." U. S. v. Delaware, L. & W. R. (C. C.) 152 Fed. 269, 273.

But, whether these two sets of descriptive words be regarded as conveying different meanings or not, the exact point raised by this demurrer was before the court in U. S. v. Potter (C. C.) 56 Fed. 83. It was there urged (page 85) that certifying checks before sufficient money is on deposit is one offense, and certifying checks before the amount is entered upon the books of the bank is another, and that therefore some counts, which set out circumstances covering both offenses, were bad for duplicity; and this point was explicitly overruled by Putnam, J. (page 92).

2. It is also urged, under the motion to quash, that the first 15 counts are bad, in that they do not set out totidem verbis the written certifications which an examination of the last 16 counts shows to have existed upon the checks referred to in all the counts. The word "certify," as applied to bank checks and as used in the statutes under consideration, has become a term of art, and the court is bound to take judicial notice of its meaning. When it is alleged that one "certified" a check, that word implies that certain words have been written or printed upon said check, and that the check passed from the custody of the bank into the hands of some other party, and that thereby the person certifying created an obligation of the bank. Potter v. U. S., 155 U. S. 444, 15 Sup. Ct. 144, 39 L. Ed. 214.

This indictment alleges a certification. If under it there be not proven such actions or course of business as are necessarily and legally implied from the word "certify" or "certification," then there is a variance between the count and the proof. It does appear to have frequently occurred in indictments for the same offense, as is alleged by this instrument, that the exact words of certification were set out;

but no case is cited showing that this course is necessary, and it appears to me that the ruling of the Supreme Court in the Potter Case as to the meaning of the word "certification" renders the exact letters and figures declaring the certification matters of proof, rather than pleading. This is consonant with the general rule that:

"The rule which requires a setting out of the entire instrument or its tenor is not applicable, unless it touches the very pith of the crime itself, as in forging or counterfeiting." *U. S. v. Grunberg* (C. C.) 131 Fed. 137.

And, further:

"The rule which requires a setting out of the entire instrument or its tenor seems limited mainly, if not wholly, to cases of forging, counterfeiting money, and threatening letters." *U. S. v. French* (C. C.) 57 Fed. 382.

3. Under the motion to quash it is suggested that, inasmuch as from the whole indictment it appears that in no case did this defendant certify in the sense of personally signing the certification stamped on the checks in question, therefore he personally cannot be indictable under section 5208 as amended, and for this proposition Judge Putnam's remarks in *U. S. v. Potter*, *supra*, are cited as authority. I think that case is authority for no more than the holding that, where a count charged one with aiding and abetting another in making an unlawful certification, such count was not authorized by the statute.

Such is not the case here. The count distinctly charges this defendant with himself certifying the checks. The whole indictment, taken together, shows that the first 15 counts must fail unless the prosecution can prove that the individuals who actually executed the certification indorsed were but the physical instruments of this defendant in doing what was done, and that an indictment will lie for causing or procuring a coerced subordinate to do the forbidden act is distinctly held by Putnam, J., in the case last cited. Whether the ruling made in that case does not infringe the general rule that there are no accessories to a misdemeanor may be doubted; but a discussion of that point is not necessary here.

4. As to the last 16 counts, it is asserted that they are bad for indefiniteness and uncertainty. They certainly set forth in language plain and easily understood exactly with what the defendant is chargeable. The gist of the offense is in the language of the statute that he "willfully misapplied" the "moneys, funds, and credits" of the Mercantile National Bank. The draftsman of the indictment evidently recognized that the expression "willful misapplication" has not a settled technical meaning, and must therefore be supplemented by further averments showing how the misapplication was made and the illegality thereof. *Batchelor v. U. S.*, 156 U. S. 429, 15 Sup. Ct. 446, 39 L. Ed. 478. In my judgment the supplementary averments are plain, when measured by the criticism of Judge Thayer in *Rieger v. U. S.*, 107 Fed. 919, 47 C. C. A. 61 et seq.; and the illegality of the transaction, if proven as averred, is also clear, within *U. S. v. Fish* (C. C.) 24 Fed. 585.

5. It is urged that, if all that the last 16 counts set forth be proven, the proceeding amounts to no more than an overdraft. An overdraft may be legal, or it may be criminal, according to the intent of the

person committing it, as inferable from the surrounding circumstances shown in proof. That the jury may not draw from all the testimony the inference necessary to sustain the indictment is no ground of objection on demurrer.

6. It is argued that the last 16 counts do not show what was misapplied—i. e., whether moneys, funds, or credits—and that it is incumbent upon the government to specify the exact thing misapplied. The value in lawful money of the United States of the misapplied property is definitely and fully set forth, and it seems to me entirely clear that this is sufficient. To the refinement attempted in *U. S. v. Smith* (D. C.) 152 Fed. 544, I cannot give assent, and it is opposed to the reasoning in *Dow v. U. S.*, 82 Fed. 904, 27 C. C. A. 140.

The demurrers are overruled, and the motion to quash denied.

UNITED STATES v. MORSE et al.

(Circuit Court, S. D. New York. April 29, 1908.)

1. BANKS AND BANKING—NATIONAL BANKS—MISAPPLICATION OF FUNDS—INDICTMENT.

An indictment alleging that defendants, being officers of a national banking association, willfully and fraudulently, and with intent to injure and defraud the association for the use and advantage of M., misapplied certain money of the association, to wit, \$126,000, and that M. made a certain check on the bank payable to H. for \$126,000, and delivered the same to him, defendant M. knowing at the time that he did not then have on deposit with the bank the amount specified therein, but that M. as vice president and C. as president caused the check to be paid from moneys of the association, with intention on the part of M. to convert the amount to his own use, repayment not having in any way been secured and M. having no right or title thereto, stated an offense under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), declaring that every president, director, cashier, etc., of any national banking association, who willfully misapplies any of the moneys, funds, or credits of the association, shall be guilty of a misdemeanor, and was not fatally defective for failure to charge that the overdraft payment was unauthorized, that it was an actual conversion of the amount paid, or that the money was in some way absolutely lost to the bank.

2. SAME—CRIMINAL MISAPPLICATION.

In order that there shall be a criminal misapplication of the moneys, funds, or credits of a national banking association by its officers, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), making such misapplication a crime, there must be a conversion of the moneys, funds, or credits of the association by the accused, either for his own use or that of some person other than the injured bank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 964.]

3. SAME—WILLFUL MISAPPLICATION.

In a prosecution against bank officers for misapplication of the bank's funds, an indictment alleging that defendants, being officers of the bank, willfully and fraudulently, with intention to defraud the association, did misapply certain moneys of the bank, etc., constituted a sufficient allegation of a criminal intent to defraud, which was the gravamen of the offense to be inferred from facts and surrounding circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 973.]

4. SAME—BANK OFFICERS—AUTHORITY—CONVERSION OF FUNDS.

Officers of a national bank possess no authority to produce or permit a conversion of the bank's funds to the use of one of such officers; authority to commit a crime being an impossibility.

5. SAME—CONVERSION—SUBSEQUENT RETURN OF MONEY.

Where one of the officers of a national bank willfully converted certain of the bank's funds to his own use, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), making such act a crime, it was no defense that the money was subsequently refunded; such fact being only evidence to negative the officers' intent to defraud at the time of the alleged conveyance.

6. CONSPIRACY—NATIONAL BANKS—CONDITION—FALSE STATEMENTS.

An indictment alleging the conspiracy to defraud the United States in the exercise of its governmental and fiscal functions, by deliberately giving false information regarding the financial condition of a national bank, the fraud resulting in lessening the power of the federal government by failure to maintain in efficient condition one portion of the national fiscal system, stated an offense against the United States; it being possible to have a conspiracy to defraud by merely deceiving a governmental officer, though neither the government nor the officer was deprived thereby of money or money value.

7. BANKS AND BANKING—NATIONAL BANK OFFICERS—OFFENSES—FALSE ENTRIES.

Where an indictment against bank officers alleged a conspiracy to make false entries in the books of the bank, one of which was charged to consist in entering in "call loans account" a "fictitious" promissory note as though it were a bona fide note affected by certain stock as collateral, whereas in truth the bank unlawfully owned the stock and the note was created and entered as a genuine note merely to conceal the illegality of the original purchase of the stock and the continued holding thereof, was not defective, in that the entry was a true entry of a fraudulent transaction only.

8. SAME—STATUTES—CONSTRUCTION—"ENTRY."

The word "entry," as used in Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), declaring that every officer, clerk, or agent of a national banking association who makes any false entries in any of the bank's books with intent to injure or defraud the association shall be guilty of a misdemeanor, means "an item in an account."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2400-2401.]

9. WORDS AND PHRASES—"DOUBLE ENTRY."

The phrase "double entry," as used in bookkeeping, signifies two entries of the same transaction.

10. INDICTMENT AND INFORMATION—DUPLICITY.

Where counts in an indictment against national bank officers in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), in alleging the transaction claimed to have been falsely entered, described two different entries or sets of words written down in different parts of the same book or report, each count revealing a false record by double entry, such counts were double, as it does not follow that, because the debit entry of a transaction is false, the credit entry of the same transaction was also false.

11. BANKS AND BANKING—NATIONAL BANKS—REDUCTION OF CAPITAL—PURCHASE OF BANK'S SHARES.

The only method by which a national bank can reduce its stock being that prescribed in Rev. St. § 5143 (U. S. Comp. St. 1901, p. 3463), and the possibility of ownership of its own stock being recognized by section 5201 (page 3494), the unlawful ownership of its own shares by a national bank did not constitute a pro tanto reduction of its corporate stock, and hence was improperly omitted from the bank's statements of assets.

Henry L. Stimson, U. S. Atty.
Wallace MacFarlane, for defendant Morse.
William M. K. Olcott, for defendant Curtis.

HOUGH, District Judge. The 29 counts of this indictment may be conveniently divided into: (1) Misapplication counts (21-29, inclusive), charging defendants with willful misapplications of the funds of the National Bank of North America, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497). (2) Count No. 1, charging a conspiracy to defraud the United States in respect of its sovereignty or power. (3) Counts 2 to 11, inclusive, charging conspiracies under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), to make false entries in books and reports in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497). (4) False entry counts (12-20, inclusive), charging substantive violations of Rev. St. § 5209, by making false entries in bank reports made to the Comptroller of the Currency.

1. The Misapplication Counts.

The important words (so far as these counts are concerned) of section 5209 are as follows:

"Every president, director * * * or agent of any association who * * * willfully misapplies any of the moneys, funds or credits of the association * * * with intent * * * to injure or defraud the association * * * or any individual person, * * * and every person who with like intent aids or abets any officer * * * in any violation of this section shall be deemed guilty of a misdemeanor."

All these counts are alike in their method of stating the alleged offense. Each in the same form of words alleges the willful misapplication of a specific sum of money in substantially the same way. Reduced to its simplest form, by omitting formal words and many epithets and adjectives common in all pleadings, the material parts of the twenty-first count are as follows:

Morse and Curtis, being officers of the banking association, willfully and fraudulently and with intent to injure and defraud the association for the use, benefit, and advantage of Morse, did misapply certain moneys of the association, viz., \$126,000.

This is the charging part, and follows substantially the language of the statute. Then is declared the manner and means by which the alleged violation occurred. And, again omitting repetitions, legal verbiage, and condemnatory adjectives, the story is as follows:

Morse made a certain check on the Bank of North America, payable to the order of Augustus Heinze, for \$126,000, and delivered the same to Heinze, Morse at the time knowing that he did not then have on deposit with said association the amount specified therein; and Morse as vice president and Curtis as president caused to be paid upon said check \$126,000 of the moneys of the association, in excess of all amounts which Morse was then entitled to draw out of the moneys, funds, and credits of the association. Morse and Curtis then intended that Morse should appropriate and convert to his own use said \$126,000, although they then well knew said \$126,000 so paid as aforesaid was not on deposit with the association by Morse, and was not due and owing by and from the association to Morse. Repayment thereof to the association was not in any way secured, and Morse had no right and title to the same.

The wording of this count is very different from that of the indictment lately considered by this court in *United States v. Heinze*, 161 Fed. 425, in that it does not expressly charge that the transaction complained of was without the knowledge or consent of the national bank or its directors, does not assert that the money paid on the check was wholly lost to the banking association, and does not *totidem verbis* allege an actual conversion by the accused of the moneys, funds, and credits of the bank at the time of the payment of the check. The demurrer, therefore, raises the inquiry whether an indictment which in substance alleges an overdraft, asked and granted with intent to defraud the paying bank, and with intent that the person receiving the overdraft should convert the proceeds thereof to his own use in fraud of the bank, constitutes a legal statement of the crime of willful misapplication under section 5209.

The position of defendants is that the absence of allegations (a) that the overdraft payment was unauthorized, or (b) that there was an actual conversion of the amount paid, or (c) that the money was in some way absolutely lost to the bank, renders the indictment insufficient, because it does not properly negative the presumption of law that a mere overdraft is not an illegal transaction and cannot of itself constitute a willful misapplication of the paying bank's resources. This form of indictment under section 5209 has been repeatedly used in this district. It follows (*mutatis mutandis*) several of the counts in *United States v. Fish* (C. C.) 24 Fed. 585, and is also in legal effect identical with the ninety-ninth count in *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; in both which cases indictments were found and convictions had, subsequent to the decisions in *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520, and 108 U. S. 192, 2 Sup. Ct. 525, 27 L. Ed. 703.

However unfortunate, if not unnecessary, was any departure from the plain rule that a statutory misdemeanor is sufficiently alleged in the language of the statute, the *Britton* decisions are plain that not every misapplication is a crime under the act, and that the test (or at least a test) of criminal misapplication is that there must be a conversion of the moneys, funds, or credits of the association by the accused, either for his own use or that of some person other than the injured bank. This is more than a rule of pleading. Unless such conversion be shown in evidence there can be no conviction; but it follows from this substantive law that an indictment alleging willful misapplication must show upon its face the criminality of the transaction described and negative an innocent interpretation, if one be possible. 107 U. S. 669 *et seq.*, 2 Sup. Ct. 512, 27 L. Ed. 520. The *Britton* decisions, however, do not declare any hard and fast method of pleading under section 5209, as is abundantly shown by the later decisions in the same court.

The *Fish* Case, *supra*, was decided in the light of the *Britton* opinions, and the judgment of Benedict, J., on this point was concurred in by Judges Wallace and Brown—a concurrence in my opinion of the greatest weight. The count considered was in form exactly like the one at bar, and this court decided that the *Britton* discount indictment (108 U. S. 192, 2 Sup. Ct. 525, 27 L. Ed. 703) was held bad only

because it was not charged that the discount was originally procured by fraudulent means, and the stock purchase indictment (107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520) was bad because of total failure to charge any criminal misapplication at all; the implication being (continued Benedict, J.) that, had the act of discount "been done in bad faith and with intent to defraud," it would have been punishable under section 5209. In the Fish indictment and the count at bar bad faith and intent to defraud are charged in general terms and with respect to the original creation of the overdraft. It was therefore held that the indictment against Fish was good, and it follows that that decision is an authority directly opposed to defendant's contention in this case.

Two years after the Fish decision, *U. S. v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664, was decided. I have not been able to examine the indictment therein, and the question certified was not one of pleading; but the court (after reiterating the rule in *Britton's Case*) said:

"When it is charged * * * that the defendant did willfully misapply certain funds of the association by causing them to be paid out to his own use and benefit in unauthorized and unlawful purchases, without the knowledge and consent of the association and with intent to injure it, this completed the offense of willful misapplication."

This reference to the knowledge and consent of the association, and its possible authority to do the act complained of, must be read in connection with *Evans v. U. S.*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, and, as so read, the *Northway* decision is not opposed to that in *Fish's Case*.

In 1893, with the *Britton* and *Northway* Cases before him, Judge Benedict decided *United States v. Eno* (C. C.) 56 Fed. 218. The *Eno* indictment had been found in 1884, and reasons for hearing a demurrer thereto in 1893 do not appear on the record. Contemporary local history may furnish some excuse for perfunctory argument, but the judgment requires respectful attention. *Eno* was charged with causing a payment to be made to Dyett of moneys of the Second National Bank, of which he was president. The court held that the indictment did not charge that the money was paid to or received by Dyett to *Eno's* use, nor that such payment to Dyett was really a payment to *Eno*, wherefore it was not shown that the payment was unlawful as to Dyett, and the count was bad under the rule in *Britton's Case*. This as a statement of general law need not be here disputed, but it is inapplicable to this indictment without departing from the *Fish Case*, which as a pronouncement of the full court is of superior authority. The further ruling of the *Eno Case* that allegations of "intent to defraud" or "intent to injure" are mere surplusage is opposed to the later decision in *Evans v. U. S.*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830, and must be disregarded.

The *Evans Case* contains, as above noted, an overdraft count legally identical with the one at bar. *Evans* had been convicted, not only under that count, but under others alleging unlawful discounts. The writ of error was once argued, and a reargument ordered only

as to the counts alleging offenses other than overdrafts. It is now urged that, inasmuch as Evans' sentence was no greater than would have been justified under one count, the nature of the reargument ordered shows that the overdraft count was considered clearly bad, though nothing is said about it in the opinion reported. I cannot believe that the Supreme Court sits to decide important matters by any such indirection, and am of opinion that the reported discussion of the unlawful discount portion of the indictment is valuable and decisive of the present argument.

The discount of a note, like the granting of an overdraft, is not of itself an unlawful act, much less a crime. The motive, purpose, or intention with which the payment by draft or discount is made and received determines the difference between legality and illegality, honesty and crime; and motives, purposes, or intentions are absolutely known only to the person accused, and in the absence of confession or admission can only be determined or ascertained by court or jury by inference from surrounding circumstances, usually numerous, and singly inconclusive, if not unimportant. It may be said here, as in that case, that:

"Defendant's entire criticism seems to be founded upon the hypothesis that no weight is to be given to the words 'willfully, unlawfully, and fraudulently,' or to the general allegation of an intent to defraud; in short, that these words are mere surplusage."

This contention the court rejected, holding that, while "willfully misapply" are words not inconsistent with honest purpose, yet, since an intent to defraud is only to be gathered from facts and circumstances, an allegation of intent to defraud is material in the highest degree, since the "gravamen of the offense consists in the evil design." It must follow that when the indifferent facts, the acts reconcilable in themselves with either honesty or criminality, are clearly stated, a general allegation of criminal intent gives to the accused every warning he can reasonably claim, because the only question left (if the facts alleged are true) is addressed to his own consciousness, concerning which he alone has full information. Not only does the opinion of the court in the Evans Case illuminate the matter in hand, but the dissenting opinion of Field, J., shows that the very principles now contended for were there fully and ably presented and emphatically repudiated.

Batchelor v. United States, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478, arose under an indictment for discounting worthless paper. The decision seems to me unrelated to the present question; but Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, is conclusive of a point which has caused me great doubt. The count at bar does not charge that there was a conversion. It only states an intent to convert. In that respect it is exactly like the overdraft count in Coffin's Case. The Coffin indictment stated, however, several facts plainly indicative of actual conversion, and the court said:

"The fact that the count charges the intent to convert money * * * does not obliterate the clear statement of the actual conversion. In this regard the count is clearer and stronger than was held sufficient in Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830."

When saying this the court had before it only an overdraft count, and the reference to the Evans Case can only reasonably relate to the overdraft count then considered, but not discussed in the opinion, and identical with the one under consideration. If this be not so, it surely means that overdraft and discount counts are to be measured by exactly the same rules.

Rieger v. United States, 107 Fed. 916, 47 C. C. A. 61, holds explicitly that it is not necessary in terms to allege a conversion. That may be inferred from the allegation of payment or application to the use, benefit, and advantage of the accused or another. *United States v. Martindale* (D. C.) 146 Fed. 280, declares it a fatal objection not to negative the knowledge and approval of the governing authority of the bank. This is not consistent with *Evans' Case*, 153 U. S. 593, 14 Sup. Ct. 934, 38 L. Ed. 830.

On principle these defendants could not have possessed authority to produce or permit a conversion of the funds of the bank to Morse's use. Authority to commit a crime is an impossibility, yet nothing short of that power meets the exigencies of defendants' case if the allegations of the count are true as pleaded. It cannot be necessary to negative a legal impossibility. To assert, as does this count, that the payment for the contemporaneous benefit of Morse was willfully made, with intent that Morse should convert the same to his own use, without securing repayment, and with intent to defraud, does clearly aver a conversion of the funds, effected as soon as the bank paid over the money.

Conversion is a technical term, and it is a fair question: Could the bank have maintained an action sounding in tort against Morse for this \$126,000, directly it was paid out, assuming ability to prove the above-recited allegations? I think it could, and, if so, the conversion is sufficiently alleged. The fact that at some subsequent time the money was refunded would be perhaps persuasive evidence that there was no intent to defraud; but that the pecuniary loss remained actual down to indictment must be immaterial. The return of goods alleged to have been stolen may be evidence that they were only borrowed, and such return may estop the owner from civil suit; but, if the goods were really taken *animo furandi*, their ultimate loss or return is immaterial to a criminal prosecution. The crime was committed when the taking occurred, and no subsequent repentance or reparation can wipe that out. So here, if the evil intent described by the statute was in these defendants when the bank parted with its money for Morse's benefit, and without recourse to any person other than Morse, then it is immaterial (except as explaining mental processes) whether Morse or any one else ever refunded the same. The demurrers to the misapplication counts are overruled.

2. The First Count.

This alleges with elaboration a conspiracy to defraud the United States in the exercise of its governmental and fiscal functions, by deliberately giving false information regarding the financial condition of the Bank of North America; the fraud resulting in lessening the

power of the federal government by failure to maintain in efficient condition one portion of the national fiscal system. I remain of the opinion, expressed on the argument, that indictments of this kind under section 5440 are too firmly established by authority to be overthrown in trial courts.

To cause or conceal a rotten spot in the national banking system is an assault on the government quite as direct and obvious as is foisting into public employment a probably incompetent letter carrier. The doctrine of *Curley's Case*, 130 Fed. 1, 64 C. C. A. 369, has been approved so often and in so many courts that I consider discussion here useless. *Curley's* petition for a certiorari and the briefs thereon (195 U. S. 628, 25 Sup. Ct. 787, 49 L. Ed. 351), have been submitted to me and carefully examined. The question whether there could be a conspiracy to defraud by merely deceiving a governmental officer, when neither government nor officer was to be deprived thereby of money or its worth, was presented to the Supreme Court so fully and forcibly, yet so simply and directly, that the refusal of the writ is certainly an authority demonstrating the willingness of the highest tribunal to let the law alone. I overrule this branch of the demurrer.

3. The Specific Conspiracy Charges.

The second and eleventh counts, which charge a conspiracy in very general terms, have not been attacked in argument; but counts 3 to 10, each of which alleges a conspiracy under section 5440 to make a false entry in a book of the bank, are asserted to be defective, in that the contemplated entry was, or was intended by defendants to be, not a false entry, but a true entry of a fraudulent transaction, and therefore not within the act. *Coffin v. U. S.*, 156 U. S., at page 463, 15 Sup. Ct. 394, 39 L. Ed. 481. An illustration of the sort of false entry alleged may be taken from count 3, which charges defendants with entering in "call loans account" a "fictitious" promissory note as though it were a bona fide note accompanied by certain stock as collateral; whereas in truth the bank unlawfully owned the stock, and the note was created and entered as a genuine note merely to conceal the illegality of the original purchase of stock and the continued holding thereof.

It is obvious enough that "it cannot be a false entry to make a recital on the books of the bank which speaks the truth" (*U. S. v. Young* [D. C.] 128 Fed., at page 115), but the sort of truth referred to must be of legal standard; i. e., the whole truth, and nothing but the truth. It may be the truth that there was a note; but, if the note was "fictitious," it is not the whole truth to recite or record or enter it as a genuine note. There is a difference between a false record and the record of a falsehood—between a fraudulent entry and the entry of a fraud. The difference is that the latter exposes the falsity or fraud, while the former does not. If this note was fictitious—e. g., forged to the knowledge of the bank, or unenforceable against the maker by agreement of parties—it was no better than a blank piece of paper, and its inclusion in the "call loans" was as clearly within the statute as were the entries as bank cash of money not on deposit,

considered in *U. S. v. Peters* (C. C.) 87 Fed. 984. I have taken the word "fictitious" most strongly against the demurrant. Further than that there is no need of going at present.

4. Duplicity in Counts 12-16, 19 and 20.

These portions of the indictment charge substantial violations of section 5209 by making false entries. Each count clearly states and describes two different enterings or sets of words written down in different parts of the same book or report. It is said, however, that every count does no more than give the two sides of the false account; e. g., it shows falsity in "bills payable" and corresponding falsity in "securities"—in other words, that each count reveals a false record by double entry. I think "entry" is used in the statute in its simple and obvious meaning, viz., "an item in an account." Cent. Dict.

The very phrase "double entry" signifies two entries. It is common knowledge that bookkeeping by double entry requires, not two entries of the same fact, but a debit entry of that which the accounting party has received and a credit entry of that with which the accounting party has parted, or, to vary the statement, the transaction is recorded in two different ways. It does not follow that, if the debit entry is false, the credit entry must also be false, or that it is a part of the debit entry. The two things are entirely distinct, and it does not advance the discussion to point out that, unless the two entries are correspondingly false, a reasonably skillful accountant will detect the error. It is perfectly possible that one may be false and the other may be true. Indeed, it is by such discrepancies that dishonest bookkeeping is usually discovered, and at all events, as the very name "double entry" indicates, there were two entries made, and not one entry, and both of these entries are charged in these counts. These portions of the indictment are therefore, in my judgment, bad for duplicity, and the demurrer is sustained on that ground alone.

5. Counts 17 and 18.

The false entry charged in these two counts is that from the total amount of bonds, securities, etc., owned by the Bank of North America, there were deliberately omitted certain shares of the capital stock of that bank, which shares were then actually owned by the bank.

It is urged that, assuming such purchase by the bank, the moment the bank acquired ownership there was a pro tanto reduction of the corporate stock, with the result that it would have been untrue to enumerate the bank's own holdings among its assets; and this argument is rested on a remark of Woods, J., in *Burrows v. Niblack*, 84 Fed. 111, 28 C. C. A. 130. I think this is opposed to the general current of authority as stated in *Cook on Stock Corporations*, vol. 1, § 282, viz.: That such purchase "will in no case constitute a reduction when the corporation lacks authority from the Legislature to reduce its capital." That is the case with national banks. The only method by which a national bank can reduce its stock is that prescribed in section 5143, Rev. St. (U. S. Comp. St. 1901, p. 3463),

and the possibility of ownership of its own stock is recognized by section 5201 (U. S. Comp. St. 1901, p. 3494). It follows that there was here an unlawful ownership, but nevertheless an ownership, and the fact thereof should have been stated. The demurrers to these two counts are overruled.

Upon further consideration of defendants' motion to compel the prosecution to elect between the conspiracy counts and the misapplication counts, I have concluded not to compel such election. Study of the case shows the most intimate relation between the facts on which all the counts must stand or fall. It would be no assistance to the administration of justice to compel two trials, instead of one.

BERNIER v. GRISCOM-SPENCER CO.

(Circuit Court, S. D. New York. May 11, 1908.)

1. SPECIFIC PERFORMANCE—CONTRACT TO DELIVER CORPORATE STOCK—PLEADING.

It is not essential to the statement of a good cause of action for specific performance of a contract to assign corporate stock that the bill show that the complainant is entitled to an accounting for the amount of dividends the stock has earned.

2. CORPORATIONS—STOCK—DIVIDEND—DECLARATION—DISCRETION.

When dividends shall be declared, and the amount thereof, are largely discretionary with the officers of a corporation.

3. SAME—STOCKHOLDER'S RIGHT TO COMPEL ACCOUNTING.

Under an agreement that the purchaser of corporate stock should be entitled to dividends thereon "when declared," he is not entitled to an accounting for the amount of dividends earned before a dividend has been declared, where no undue or improper delay in declaring one is shown.

4. SAME—STOCK AS PERSONALTY.

Common stock of a corporation is personalty, and comes within the rules of equity governing an agreement to sell and deliver specific personalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 166.]

5. SPECIFIC PERFORMANCE—CONTRACT TO ASSIGN STOCK—RELIEF—NECESSARY PROOF.

One seeking relief under a contract for the assignment of corporate stock must allege and show full performance on his part.

6. SPECIFIC PERFORMANCE—DELIVERY OF PERSONALTY—PROOF—REQUISITES—INADEQUATE REMEDY AT LAW.

To entitle one to specific performance of an agreement to deliver specific personalty usually something more is necessary than a mere allegation of facts, showing that the complainant is entitled thereto. Specific performance is an equitable remedy, and usually it must appear that the party seeking the remedy is without full and adequate remedy at law. Hence one is not entitled to specific performance of a contract to deliver corporate stock where his bill does not show that his remedy at law is inadequate, and that the damages may not be easily estimated, where no element of trust arises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 5.

Right to specific performance as affected by adequacy of remedy at law, see note to *Marthinson v. King*, 82 C. C. A. 368.]

7. EQUITY—PLEADING—MULTIFARIOUSNESS.

A bill to specifically perform a contract to deliver corporate stock, and for an accounting for dividends that should have been paid to complainant on such stock if it had been transferred when it should have been, and for a money judgment therefor, is not multifarious; the accounting being a mere incident to the specific performance.

8. SAME.

A bill for equitable relief must show, by facts pleaded, that the interposition of a court of equity is necessary or proper; that complainant has no adequate remedy at law.

9. COURTS—GENERAL JURISDICTION—PLEADING—AMOUNT IN CONTROVERSY.

Corporate stock is presumed to be worth par, as affecting pleading in a case where jurisdiction depends upon the amount in controversy.

On Demurrer to Bill of Complaint.

Hugo Gordon Miller, for complainant.

Robinson, Biddle & Benedict, for defendant.

RAY, District Judge. This is an action by complainant to compel the transfer and delivery to him of \$9,000 of the common stock of the defendant company, formerly the James Reilly Repair & Supply Company, pursuant to an alleged contract, an accounting for the dividends that should have been paid to complainant on such stock if transferred to him when it should have been, and a money judgment therefor. The grounds of demurrer will be stated later.

The complaint contains the necessary allegations as to diversity of citizenship, the complainant being a citizen of the state of New York, and defendant a New Jersey corporation having a regular and established place of business in the Southern district of the state of New York. There is no direct averment that the amount in controversy, exclusive of interest and costs, is \$2,000 or upwards. The bill then alleges that the defendant was incorporated in New Jersey prior to June 9, 1904, under the name the James Reilly Repair & Supply Company, and that July 2, 1907, its name was duly changed to the Griscom-Spencer Company; that on and before said June 9, 1904, the complainant was employed by the defendant corporation in the capacity of its assistant manager, at a salary of \$75 per week, and that, as additional compensation for his labor, defendant agreed to assign to him "twenty thousand dollars worth of common stock of the James Reilly Repair & Supply Company," all dividends to be paid to him, and that he was to acquire title to such stock, and it was to be assigned to him at the rate of \$3,000 per year. The alleged agreement is evidenced in part by a letter from M. K. Bowman to Bernier, dated June 9, 1904, and Bernier's written acceptance, dated June 13, 1904, set out in full; and the Bowman letter is alleged to have been written and sent "with the full knowledge and under the direction of all the officers and directors of the defendant company." The complaint then alleges that complainant entered upon the discharge of his duties June 9, 1904, under such contract, and continued in such employment up to June 15, 1907, and that he fully performed his part of the contract; that no stock has been assigned or transferred to him, and that he has received no dividends; that the defendant has earned large sums available

for dividends, but none have been declared; that defendant has \$112,000 net surplus of funds; that he does not know the amount applicable to dividends, and has no means of ascertaining same; that he has duly demanded the assignment of \$20,000 of such stock, and also \$3,000 of such stock per annum, but defendant has refused to transfer or assign any of such stock. There is no allegation that defendant has any of its stock not transferred to other parties. There is no allegation as to the amount of the authorized capital stock or common stock of such corporation. There is no allegation as to its actual value, or as to the number of shares into which it is divided. There is no allegation that this common stock cannot be obtained and purchased in the market, and no allegation that it has any peculiar or special value to complainant or any one else.

The demurrer is that the facts stated do not entitle complainant to any of the relief demanded, or to any such relief as is sought or demanded; that there is no privity between the complainant and defendant that entitles him to the relief demanded; that there is a defect of parties, as the defendant's directors should be joined; that several matters are joined in the bill, and it is multifarious; that there is no jurisdiction, as \$2,000 is not involved, exclusive of interest and costs; that the bill of complaint does not show facts which entitle complainant to any of the relief demanded. It is clear that this is an action in equity; that the object is to compel the specific performance of a contract to deliver \$20,000 worth of the common stock of defendant corporation to the extent of \$9,000, the allegations showing that under the agreement complainant has earned and become the absolute owner of that amount in value of such stock. The other relief demanded is purely incidental. While the bill of complaint does not allege that Bowman was the treasurer of the defendant company, I will assume that he was. His letter making the offer reads as follows:

"The James Reilly Repair & Supply Company.

"229 & 230 West Street, New York.

"June 9, 1904.

"Mr. L. L. Bernier, Assistant Manager, 230 West Street, New York—
Dear Sir: In accordance with our conversation, I hereby agree to have assigned to your name \$20,000 worth of the common stock of the James Reilly Repair & Supply Company, with the understanding that the dividends when declared be paid you forthwith, and that you shall acquire absolute title to the stock at the rate of \$3,000 per annum.

"I further agree to sell you \$20,000 worth of additional common stock of the Reilly Company, or any part thereof, at par, at any time within the next five years.

"All of this to be contingent upon your remaining in the Reilly Company's employ, at your present salary of seventy-five dollars per week, and devote all of your time and energy to the advancement of its interests, development of its business and increase of its prosperity; the object of this transaction being to make you vitally interested in the success and welfare of the company.

"Please acknowledge receipt of this letter in writing, with a statement to the effect that you agree to these terms.

"Yours truly,

"K. Bowman."

The acceptance as follows:

"New York, June 13, 1904.

"M. K. Bowman, Esq., Treasurer the James Reilly Repair & Supply Company, 229-230 West Street, New York—Dear Sir: I beg to acknowledge the receipt of your proposition dated June 9, 1904, contingent upon my remaining in the employ of the James Reilly Repair & Supply Company. I thank you for the same and accept it in full, assuring that I will do everything in my power in the future as I have done in the past, to further the interests of the company and prove worthy of the confidence placed in me. Thanking you for this mark of your esteem, I am,

"Yours respectfully,

Louis L. Bernier."

The agreement contained in the first clause or paragraph is to "have assigned to your name \$20,000 worth of the common stock" with the understanding that the dividends, "when declared," be paid forthwith, and that complainant is to acquire absolute title to such stock, at the rate of \$3,000 per annum. The second clause or paragraph evidently refers to other stock, for he says "additional common stock." Then comes the declared purpose to make the complainant vitally interested in the affairs of the company. The letter is silent as to whether the assignment of stock is to be of the \$20,000 worth at one time and when fully earned, or at the rate of \$3,000 per year. The bill of complaint is not very specific on this point, but I think the averment is that the verbal agreement, confirmed by the letter, is that \$3,000 worth was to be assigned each year. In any event it is an agreement, on the part of complainant, to perform labor and services as manager at \$75 per week and \$3,000 worth of stock each year; and, as he was to have \$20,000 worth, it is evident the parties contemplated employment for at least about seven years. If the true contract was indefinite or definite on that point, it is a matter of answer.

It is not essential to the statement of a good cause of action for specific performance in the assignment of the stock that the bill of complaint show that the complainant is entitled to an accounting for the amount of dividends the stock has earned. I do not think that the bill shows such a right in complainant, even if it states a good cause of action in equity for specific performance. When dividends shall be declared, and the amount thereof, are largely matters of discretion with the officers of the corporation. Dividends do not necessarily follow net earnings. Complainant was to have the dividends "when declared." There is no allegation of any undue or improper delay in declaring dividends, or that they are delayed for any ulterior purpose. The real question is, has complainant alleged facts which entitle him to a decree for the transfer to him of \$9,000 worth of the common stock of this corporation?

Common stock is personal property, and comes within the rules of equity governing an agreement to sell and deliver specific personal property. Of course, full performance by the party seeking relief must be alleged and shown. Complainant says he has fully performed as to three years, and has earned and is entitled to the \$9,000 worth. But to entitle a party to specific performance of an agreement for the delivery of specific personal property usually something more is necessary than a mere allegation of facts showing that

the complainant is entitled thereto. Specific performance is an equitable remedy, and usually it must appear that the party seeking the remedy is without full and adequate remedy at law. As, for instance, should A. agree to work for B. for one year at a compensation of \$2 per week, with board and lodging, and 10 of the sheep then owned by B., and A. does the work, receives the \$2 per week and his maintenance, but B. refuses the sheep, can A. maintain a suit in equity to compel specific performance? If he alleges that the sheep contracted and paid for are of a peculiar breed, of special character and value, and that B. has them, and that they cannot be obtained elsewhere or in the market or have no market value, or that value is fluctuating (possibly) or uncertain, equity would entertain the action and decree performance. Why? For the simple reason it is made to appear that A. has no full, complete, or adequate remedy at law. It would be very difficult, if not impossible to prove the damages. A. could not go into the market and purchase such animals or their equal, or it would not appear that, if he was given money in lieu of performance, he could make himself good. That this same rule applies in the case of stock in corporations is made plain by text-writers, and the great mass of decided cases. 3 Page on Contracts, § 1630, pp. 2469-2472; Lawson on Contracts (2d Ed.) § 493, p. 575; 2 Pomeroy's Equitable Remedies, § 752, pp. 1268, 1269 (volume 6 of Pom. Eq. Jur.); *Hyer v. Richmond Traction Company*, 168 U. S. 471, 483, 484, 18 Sup. Ct. 114, 42 L. Ed. 547; *Krohn v. Williamson* (C. C.) 62 Fed. 869, 877, affirmed 66 Fed. 655, 13 C. C. A. 668; *Bomeisler v. Forster*, 154 N. Y. 229, 239, 48 N. E. 534, 39 L. R. A. 240; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Treat v. Richardson*, 47 Conn. 582; *Moulton v. Manufacturing Co.*, 81 Minn. 259, 83 N. W. 1082; *Barton v. De Wolf*, 108 Ill. 195; *Rigg v. Railway*, 191 Pa. 298, 43 Atl. 212; *Ryan v. McLane*, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501, 80 Am. St. Rep. 438; *Kimball v. Morton*, 5 N. J. Eq. 26, 53 Am. Dec. 621; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084; *North Cent. R. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683; *Manton v. Ray*, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811.

It is, of course, understood that I am not speaking of actions to compel a transfer of stock where the one party holds it in trust for another, or where a party has stock, the certificate having been issued to another, and he seeks to compel its transfer on the books and have a new certificate issued. The right to equitable relief in such cases cannot be questioned. But here a different question is presented.

Lawson on Contracts (2d Ed.) § 493, says:

"A court of equity will not decree a specific performance of a contract for the sale of chattels, because the breach may be sufficiently remedied by damages. If A. refuses to deliver goods he has sold to B., the latter may purchase them elsewhere, and recover the loss to him resulting from A.'s failure to perform. This rule extends to all kinds of personal property, including government bonds and the shares of stock and bonds of business corporations, which are always to be bought in the market. But in the application of this rule three classes of cases are to be excepted, though two of them are not exceptions to but rather further illustrations of the govern-

ing principle, viz., that agreements will not be specifically enforced, unless from the nature of the contract, the character of the subject-matter or other special and peculiar causes damages will not be an adequate remedy."

In 2 Pomeroy, Eq. Remedies (6 Pom. Eq. Jur.) § 752, it is said:

"The right to specific performance of contracts for the sale of corporate stock depends upon the character of the stock. In England it is held that a transfer of public stocks, which are always to be had by any person who chooses to apply for them in the market, will not be decreed, for damages are adequate. Shares of railway and other private corporations, which are limited in number and cannot always be had in the market, stand upon a different footing, and equity may grant its relief. The rules in the United States are narrower, and it would seem, more in accord with principle. Specific performance will not be decreed if the shares are readily obtainable in the open market. If, however, the shares have no market rating, and cannot easily be obtained elsewhere, damages will be inadequate, and specific performance will be granted."

In 3 Page on Contracts, p. 2469, § 1630, it is said:

"Contracts for the sale of corporate stock are controlled by the same principles as those applying to sales of other personal property in general. If the stock is one which is regularly bought and sold, it is easy to estimate in money the damages sustained from the breach. The vendee can then, with the unpaid purchase money and the damages thus recovered, purchase in open market an amount of stock equal to that contracted. In such cases the remedy at law is adequate, and in the absence of special circumstances specific performance will not be decreed. To obtain specific performance it must be shown, further, that special circumstances exist which make the remedy at law inadequate."

In *Hyer v. Richmond Traction Company*, 168 U. S. 471, 483, 484, 18 Sup. Ct. 114, 119, 42 L. Ed. 547, the Supreme Court, speaking by Mr. Justice Brewer, said:

"But even if it be considered as a contract specifically for the transfer of stock, what is the rule in respect to actions in case of a breach thereof? If stock has a recognized market value, courts will ordinarily leave the parties to their action at law for damages for breach of the agreement to sell, but in cases where the stock has no recognized market value, is not purchasable in the market, or has a value which is not settled, but is contingent upon the future workings of the corporation, equity will sometimes decree specific performance of a contract of purchase. It is in reliance upon this that plaintiff claims the right to a decree for specific performance. The enterprise, he says, is a new one; it is difficult to put a fair pecuniary value on the stock or on the franchise. It is one of those things contingent largely on the successful working of the railway. It must be conceded that there is force in the contention that only by letting the plaintiff into the possession of the interest he claims can adequate compensation be secured. At the same time the present value of the franchise and therefore of the stock of the corporation owning the franchise is not wholly beyond estimate. That which it may have three or four years hence may depend largely upon the matter of management. But it is a franchise which has definite possibilities. The miles of track covered by it, the population adjacent to the line and therefore the number of people likely to avail themselves of its advantages, the cost of construction and of operation, are all well-known facts, and upon such known facts it is not impossible for a jury to form a fair estimate of the value of the franchise, and therefore of the damage which the plaintiff has sustained by the repudiation of the contract to give him a half interest in it."

In *Krohn v. Williamson* (C. C.) 62 Fed. 869, affirmed 66 Fed. 655, 13 C. C. A. 668, the syllabus applicable reads:

"6. Specific Performance—Jurisdiction—Transfer of Stock. Where jurisdiction is acquired on the ground that the suit is to enforce a trust, the court

may compel performance of an obligation to transfer stock, the subject of such trust, the value of which is uncertain."

At page 877 of 62 Fed., page 668 of 13 C. C. A., Taft, Circuit Judge, said:

"It is true that the relief asked is in the nature of a decree for the specific performance of an obligation to transfer personal property, and that ordinarily courts of equity will not afford such a remedy. The modern tendency of courts, however, is towards a much more liberal rule in this regard; and, if any good reason appears why damages for conversion will not be adequate remedy for the injury a decree will be granted. Here the stock has no market value. The damage for conversion would be wholly speculative and uncertain. But the controlling reason why in this case the delivery of the stock in specie should be decreed is that the defendants hold it in trust for the complainant. The confidential relation in violation of which defendants seek to retain its possession, gives the complainant the option either to have the stock or its value. The court, as a court of equity, acquires jurisdiction of the action, not because damages at law would be inadequate, but because it is an action to enforce a trust, and, having jurisdiction on this ground, may give such full relief as the nature of the case requires. *Johnson v. Brooks*, 93 N. Y. 337; *Stanton v. Percival*, 5 H. L. Cas. 257; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Kimball v. Morton*, 5 N. J. Eq. 26, 53 Am. Dec. 621; *Pom. Eq. Jur.* § 14."

In *Bomeisler v. Forster*, 154 N. Y., at page 239, 48 N. E., at page 535, 39 L. R. A. 240, the court said:

"The rule of specific performance will be extended to personal contracts, where the party wants the thing in specie, and he cannot otherwise be compensated. *Phillips v. Berger*, 2 Barb. 608; *Story's Eq. Jur.* § 716. That is to say, the extension of the rule to such cases is justified where there would not be a complete and satisfactory remedy by compensation in damages, or where the benefits of the contract would not inure fully to the party, in whose favor it was made, unless it was specifically performed."

It is not necessary to quote further from the authorities. There is no allegation in the bill tending to show that the remedy at law is not full and adequate; that damages may not easily be estimated. There is no element of trust. There is no multifariousness, as an accounting for and payment of the dividends declared, or that should have been declared if any, is a mere incident to the specific performance, when proper grounds for specific performance are alleged. It may be thought that the want of grounds for the interposition of a court of equity should be set up by way of answer—alleged as a defense. But such is not the law. The complainant, on coming into a court of equity for equitable relief, must show by facts pleaded that the interposition of a court of equity is necessary or proper; that he has no full and adequate remedy at law. By reference to the numerous cases cited in 3 Page on Contracts, *supra*, it will be seen where equity will or will not compel specific performance of a contract to sell and transfer stock in a corporation.

It may be suggested that a bill of complaint, where jurisdiction depends on diversity of citizenship and the amount in controversy, should contain a definite allegation as to both facts, but I need not enter on that phase of this case. Twenty thousand dollars worth of stock at one time, the time when it was to be transferred, may not

be 20 cents worth when suit is brought. However, the presumption is that stock is worth par.

The demurrer must be sustained for the reasons stated. Complainant may amend in 20 days, on payment of taxable costs to date, such costs to be taxed by the clerk.

In re J. M. CEBALLOS & CO.

(District Court, D. New Jersey. March 27, 1908.)

1. BANKRUPTCY—ACTS OF BANKRUPTCY—VOLUNTARY PETITION—FILING.

The filing of a voluntary petition in bankruptcy under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), is not of itself an act of bankruptcy, but simply institutes a proceeding in which the court acquires jurisdiction to adjudge bankruptcy if the facts warrant an adjudication.

2. SAME—PARTNERSHIP.

The filing of a petition in bankruptcy by one partner against his co-partners is not an act of bankruptcy on the part of the firm.

3. SAME—PETITION, AUTHORITY TO FILE—RIGHT OF PARTNER.

Bankr. Act July 1, 1898, c. 541, § 5a, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), declares that a partnership may be adjudged bankrupt, and section 5h provides that in the event of one or more, but not all of the members of the firm being adjudged bankrupts the partnership property shall not be administered in bankruptcy, unless by the consent of the partner or partners not adjudged bankrupt, such partner or partners being authorized to settle the partnership business, and account for the interest of the partner or partners adjudged bankrupts. *Held*, that under such sections and General Order 8 (32 C. C. A. xi), providing that any member of a firm refusing to join in a petition to have the partnership declared a bankrupt shall be entitled to defend, etc., one partner may file a bankruptcy petition against the firm and his partners.

4. SAME—CONTESTING PARTNERS—ADJUDICATION.

Where a bankruptcy petition is filed by a member of a firm against the firm and his partners, it is involuntary in so far as it affects the non-consenting partners, who cannot, as individuals, be adjudged bankrupts, in the absence of an allegation that they, or either of them, committed an act of bankruptcy within four months before the petition was filed.

5. SAME—PETITION BY INDIVIDUAL PARTNERS.

Under Bankr. Act July 1, 1898, c. 541, §§ 5a, 5h, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), and General Order 8 (32 C. C. A. xi) providing for the administration of the affairs of a partnership in bankruptcy, a court of bankruptcy has power to adjudge a partnership bankrupt on petition of one of its members against the objection of the others, though the petition was filed more than four months after a general assignment of all the partnership assets for the benefit of creditors, on the allegation that the partnership and its individual members are insolvent.

6. SAME—DEFENSES.

It is no defense to a bankruptcy proceeding against a partnership, on petition of one of its members, that the firm is without assets, having transferred all of its property to an assignee for the benefit of creditors more than four months prior to the filing of the bankruptcy petition.

In Bankruptcy. On petition and answers.

William Osgood Morgan, for petitioner.

R. V. Lindabury, for respondents.

LANNING, District Judge. The petitioner, Anderson C. Wilson, on September 4, 1907, filed his petition alleging that he and the respondents, Juan M. Ceballos and John S. Fiske, have been partners, doing business under the firm name of J. M. Ceballos & Co.; that the firm had its principal place of business in New York City until October 10, 1906, when the partnership business was discontinued; that his residence and domicile has been, for the greater portion of six months next preceding the filing of his petition, in New Jersey; that the partnership is insolvent and owes debts in excess of \$1,000, which it is unable to pay in full; that each of the partners is insolvent and owes debts in excess of \$1,000, which he is unable to pay in full; that he and the partnership are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy; that each of his partners, who reside in the state of New York, refuses to join in his petition; that neither of his partners is a wage-earner or a person chiefly engaged in farming or the tilling of the soil; that the partnership has been dissolved, but that there has as yet been no final settlement of its business; and that the schedules annexed to his petition contain full and true statements of the assets and debts of the partnership, and of his individual assets and debts, and of his and its creditors. The prayer is that the partnership and all its members may be adjudged bankrupt, that the petitioner be discharged from his individual debts and from the debts of the partnership, and that a copy of the petition and a subpoena be served on each of the nonassenting partners, and such proceedings had as are provided in General Order 8 (32 C. C. A. xi).

The schedules annexed to the petition show that on October 10, 1906, the partnership made a general assignment for the benefit of its creditors, under the law of the state of New York, to William V. Rowe, and that the assignment did not convey to the assignee any of the property of the petitioner, for the reason that under the partnership agreement none of the partnership property belonged to the petitioner; he having only an interest in the profits of the partnership and in certain contingent assets of the firm.

Juan M. Ceballos and John S. Fiske have filed separate answers, the same in substance and form, alleging that the petitioner has no standing to present his petition, because it appears by it and the schedules annexed thereto that the partnership was dissolved prior to its presentation; that under the partnership agreement the petitioner had no interest in the assets of the partnership, that there are no assets of the partnership, and that the petition contains no allegation that either of the respondents committed any act of bankruptcy within four months prior to the filing of the petition. The answers also admit that the principal place of the firm's business was in New York City, and that that business was discontinued on October 10, 1906. They set forth certain of the provisions of the partnership agreement, showing the petitioner's interest in the partnership business, and allege that on October 10, 1906, the partnership made a general assignment, without preference, to William

V. Rowe for the benefit of its creditors; that thereupon the partnership was dissolved; that the assignment was made pursuant to a statute of the state of New York; that Rowe accepted the deed of assignment, qualified as assignee, and is now administering his trust as assignee; that since the assignment the partnership has had no assets; that neither of the respondents committed any act of bankruptcy within four months prior to the filing of the petition; and that neither the partnership nor either of the respondents should be adjudged bankrupt.

After the answers were filed, the petitioner was given leave to amend his schedules in such manner as to show that he had an interest in certain of the assets of the partnership.

No proofs have been taken. The cause has been argued on the petition and the answers thereto. The single question presented for decision is whether the court can adjudge a partnership and its individual members bankrupt on a petition of one of its members, against the objection of the other members, when the petition was filed more than four months after a general assignment of all the partnership assets for the benefit of its creditors, and on the mere allegation of the insolvency of the partnership and its individual members. The question is not free from difficulty.

The cases decided under the provisions of Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, as well as those decided under the existing act, are relied on by the counsel for the petitioner to support the present proceeding. It is important, in considering the cases decided under the act of 1867, to bear in mind the provisions of that act. Section 11 expressly provided that the filing of a voluntary petition should be an act of bankruptcy. The present bankruptcy act contains no such provision. The filing of the voluntary petition in bankruptcy, under the present law, is not an act of bankruptcy. It simply institutes a proceeding in which the court acquires jurisdiction to adjudge bankruptcy if the facts warrant adjudication. It follows that the filing of a petition by one partner against his copartners cannot be deemed an act of bankruptcy on the part of the partnership.

Section 36 of the act of 1867 prescribed the procedure where two or more persons, being partners in trade, had been adjudged bankrupt on the petition of any one of them. Such a proceeding differed from one in voluntary bankruptcy, instituted under the authority of section 11 of the act, in that its object was in part to secure an adjudication of bankruptcy against persons not petitioning for it, and also from a proceeding in involuntary bankruptcy, instituted under the authority of section 39 of the act, in that the petitioner was not obliged to aver an act of bankruptcy, although he might do so if a partnership act of bankruptcy had been committed by any one of his copartners. It was a voluntary proceeding as to the petitioner, and involuntary as to his objecting copartners. The position of nonassenting partners in such a proceeding doubtless induced the promulgation, by the Supreme Court, of General Order 18, under the act of 1867, which gave a nonassenting partner the right "to resist the prayer of the petition in the same manner as if the petition

had been filed by a creditor of the partnership," and also the right "to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defenses which any debtor proceeded against is entitled to take by the provisions of the act." The construction given to this order was, as I understand it, that it authorized the non-assenting partners to set up, as a defense, a denial of any jurisdictional fact alleged in the petition, and nothing more. If the petition alleged insolvency of the partnership, it was sufficient, without adding that there had been a partnership act of bankruptcy. See *In re Penn*, Fed. Cas. No. 10,927; *In re Noonan*, Fed. Cas. No. 10,292; *In re Stowers*, Fed. Cas. No. 13,516.

While the present bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) contains no provision expressly authorizing a partner to file a petition against his copartners, such power must be implied from section 5 of the act and General Order 8 which, in substance, embodies the language of General Order 18, promulgated under the act of 1867. Section 5a declares that a partnership may be adjudged bankrupt, and in this respect goes farther than did the act of 1867, which provided simply that "two or more persons who are partners in trade" might be adjudged bankrupt. Section 5h is as follows:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

This last provision, especially when read in connection with the other provisions of section 5, concerning the method of administering the partnership property and the property of the individual members of the partnership in the same proceeding, seems to show a legislative intent to authorize petitions to be filed in partnership cases, not only by all the partners in a purely voluntary proceeding, or by creditors of the partnership in a purely involuntary proceeding, but by one partner against his copartners. Except for this legislative intent General Order 8 would not have been promulgated. It is true that section 59 contains the only provision of the act that expressly defines who may file a petition in proceedings to have a debtor adjudged an involuntary bankrupt, and that that provision is confined to creditors. It is also true that section 5, when read with section 59 only, is consistent with the theory that adjudication against a partnership can be made only on a petition filed by creditors in an involuntary proceeding. But section 4a declares that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt," and section 1 declares that the word "persons" as used in the act, unless inconsistent with the context, shall be construed to include partnerships. If a partner may not file his petition against his copartners to have the partnership adjudged bankrupt, except with their consent, or

unless they have committed a partnership act of bankruptcy, there is no proceeding provided by which he may be discharged from his partnership debts. If this be the law, he is, notwithstanding the express provisions of section 4a, not entitled to the benefits of the act as a voluntary bankrupt.

But this proceeding is voluntary as to the petitioner, and involuntary as to his two copartners. The petitioner is therefore entitled, as an individual at least, to adjudication. The two copartners cannot, as individuals, be adjudged bankrupt, for the reason that it is not alleged that either of them committed an act of bankruptcy within four months before the petition was filed, and also for the reason that the petition is filed against them by a copartner, and not by creditors. The doctrine that a partnership is to be regarded, within the purview of the present bankruptcy act, as a legal entity is one that seems to be settled by *In re Meyer*, 98 Fed. 976, 39 C. C. A. 368, and *In re Mercur*, 122 Fed. 384, 58 C. C. A. 472, decided by the Circuit Courts of Appeals for the Second and Third Circuits. In a purely voluntary proceeding in which all the partners join in the petition, or in a purely involuntary proceeding in which creditors are the petitioners, it comes or is brought into court with its members. In a proceeding like the present one, where a single partner files his petition against all the other partners, it is likewise in court with its members. But a single partner cannot maintain a petition to have his partnership adjudged a voluntary or an involuntary bankrupt in the sense in which these terms are generally used. If he can neither maintain a petition to have his partnership adjudged bankrupt, on the sole ground of the insolvency of the partnership and all its members, nor on the sole ground that the partnership has, through one or more of its nonjoining partners, committed an act of bankruptcy, General Order 8 is a nullity; for it has no other purpose than to prescribe the practice for the class of cases where less than all the partners file a petition to have the partnership adjudged bankrupt. The reasonable view to take of the matter is that General Order 8, promulgated under the act of 1898, and General Order 18, promulgated under the act of 1867, though similar in language, differ in their operative effects. The act of 1867 did not authorize an adjudication against a partnership as a separate entity. An adjudication against a partnership under that act was merely one against its members as copartners. When a non-petitioning partner appeared, under the provisions of General Order 18, to resist adjudication against his firm, he was resisting adjudication against himself as an individual. Such is not the effect of General Order 8, promulgated under the present bankruptcy act. All that a nonjoining partner may do under it is to resist adjudication against the partnership as a separate entity. In doing so he can defend only against the allegations contained in the petition. If he considers the petition demurrable, he may demur. If not, he may answer. In the present case the only ground on which the petitioner asks for adjudication against the partnership is the insolvency of it and its partners. His copartners have not objected, by formal de-

murrers, that the petition is for that reason defective, but have filed answers, in which they have set up other defenses without denying the insolvency of themselves or of the partnership. I think a petition by a single partner, praying adjudication against his partnership, either on the sole ground of the insolvency of the partnership and all its partners, or on the sole ground that the partnership has, through one or more of the nonjoining partners, committed an act of bankruptcy, is good.

The petitioner alleges that his partnership and all its members are insolvent, and—

"that he and the partnership are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy."

He has prayed for adjudication of bankruptcy for his partnership and all its members. He has annexed to his petition schedules of his personal assets and liabilities and of his partnership's assets and liabilities, together with a list of the creditors of each. He has thereby laid the basis for the procedure defined in the Laughlin Case (D. C.) 96 Fed. 589, provided this is a case in which the partnership creditors should elect a trustee. But, in view of the provision of section 5h that, where one or more, but not all, of the members of a partnership are adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by the consent of the partner or partners not adjudged bankrupt, is this such a case? General Order 8, and section 5h must be so construed, if possible, that both may stand. If section 5h be construed not to apply to a case where a partnership and all its partners are insolvent, the two provisions are harmonized. More than that, the petitioning partner, being a "person who owes debts," will thereby be enabled to have the partnership property administered in bankruptcy, and not by insolvent partners who have escaped adjudication, and to secure a discharge from his partnership debts, which is one of the "benefits" intended to be secured to him by the provision of section 4a. I think section 5h should be so construed. As was said by the Circuit Court of Appeals in the Mercur Case, 122 Fed. 384, 58 C. C. A. 472, in adopting the opinion of Judge Archbald, that section "merely preserves to an existing solvent partner the right to administer the affairs of the partnership if he wants to, and it is not to be carried further by mere implication." The procedure suggested in the Laughlin Case should be followed.

The defense set up in the answers that the partnership is without assets is not valid. It may be that it has no assets which a trustee in bankruptcy will be entitled to take possession of. As the partnership assignment to Rowe was made more than four months before the petition in bankruptcy was filed, the trustee could not recover from the assignee under the provisions of section 67e. It is doubtful, perhaps, if he could recover under the provisions of sections 60a and 60b, or of section 70e. It is not necessary, however, to decide this question at the present time, for it is not now before the court, and it is not essential to a proceeding in bankruptcy that

the alleged bankrupt shall have assets. In re Hirsch (D. C.) 97 Fed. 571.

An adjudication will be denied as to Ceballos and Fiske as individuals, and granted as to Wilson and the partnership.

In re J. M. CEBALLOS & CO. et al.

(District Court, D. New Jersey. April 27, 1908.)

BANKRUPTCY—PARTNERSHIP—PROCEEDINGS BY PARTNER—OBJECTING PARTNERS—INDIVIDUAL DEBTS AND PROPERTY—SCHEDULES.

General Bankruptcy Order 8 (32 C. C. A. xi) provides that any partner, who refuses to join in a petition to have the firm declared bankrupt, may resist the prayer of the petition as if filed by a creditor, and make all defenses which he is entitled to make by the provisions of the act; and in case an adjudication is made on the petition, such objecting partner shall be required to file schedule of debts and inventories of his property in such manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made. *Held*, that where a firm and a petitioning partner are adjudged bankrupts against the protest of objecting partners, the latter may be properly required to file a schedule of their individual debts and an inventory of their individual property, though they themselves, having committed no act of bankruptcy, could not be adjudged bankrupts as individuals.

In Bankruptcy. On motion for order to file schedules.

William Osgood Morgan, for the motion.

R. V. Lindabury, opposed.

LANNING, District Judge. The petitioning partner, Anderson C. Wilson, and the partnership of J. M. Ceballos & Co. have recently been adjudged bankrupt. Adjudication of bankruptcy against the objecting copartners, Juan M. Ceballos and John S. Fiske, as individuals, was denied. Application is now made by the petitioning partner for an order directing each of the two objecting copartners to file a schedule of his individual debts and an inventory of his individual property. The application is made under the last clause in General Order 8 (32 C. C. A. xi) in Bankruptcy. On the argument I stated (speaking from memory only) that the last clause of that General Order was new, and formed no part of General Order 18, under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). In that statement I was in error. The full text of each of these orders is as follows:

General Order 18 under the act of 1867:

"In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon

the petition, such copartner shall be required to furnish to the marshal, as messenger, a schedule of his debts and an inventory of his property, in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."

General Order 8 (32 C. C. A. xi), under the act of 1898 (Act July 1, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]):

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."

Under the act of 1867 a partnership was not regarded as a legal entity in the sense in which the courts regard it under the act of 1898. Although General Order 18 referred to the procedure in a case where one or more members of a copartnership refused to join a petitioning partner in a petition to have "the firm declared bankrupt," the only way of obtaining an adjudication against a "firm" under the act of 1867 was by having all the copartners so adjudged. This is clearly shown by the provisions of that act. Section 11 provided that in a voluntary case the petitioner should annex to his petition a verified schedule of his debts and an inventory of his property; section 42 provided that in an involuntary case the bankrupt should file such schedule and inventory; and section 36 provided that where two or more persons being partners in trade should be adjudged bankrupt "all the joint stock and property of the copartnership, and also all the separate estate of each of the partners," should be taken, excepting the parts by that act exempted from seizure. General Order 18 provided a method for enforcing the act in partnership cases, where a petition was filed by less than all the partners. It required each nonjoining partner, where the "firm"—that is, all the partners—were adjudged bankrupt, to furnish "a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."

I think General Order 8 has the same effect. In *Chemical National Bank v. Meyer* (D. C.) 92 Fed. 896, where there was a petition by creditors to have the firm of Meyer & Dickinson, and the partners Henry L. Meyer and Joseph R. Dickinson as individuals, adjudged bankrupt, adjudication was made as to the firm and Henry L. Meyer. No adjudication was made against Joseph R. Dickinson as an individual, for the reason that he had committed no act of bankruptcy, but it was held that he was a proper party to the proceeding. The decree of adjudication was affirmed by the Circuit

Court of Appeals of the Second Circuit. See *In re Meyer*, 98 Fed. 976, 39 C. C. A. 368. In the opinion of the latter court, Judge Wallace, after referring to the provisions of section 5 of the bankruptcy act, said:

"We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity, which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners, as well as the partnership estate, and marshal and distribute them according to equity. The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupt. The language does not require such an adjudication. The section is silent respecting a discharge of the partners individually. It does not, by terms or by implication, preclude an adjudication of the individual partners as bankrupt in the partnership proceeding; and, if there is such an adjudication, there is nothing to prevent the partners from receiving a discharge individually, if they are otherwise entitled to it under the act. But, as the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual members cannot be adjudged bankrupts in such a proceeding, who have not committed, or been participants in committing, one of the enumerated acts."

In the *Stokes Case* (D. C.) 106 Fed. 312, Judge McPherson, of this circuit, followed the doctrine of the *Meyer Case*, and held that the trustee of a bankrupt partnership was entitled to an order requiring the assignees of the partners, who had conveyed their individual assets for the benefit of their creditors, to transfer such individual assets to the trustee. And in *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, where the District Court had adjudged a partnership, and some, but not all, of its partners as individuals, bankrupt, and where the District Court had made an order that "all parties hereto found to be partners as aforesaid, whether or not adjudged bankrupts, shall each file with the referee as required by law his or her schedule of debts and inventory of properties in the same manner as if adjudged bankrupts," the language of the Circuit Court of Appeals of the Sixth Circuit shows approval of the order, notwithstanding the appeal was dismissed for irregularity in the manner of carrying up the order for review by the Circuit Court of Appeals.

Following the doctrine of these authorities, the order now applied for will be granted.

BEATTY v. WILSON.

(Circuit Court, D. Kansas, First Division. March 6, 1908.)

No. 8,578.

1. COURTS—FEDERAL COURTS—LEGAL AND EQUITABLE JURISDICTION.

Only legal rights can be enforced in an action at law in the federal courts, regardless of the rule of decision in the courts of the state; the distinction between actions at law and suits in equity in the federal courts being fundamental and jurisdictional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 913.]

2. SAME—EJECTMENT—EQUITABLE TITLE.

An assignee of a school land certificate, to whom no patent had been issued, could not maintain ejectment in the federal courts to recover the land from a subsequent purchaser from the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 913.]

3. PUBLIC LANDS—LANDS OF STATE—SCHOOL LANDS—TRANSFER—RIGHTS OF PURCHASER.

Under Gen. St. Kan. 1901, § 6347, as amended by Laws 1903, p. 723, c. 477, § 1, and Gen. St. 1905, §§ 6880, 6888, providing for the sale of school lands by the state, a purchaser prior to the issuance of the patent acquires only an equitable interest.

Mulvane & Gault, D. R. Hite, Geo. F. Beatty, J. B. Larimer, A. G. Wolfenbarger, and Berge, Morning & Ledwith, for plaintiff.

Frank Doster and Langwade & Carter, for defendant.

POLLOCK, District Judge. This is an action at law in the nature of ejectment, brought by plaintiff against defendant to recover a tract of property situated in Decatur county, this state. A jury was waived and the cause tried and submitted to the court. This is one of a series of cases brought in this court by the plaintiff and others, involving substantially the same matters of fact and law. By stipulation of parties a jury in all has been waived, the cases tried and submitted, and a decision of one is a determination of all. The facts necessary to a decision of the controversy are as follows:

On October 15, 1884, one I. L. Peck purchased from the state the tract of school land in Decatur county now in controversy, under the terms and provisions of the law relating to the disposition of the school lands of the state. Ten per cent. of the purchase price was paid, a bond given, and the purchaser received the usual certificate of purchase, providing for the deferred payments and for a patent upon the completion of the contract, which certificate reads as follows:

"State of Kansas, Decatur County—ss.:

"Whereas, on the 15th day of October, A. D. 1884, I. L. Peck purchased from the state of Kansas the following described land, to wit: The northeast quarter of section No. eleven, in township No. five, range No. twenty-nine west, containing one hundred and sixty acres, under the provisions of 'An act to provide for the sale of the school lands,' approved February 22, 1864, and acts of the Legislature of the state of Kansas amendatory and supplemental thereto, at and for the sum of four hundred and eighty dollars;

"And whereas, the said I. L. Peck has paid to the county treasurer of Decatur county the sum of forty-eight dollars:

"Therefore, the said I. L. Peck, his heirs or assigns, will be entitled to a patent from the state of Kansas to the land within described on the 15th day of October, A. D. 1904, upon the payment of the sum of four hundred and thirty-two dollars, that being the balance of the purchase money therefor, payable in twenty years, or in installments of not less than twenty-five dollars each, with interest upon the balance unpaid at the rate of six per cent. per annum.

"The purchaser can at any time procure his patent upon the payment of the purchase money, with six per cent. interest from the day of sale until the day of last payment."

This certificate, by mesne assignments and transfers indorsed thereon and of record in the office of the county clerk of Decatur county, passed to the plaintiff in this action. The statutory provisions of the

state in effect at the time such contract of purchase and sale was made, in so far as material, read as follows:

Section 6347, Gen. St. 1901, as amended by section 1, c. 477, p. 723, Laws 1903:

"Any person purchasing such school land shall pay to the treasurer of the county in which the same is situated, one-tenth of the amount of the purchase money, taking therefor a receipt, which he shall present to the county clerk, together with a bond in double the amount of the purchase money unpaid, conditioned that he will not commit waste upon said land, and that he will pay the balance of said purchase money in twenty years, and interest to be paid annually thereon at the rate of six per cent. per annum, as the same becomes due: Provided, that the purchaser may pay the balance of the purchase money at any time, or in installments of not less than twenty-five dollars; provided, also, any person having purchased such land and made partial payment of the purchase money, and who is not in default in the payment of interest due upon such purchase money or taxes upon the land, or who, being in default and interest past due, and taxes past due upon the land, will pay up in full all such delinquent interest and taxes, may, upon surrendering the certificate of purchase to the county clerk of the county in which the said land is situated, take out a new certificate of purchase under the provisions aforesaid, and upon presenting a new bond in double the amount of the purchase money remaining unpaid, said bond conditioned the same as the bond aforementioned in this section; and provided, further, that the owner and holder of any certificate or certificates for the purchase of school lands upon which interest has been paid for more than fifteen years, may surrender the same to the county clerk of the county in which said land is situate, and upon such surrender the county clerk shall issue a new certificate or certificates, due in twenty years, with the option of prepayment, on which interest is to be paid at the rate of four per cent. per annum, and subject to all the other provisions of the act relating to school lands."

Section 6880, Gen. St. 1905:

"The county clerk shall thereupon enter the amount of the purchase money of the land, the amount paid upon the same, in a book kept for that purpose, and shall charge the same to the county treasurer in the records of the county, and shall issue to the purchaser a certificate, under the seal of his office, showing the amount paid, the amount due and the time when due, with interest, and that upon the payment of said amount when due, with interest, he will be entitled to a patent to said land. It shall be the duty of the Attorney General to prepare a proper form for said certificate for the sale of said land, so as to protect the rights of the state and of the purchaser, his heirs and assigns."

Section 6888, Gen. St. 1905:

"If any purchaser of school lands shall fail to pay the annual interest when the same becomes due, or the balance of the purchase money when the same becomes due, it shall be the duty of the county clerk of the county in which such land is situated immediately to issue to the purchaser a notice in writing, notifying such purchaser of such default; and if such purchaser fail to pay or cause to be paid the amount so due, together with the costs of issuing and serving such notice, within sixty days from the service thereof, the said purchaser, and all persons claiming under him, will forfeit absolutely all right and interest in and to such land under said purchase, and an action will be brought to eject said purchaser, and all persons claiming under him, from such land. It shall be the duty of said county clerk to include in such notice all tracts of land sold to the same purchaser, and on which default in any such payments then exist. The notice above provided for shall be served by the sheriff of the county by delivering a copy thereof to such purchaser if found in the county, also to all persons in possession of such land: if such purchaser cannot be found, and no person is in possession of said

land, then by posting the same up in a conspicuous place in the office of the county clerk. And in case such land or any part thereof has been sold for taxes, a copy of such notice shall be delivered to such purchaser at tax sale, if a resident of the county. Said sheriff shall serve such notice and make due return of the time and manner of such service, within fifteen days from the time of his receipt of the same. The sheriff shall be entitled to the same fees and mileage for serving the same as allowed by law for serving summons in civil actions. If such purchaser shall fail to pay the sum so due, and all costs incident to the issue and service of said notice, within sixty days from the time of service or posting of such notice as above provided, such purchaser and all persons claiming under him, shall forfeit absolutely all rights and interest in and to such land under and by virtue of such purchase; and the county attorney shall proceed to eject him, and all persons claiming under him, from said premises, if in possession. * * *

Section 6887, Gen. St. 1905:

"On presentation of a certificate of the county clerk, showing that any person has paid the full amount of the purchase money, and all interest due, for any portion of said school lands, with a certificate thereon, indorsed by the Auditor of State, showing that he has charged the county treasurer of the county where the land is situated, with the full amount of the purchase money mentioned in said certificate, the Governor of the state shall issue a patent to the purchaser, his heirs, or assigns, for the same, which said patent shall convey to the patentee a full title, in fee simple, to said lands."

The contract made by Peck with the state for the purchase of this land was not kept and performed by Peck or his assignees of the certificate of purchase, and on September 19, 1899, the county clerk of Decatur county issued to Peck and to the last assignee of the certificate, as by the law provided, the following notice:

"County Clerk's Office, Oberlin, Kansas, Sept. 19, ——. "Mr. I. L. Peck, J. I. Case Threshing Machine Co., Last Assignee: "You are hereby notified that the annual interest on the balance of the purchase money for N. E. $\frac{1}{4}$ Sec. 11—5—29, school land, is due, and unless you pay or cause to be paid the amount due, together with the costs of issuing and serving this notice, within sixty days from service of this notice, you and all persons claiming under you will forfeit absolutely all right and interest in and to such land under such purchase, and an action will be brought to eject you and all persons under you from said land. "[Seal.] [Signed] W. H. Andrews, County Clerk."

The return of the sheriff who made service of this notice, as indorsed thereon, reads as follows:

"Received this writ Sept. 19, 1899. 30th day of Sept. 1899, having made diligent search, I cannot find any of the within-named persons in Decatur county, Kansas: I. L. Peck, Case Threshing Machine Co.—they being non-resident. H. A. Griffith, Sheriff.

"By John Haywood, Deputy."

This return fails to show a compliance with the above-quoted provisions of the law as to the manner of service of notice of forfeiture. However, it is stipulated by the parties in the agreed facts, if competent as evidence, as follows:

"That the sheriffs making service of said forfeiture notices or the county clerks of the several counties will testify that in all cases where personal service of said forfeiture notices was not made the said notices were posted by the sheriff in a conspicuous place in the county clerk's office, and the sheriff will testify that in each of said cases where notices were posted he drove to and over the lands and that no one could be found in possession

thereof, and that the persons named in the notices could not be found in the county in which the lands were situated."

On December 1, 1899, there was entered on the appropriate records in the office of the county clerk of Decatur county a declaration of forfeiture of the rights of Peck and his assignees in the land in question. Thereafter, and on the 23d day of January, 1902, the tract of land in question was again offered for sale in accordance with the provisions of law, and was purchased by defendant, who received a certificate of purchase and went into possession of the property, and has in all things kept and performed his contract of purchase with the state. It is stipulated in the agreed facts that the holder of the first certificate of purchase had knowledge of the purchase by defendant, his entry on the land, and the making of improvements thereon, and did not protest. The legal title to the land in controversy at all times was and is now vested in the state.

On this state of facts it is the contention of plaintiff that the attempted forfeiture of the contract rights of Peck with the state in the land in question, to which plaintiff has succeeded by assignment of the certificate, is void and of no effect, because the notice of such forfeiture is not shown by the return of the officer to have been served as provided by the law, and, as time of payment is not made of the essence of the contract between Peck and the state, therefore, notwithstanding the default in payment to the state by the owner and holder of the certificate of purchase in accordance with the terms of the contract, yet plaintiff, as the holder of such certificate, has such rights in the land as will enable him to bring and maintain this action against defendant, who purchased from the state with constructive notice made by the public records of the county of the contract rights of Peck and his assignees in the land, and the manner in which the forfeiture of such contract rights was attempted to be made by the state.

It is contended by defendant: (1) That, as at all times the legal title to this land has remained in the state, the plaintiff by his evidence has not shown himself possessed of such legal right to the property as will permit him to recover in this action; (2) that the attempted forfeiture by the state is not void; (3) as the assignor of plaintiff made default in performance of his contract with the state, and as he stood by and saw defendant contract with the state in relation to the land, enter thereon, and make valuable and lasting improvements without protest, he should not now be allowed to assert any right to the land, although the attempted forfeiture by the state is void.

From a careful consideration of the facts and the elaborate briefs of counsel, I am of the opinion only one question raised for decision need be considered, and that is, conceding the attempted forfeiture by the state of the contract rights of Peck and his assignees in the land, was not in compliance with the law and is insufficient to cut off and destroy such rights, are such contract rights in their character and nature such as may be asserted and maintained by plaintiff in this action at law? Of course, in the courts of the state, under the code provision abolishing all distinction between actions at law and suits in equity, the plaintiff in this action might have a recovery if he

establishes any right to the property in controversy superior to that of defendant, whether such superior right should be in its nature legal or equitable. But in this court, regardless of the rule of decision in the courts of the state; in this action at law, the only rights possible of assertion and maintenance by the plaintiff are legal rights, and for the reason that here the distinction between actions at law and suits in equity is fundamental and jurisdictional. *Cook et al. v. Foley et al.*, 152 Fed. 41, 81 C. C. A. 237. That plaintiff may recover he must establish a legal title to the property in controversy in himself or fail of recovery.

In *Hooper et al. v. Scheimer*, 64 U. S. 235, 16 L. Ed. 452, Mr. Justice Catron, delivering the opinion of the court, said:

"By the statute of Arkansas an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register and receiver of the proper land office of the United States. * * * It is also the settled doctrine of this court that no action of ejectment will lie on such an equitable title, notwithstanding a state Legislature may have provided otherwise by statute. The law is only binding in the state courts, and has no force in the Circuit Courts of the Union. *Fenn v. Holme*, 21 How. 482, 16 L. Ed. 198."

In *Fenn v. Holme*, supra, Mr. Justice Daniel, delivering the opinion of the court, said:

"This is an attempt to assert at law, and by a legal remedy, a right to real property—an action of ejectment, to establish the right of possession in land. That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them. Such authority may, however, be seen in the cases of *Goodtitle v. Jones*, 7 T. R. 49, of *Doe v. Wroot*, 5 East, 132, and of *Roe v. Head*, 8 T. R. 118. This legal title the plaintiff must establish, either upon a connected documentary chain of evidence or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title."

In *Sheirburn v. De Cordova et al.*, 24 How. 425, 16 L. Ed. 741, Mr. Justice Campbell, delivering the opinion of the court, said:

"By a statute of Texas 'all certificates for head-rights, land script, bounty warrants, or any other evidence of right to land recognized by the laws of this government, which have been located or surveyed, shall be deemed and held as sufficient title to authorize the maintenance of actions of ejectment, trespass, or any other legal remedy given by law.' Hart. Dig. art. 3230. The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198, that a further discussion is unnecessary."

In *Foster v. Mora*, 98 U. S. 425, 25 L. Ed. 191, Mr. Justice Miller, delivering the opinion of the court, said:

"In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the federal courts."

In *Oaksmith v. Johnston*, 92 U. S. 343, 23 L. Ed. 682, Mr. Justice Field, delivering the opinion of the court, said:

"The long uninterrupted possession of the premises by the devisee, and the valuable improvements made by her, might have justified the presumption of a transfer of the bond from Roger Weightman. But such transfer, if established, would not have availed the plaintiff. It would only have disclosed the possession of an equitable right to a conveyance, which a court of chancery might enforce by compelling a transfer of the legal title from the defendant, if he purchased with notice of the plaintiff's equity, or by decreeing compensation from Roger Weightman, if he conveyed the title to a bona fide purchaser without notice. But in the action of ejectment, in the federal courts, the legal title must control, and to another forum the plaintiff must look for the enforcement of any equitable rights he may possess."

Did the contract of the state with Peck confer on him or his assignees any legal title or right in the land? That the legal title was reserved by and still remains in the state is conceded. Peck contracted with the state for the passage to him or his assigns of the certificate of purchase of the legal title by patent on the performance of conditions subsequently to be performed. The contract, in this respect, was by him or those claiming under him broken. The contingency upon which the grant was to be made did not happen, and therefore the patent by which the title was to pass has not issued. Whatever rights, if any, plaintiff may have as assignee of the certificate of purchase to be relieved of his default and the contract continued in force, or to a decree for performance of the contract, or to a recovery of the money paid under the contract, or to a cancellation of the attempted forfeiture by the state (however incapable of enforcement against the sovereign state such rights may be), or to a decree against the patentee on the passage of title from the state to him, are all matters of purely equitable cognizance and immaterial here. The settled rule of this court, as stated, is not without the best of reasons for its support. This is the form of action employed in this jurisdiction to settle the title to real property. *Peterson v. Albach*, 51 Kan. 150, 32 Pac. 917. As has been said, this court of law is without jurisdiction or power to try or determine the equitable rights of the parties to the land, and as the legal title has not passed from, but resides in, the state, any judgment herein would be utterly without effect upon such legal title; for defendant, although out of possession, could keep his contract with the state, and when performance was made receive from it a patent conveying to him full legal title to the property, which, of necessity, would prevail in a subsequent action in ejectment brought by him, based on the patent granted by the state against plaintiff then in possession without title.

The contention, made by counsel for plaintiff, that the effect of the contract of Peck with the state was to place the parties in the same relation to the property as though a conveyance of the property had been made from the state to Peck, and he had given a mortgage back to secure the deferred purchase-money payments, is, to my mind, wholly untenable and unsound. An examination of the statutory provisions above quoted, providing the manner of sale and disposition by the state of its school lands, clearly shows it was not the legislative

intent to pass any title to the property by the contract of sale under the statute or the certificate of purchase issued. The title of the state in such school lands is expressly reserved, to be passed in the usual manner employed by a sovereign power when the conditions of the contract of sale should be performed by the purchaser. Like contracts have been held everywhere to reserve the legal title to the vendor, as is clearly seen from the cases cited by counsel for plaintiff in his brief. *Courtney v. Woodworth*, 9 Kan. 443; *Burke v. Johnson*, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252; *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115. As has been seen, such contracts confer merely equitable rights, on which ejectment cannot be maintained in the federal courts. *Oaksmith v. Johnston*, 92 U. S. 343, 23 L. Ed. 682.

It is thought by counsel for plaintiff the case of *Sims v. Irvine*, 3 Dall. (U. S.) 425, 1 L. Ed. 665, holds a contrary view. If so, the later, oft-repeated, and positive decisions of that court would control here; but a careful reading of the opinions in that case will show an express recognition of the settled rule. The Chief Justice, in his opinion, said:

"A confirmation of this equitable title, as effectual as that of any patent could have been, was afterwards comprised in the compact between Virginia and Pennsylvania, and in the ratification of the same by the legislative act of the latter," thus showing ample legal title to the property in the plaintiff.

Both in principle and on authority I think it altogether clear that plaintiff, as the holder of the certificate of purchase received by Peck from the state, whatever his rights thereunder, if any, may be, has no such legal title to or rights in the property in controversy as will enable him to maintain this action against defendant in possession under his contract of purchase from the state.

The decision of this question leaves unnecessary of determination the many other interesting ones involved in this action, such as the right of the plaintiff to maintain his action on a contract the conditions of which admittedly have been broken by him or his assignors; whether he or his assignors could stand by, knowing the state had attempted a forfeiture of the contract rights under the first sale made, allow defendant to purchase at a subsequent one, go into possession, remain there for a long period of time, and make valuable and lasting improvements, without protest, and then successfully maintain this action; or whether the attempted forfeiture by the state, under the facts of this case, is wholly void and of no force or effect.

On the whole case as presented, and on the undisputed facts, I have no doubt whatever that judgment must and should go for the defendant in this case and the other cases submitted.

It is so ordered.

ALLEN-WEST COMMISSION CO. v. GRUMBLES.

(Circuit Court, W. D. Arkansas, Texarkana Division. January 30, 1908.)

GARNISHMENT—PERSONS SUBJECT TO GARNISHMENT—WIFE OF DEFENDANT.

Under the law of Arkansas, a wife is subject to the common-law disabilities of coverture, except as they have been expressly removed by the married women's statutes, which are strictly construed to preserve her common-law rights. A husband cannot obtain a valid judgment against his wife, and for like reason an action cannot be maintained against her as garnishee by a creditor of her husband, under Kirby's Dig. Ark. § 379, to recover a personal judgment against her, or for the proceeds of property given her by her husband in fraud of his creditors, which proceeds she held at the time of garnishment, but subsequently returned to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 189.

Following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 606; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 393.]

Moore, Smith & Moore, for plaintiff.

Rose, Hemingway & Rose and Cantrell & Loughborough, for defendant.

ROGERS, District Judge. The original case, out of which this one grows, was before the United States Circuit Court of Appeals for the Eighth Circuit, and is reported in 129 Fed. 287, 63 C. C. A. 401. In the original case, the court dissolved the attachment against the defendant, J. H. Grumbles, and discharged his wife, Mary E. Grumbles, as garnishee. The Court of Appeals reversed the Circuit Court as to both issues, and remanded the cause to be proceeded with in conformity to that opinion. In that case the counsel for the Allen-West Commission Company urged the Court of Appeals to order the Circuit Court to direct Mary E. Grumbles, the garnishee, to pay the proceeds of the sale of the stock of J. H. Grumbles, which she had received and sold, into the Circuit Court, upon the reversal of the judgment dissolving the attachment, and discharge the garnishee. The Court of Appeals refused to do so, saying:

"She has not appeared in person or been examined under oath. She has not made default in appearance. She appeared by her affidavit, in which she denied that she was in possession of any of the property of the defendant, and denied that she was indebted to him. In this state of the case, the court below may undoubtedly compel her to appear in person and to submit to an examination under oath, and then, if the evidence sustains the charge of the plaintiff, it may order her to pay the proceeds of the sale of the stock into court; but, in the absence of any proceeding of this character and of any appearance of Mrs. Grumbles in person, the remedy of the plaintiff is to proceed against her by an action under section 360, Sand. & H. Dig., which provides that, when the garnishee fails to make a disclosure satisfactory to the plaintiff, he may proceed in an action against her by filing a complaint and causing a summons to be issued upon it. The time has not yet arrived under these statutes when the plaintiff is entitled to an order on the garnishee to pay the moneys she obtained from the sale of the stock into court."

What character of action plaintiff should bring, whether at law or equity, the court does not say, nor does the statute prescribe. The statutes referred to by the court in the quotation above are Sandel's &

H. Dig. §§ 357, 358, 359, or Kirby's Dig. §§ 376, 377, and 378, and are as follows:

"Sec. 376. Each garnishee summoned shall appear. The appearance may be in person or by affidavit of the garnishee filed in court, disclosing truly the amount owing by him to the defendant, whether due or not, and the property of the defendant in the possession or under the control of the garnishee; and, in the case of a corporation, any shares of stocks held by or for the benefit of the defendant, at or after the service of the order of attachment.

"Sec. 377. Where a garnishee, or officer of a corporation summoned as a garnishee, appears in person, he may be examined on oath; and if it is discovered on such examination that, at or after the service of the order of attachment upon him, he or the corporation was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property, and the payment or security for the payment of the amount owing by the garnishee into the court, or to such person as it may direct, who shall give bond, with security for the same; or, the court may permit the garnishee to retain the property or the amount owing, upon the execution of a bond, with one or more sufficient sureties to the effect that the amount shall be paid or the property shall be forthcoming, as the court may direct. Performance of these bonds may be summarily enforced by orders and proceedings as in cases of contempt.

"Sec. 378. The court may, on the motion of the plaintiff, compel the appearance in person and examination of any garnishee or officer of a corporation summoned as a garnishee by process as in cases of contempt; or, where a garnishee makes a default by not appearing, it may hear proof of any debt or property owing or held by him to or for the defendant, and make such order in relation thereto as if what is so proved had appeared on the examination of the garnishee."

The Court of Appeals, in so holding, followed the decision of the Supreme Court of Arkansas construing those statutes, by which it was bound. *Giles v. Hicks*, 45 Ark. 271; *Railway Company v. Richter*, 48 Ark. 349, 3 S. W. 56; *Penyan v. Berry*, 52 Ark. 130, 12 S. W. 241.

When the case was remanded to the Circuit Court, and the proper orders entered, the plaintiff elected to proceed under section 379, Kirby's Dig., which is as follows:

"Sec. 379. Upon the service of a summons upon any garnishee, or after his failure to make a disclosure satisfactory to the plaintiff, the latter may proceed in an action against him by filing a complaint verified as in other cases, and causing a summons to be issued upon it; and thereupon such proceeding may be had as in other actions, and judgment be rendered in favor of the plaintiff to subject the property of the defendant in the hands of the garnishee, or for what shall appear to be owing to the defendant by the garnishee. The judgment may be enforced by execution or other proper means."

And the cause is now here on a complaint at law filed against Mary E. Grumbles, under that section of the statute. Two defenses are set up: First, that defendant did not have in her possession, or under her control, any sum of money or credits belonging to J. H. Grumbles, and was not indebted to him in any sum when the summons was served upon her as garnishee; second, that she is now and has been the wife of J. H. Grumbles for 40 years, under disability of coverture, and incapable of making any contract.

The question arises: Can a personal judgment be rendered against a married woman garnished for her husband's debt? The answer to this question must settle the whole case. It is not without difficulty, and the authorities conflict, depending much, no doubt, on the statutes

of the different states fixing the status of married women. On the face of the statutes of Arkansas, *supra*, it would appear that any person may be garnished, including married women, lunatics, and infants; but, in arriving at the intention of the Legislature in the enactment of these statutes, the legal status of married women at that time, under the statutes of Arkansas, must be considered. They were enacted under the Civil Code, nearly 40 years ago. The pertinent provisions of the married women's law were not enacted until 1873 Kirby's Digest, §§ 5212-5220. Clearly when enacted they were not intended to apply to married women, then practically under full common-law disabilities. Many of these disabilities have by recent statutes been removed; but the Supreme Court of Arkansas has still adhered to the common-law rule, and construed all such statutes strictly. The act of December 15, 1875 (Kirby's Dig. § 5229), does not modify the common-law rule of construction always applied by that court. It only applies to that act, of which it is a part, and which relates to scheduling the separate property of married women. That the Supreme Court of Arkansas has constantly and rigidly held to the rule of the common law in construing the married women's statute will be fully verified by a glance at the decisions in footnote to Kirby's Dig. p. 1114. See, also, *Sparks v. Moore*, 66 Ark. 437, 56 S. W. 1064, *Hampton v. Cook*, 64 Ark. 353, 42 S. W. 535, 62 Am. St. Rep. 194, and *Gilkerson-Sloss Comm. Co. v. Salinger*, 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 526, 35 Am. St. Rep. 105, in which last case that court held that a wife could not form a partnership with her husband, basing the decision expressly on the grounds that her common-law disability to contract with her husband was not removed. In *Countz v. Markling*, 30 Ark. 17, it was held that a judgment being found in favor of the husband as against his wife was void, and in *Pillow v. Wade*, 31 Ark. 678, that husband and wife are incapable of contracting with each other. See other cases there collated. The general rule is that an infant may be held as garnishee on account of any personal property in his hands belonging to the principal debtor and for any debt that he has contracted in the purchase of necessities (2 *Shinn on Attachment and Garnishment*, § 530; *Scofield v. White*, 29 Vt. 330; *Wilder v. Eldridge*, 17 Vt. 226), but an infant may bind himself by a fair contract for necessities furnished him. Could it be fairly said that, under our garnishment laws, an infant could be garnisheed on any and all contracts? The statute is broad enough to admit that construction; but, manifestly, that was not the intention of the Legislature.

It may be conceded, for the purposes of this case, though not decided, that if this was a proceeding under sections 377 and 378 of Kirby's Digest, and at the trial it was found that defendant Mary E. Grumbles was in possession or had under her control any property belonging to her husband, by proper orders, the court might compel her to surrender it to be applied to his debts; but, as we have seen, this proceeding is not under those sections. It is under section 379 of Kirby's Digest, and no relief can be had in such action under the proof, and none is sought, except by the rendition of a personal judgment against her and the issuance of an execution thereon. This is necessarily so, because, if anything else were prayed, no judgment can be rendered in favor of

plaintiff to subject the property of the principal defendant, J. H. Grumbles, in the hands of his wife, the garnishee, or for what she appeared to be owing the defendant by the garnishee, for the reasons: First, that the proof shows she has no property of J. H. Grumbles in her hands or under her control; second, there is no proof to show that she ever owed the defendant J. H. Grumbles any money. The fact is, the money she had when garnished has been surrendered to J. H. Grumbles, and the relation of debtor and creditor never did exist between them. He had given her the stock, and the gift was valid between them. It was voidable only as to creditors. She returned it to him, not because she owed it, but, presumably, because she found she could not hold it as against his creditors. Nor was she a bailee. That relation did not subsist. Indeed, there was no contractual relation between the principal defendant and his wife. She was, by implication of law, a trustee, after the garnishment was served on her, so far as the plaintiff is concerned, and she was the owner in her own right, so far as all persons except plaintiff were concerned, of the stock or proceeds thereof in question.

The general rule is that no claim can be secured by garnishment against a debtor, unless his creditor, the principal defendant in the suit, can maintain a common-law action for the same, if due or when it becomes due. In other words, there must be such a liability on the part of the garnishee that would enable the principal defendant to maintain an action in his own name and for his own use directly against the garnishee, and to recover a judgment thereon (2 Shinn on Attachment and Garnishment, §§ 475, 476, 477, and cases there cited); and plaintiff by garnishment cannot place himself in a superior position as regards a recovery than is occupied by the principal defendant (*Id.* § 516, and cases cited). The above rule is subject, under the weight of modern decisions, to the exception that, where one is in possession of property of another upon a contract which was fraudulent as to creditors, it may, in his hands, be reached by garnishment. *Id.* § 484, and cases cited. But this exception is applicable to garnishees generally, and throws no light upon the question as to whether a wife can be garnished and a personal judgment rendered against her for the debt of her husband. The correct rule is, no doubt, stated in 2 Waples on Attachment, § 350, to the effect that:

"Where anything like the common-law relation of husband and wife is preserved, there can be no doubt that the wife is an improper party to summon as garnishee in an action against her husband."

The question in Arkansas is an original one, and must be examined in view of the statutes modifying the common law and fixing the status of married women. Before doing so, however, it is well enough to examine some of the authorities pro and con. *Odend'hal v. Devlin*, 48 Md. 440, is cited to show that the husband may be garnished for the wife's debt. The statutes of Maryland are not accessible, but in that case the court say:

"It is settled that the relation of debtor and creditor may exist between husband and wife growing out of the appropriation by him of his wife's separate estate, and is founded on an agreement by him to repay the moneys or property so appropriated. *Edelen v. Edelen*, 11 Md. 415. When such a debt

exists, the creditor of the wife, by a proceeding like the present, may make the husband a garnishee, with respect thereto. The marital relations in this state have been materially changed by the Code as far as rights of property are concerned. The wife may be seised of the legal estate in lands, and she may hold the legal property in personalty, in her own right; no trustee being necessary, and, in respect to property held to her sole and separate use, she has the right to resort to courts of law or equity for its protection. A married woman carrying on business in her own name as a sole trader contracts debts in respect to her business as if she were a feme sole. The remedy given to her creditors for the recovery of debts due them, by the process of attachments against her property, and credits, would be nugatory and worthless, if she could be permitted to place her funds or property in the hands of her husband, and it should be held that an attachment of this kind could not be laid in his hands as garnishee."

It is not believed this case is in point for two reasons: (1) It is the husband, not the wife, that is garnished; (2) the law of Maryland allowed the wife to resort to courts of law, as against her husband, if he was indebted to her.

Claremount Bank v. Clark, 46 N. H. 134, is cited by plaintiff's counsel in support of their contention; but the question therein was, not whether a personal judgment could be rendered against a garnished wife, but whether she could be compelled to answer questions in relation to her title to real estate attached in the suit, fraudulently conveyed to her by her husband and of which he held possession when attached. She was held to answer. The court said:

"By the statutes of this state a married woman may, under certain circumstances, make contracts, and with her husband even, which will be valid at law (Albin v. Lord, 39 N. H. 196), and in various cases may sue and be sued in her own name as if she were sole and unmarried (Rev. St. 1842, c. 149, § 3; Laws 1846, p. 308, c. 327, § 4; Laws 1860, p. 2248, c. 2342, § 3; Jordan v. Cummings, 43 N. H. 134; Ames v. Foster, 42 N. H. 382). The terms of these statutes are so broad as to allow, in certain instances, suits at law between husband and wife, and they are not coupled with any alternative clause like that in the statute of Maine, upon which the decision in Smith v. Gorman, 41 Me. 405, is placed by the court, and this natural construction of the language of these statutes is required by their general design. Albin v. Lord, 39 N. H. 203. In the present case, as Mrs. Clark may be liable as the trustee, either of her husband or of others of the defendants, notwithstanding her coverture, the mere fact that she is the wife of one of the defendants is insufficient to excuse her from answering the first question."

See, also, Jones v. Roberts, 60 N. H. 217.

This case does not seem to be in point. It relates to answering questions as garnishee.

In Clough v. Russell and Trustee, 55 N. H. 279, it is held that the wife may loan her money to her husband and recover judgment at law against him on a note given therefor. This last case discloses that in New Hampshire the common-law disability growing out of coverture does not exist in that state as between husband and wife. She may lease to him land, or make any other contract with him in relation to her separate estate, and enforce it by any proper action in court.

In Mary J. O'Brien (habeas corpus) 24 Wis. 547, it was held that, in such a proceeding as this, the wife might be compelled to answer questions in relation to property in her hands belonging to her husband.

In Berles v. Allen A. Adsit, 102 Mich. 495, 60 N. W. 967, it was held that, under a statute which provides that:

"A husband shall not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent, except in certain cases, a wife, when garnished in a suit against her husband, cannot, without his consent, be examined as to transfers of property made to her by her husband." *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; *Niland v. Kalish*, 37 Neb. 47, 55 N. W. 295; *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295.

A similar statute exists in Arkansas. Kirby's Dig. § 3095, is as follows:

"The following persons shall be incompetent to testify: * * * Fourth. Husband and wife for or against each other, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterwards, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent."

In *Mary Smith v. Michael Gorman et al.*, 41 Me. 408, it is distinctly held, under a statute broader than the Arkansas statute as to married women, that she cannot maintain an action against her husband. The court say:

"By the common law a wife can only enforce her rights in conjunction with her husband. By St. 1848, p. 61, c. 73, the wife is authorized to bring an action in her own name in vindication of her rights. So far as the statute gives her authority, she may commence and prosecute suits, and no further. By section 1 'she may commence, prosecute and defend any suit in law or equity, to final judgment and execution in her own name, in the same manner as if she were unmarried, or she may prosecute or defend such suit jointly with her husband.' The statute is in derogation of the common law, and is not to be construed as giving the wife a right of action against the husband, unless it results from the express terms of the statute, or from necessary implication. The alternative is given to the wife to sue in her own name, or 'jointly with her husband.' The authority is in the alternative, and in either case is coextensive. As the husband and wife cannot 'jointly' maintain an action against the husband, so neither can the wife alone. So the right of prosecution and of defense is coextensive. If the wife may sue the husband, the husband may sue the wife. The statute gives no mutual right of action between each other, to the husband and wife, and none such exists by the common law."

In Iowa, in *Enneking v. Scholtz et al.*, 69 Iowa, 473, 29 N. W. 422, the broad doctrine is recognized that a personal judgment may be rendered against the wife as garnishee of the husband. What the legal status of the married woman is in that state is not known. The statutes are not accessible, but the question here presented is not found mentioned, much less discussed, and it is therefore assumed that in Iowa the disabilities of coverture have been removed. See, also, *Thompson v. Silvers*, 59 Iowa, 671, 18 N. W. 854.

I do not think the cases referred to aid materially in the solution of the question at bar. The last clause of section 5214, Kirby's Dig., shows that a married woman may alone sue or be sued in the courts of Arkansas on account of her separate property, business, or service. To that extent her common-law disabilities have been removed as to suits of law and equity; but in the state of Arkansas no decision of the Supreme Court of Arkansas has been cited or found which relieves her of her common-law disability. As to her legal status with her husband, as we have seen, she cannot form a copartnership with him,

a judgment in his favor against her is void, and the contract of a married woman, unless for the benefit of herself or her separate estate in relation to her separate business, cannot be enforced against her estate. *Stowell v. Grider*, 48 Ark. 220, 2 S. W. 786; *Crenshaw v. Collier*, 70 Ark. 5, 65 S. W. 709. Her power to contract generally is not enlarged by the constitutional provision in the married women's act. *Walker v. Jessup*, 43 Ark. 174.

In *Munday v. Collier*, Adm., 52 Ark. 126, 12 S. W. 240, the wife's administrator sued the husband at law on a note for borrowed money, her separate estate. Judgment was recovered, the husband appealed, and the Supreme Court affirmed the judgment, saying:

"Whether a note given by a husband to his wife for borrowed money constitutes a legal liability or not, it is clearly a claim which equity will enforce against him; and where the wife's administrator sues the husband at law upon such note, the error, if any, in the form of the proceeding, will be waived by the defendant's failure to move a transfer to the proper docket."

In *Pillow v. Sentelle*, 49 Ark. 431, 5 S. W. 787, in equity, the question arose whether Pillow's notes to his wife were valid. The court said:

"At common law, contracts between husband and wife are void; but equity will enforce a promise made by a husband to his wife to repay her a bona fide loan out of her own separate estate"—citing a large number of cases, state and federal.

I have noticed these cases as indicating the trend of the decisions of the Supreme Court of Arkansas as to the legal status of married women in this state. The statutes and decisions in Arkansas amount to this: A woman is *sui juris*, as to her separate estate, as to the business in which she may engage on her separate account, and as to services she may render to third persons. For instance, she may make her husband her agent as to her separate estate, or employ him in connection with her separate business. As to these he may testify for her, and as to third persons she may contract as a *feme sole*. But except as the common law is expressly or by implication modified by statute, the common-law disabilities of coverture remain. She cannot form a partnership with her husband; she cannot sue him at law; generally the one cannot testify against the other; the communications between them are sacred. He is still, in certain events, a tenant by the curtesy, and their domestic relations generally are governed by the rules of the common law, except as modified by statute, and such statutes are construed strictly to preserve the common-law rights of married women. *Burns v. Cooper et al.*, 140 Fed. 282 et seq., 72 C. C. A. 25. If the husband cannot recover any judgment at law against the wife, neither can his creditor recover any judgment at law against her as garnishee for a debt due by the husband to his creditor, or for the proceeds of stock assigned to her in fraud of his creditors and held by her when garnished, and which she afterwards returned to her husband. This seems to be the rule followed by the Supreme Court of the United States ever since *Phipps v. Sedgwick*, 95 U. S. 9, 24 L. Ed. 591, in which the court said:

"While the books of reports are full of cases in which real or personal property conveyed to the wife in fraud of the husband's creditors has been pur-

sued and subjected to the payment of his debts after it had been identified in her hands, or in the hands of voluntary grantees or purchasers with notice we are not aware of any well-considered case of high authority where the pursuit of the property has been abandoned, and a judgment in personam for its value taken against the wife. Certainly no such doctrine is sanctioned by the common law; and, though the present suit is a bill in chancery, the decree in this case is nothing more than a judgment at law, and could as well have been maintained in a separate suit at law for the money as in this suit. And the liability of the executors of the wife to this personal judgment must depend on the same principle as if, abandoning the pursuit of the res, the assignee had brought a suit at law for the money. The statutes of the different states have gone very far in this country to modify the peculiar relations of husband and wife, as they existed at common law, in reference to their property; but they have not, except perhaps in Louisiana, gone so far as to recognize the civil-law rule of perfect independence in dealing with each other. While the statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands, which in equity ought to have gone to pay his debts. Equity has been ready, where such property remains in her hands, to restore it to its proper use, but not to hold her separate estate liable for what she has received, and probably spent at his dictation. Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of her husband. In receiving favors at his hands, which she supposed to be the offerings of affection, or a proper provision for her comfort, she would be subjecting that which is her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges, of the amount and nature of which she would be wholly ignorant. It answers the demands of justice in such cases if the creditor, finding the property itself in her hands or in the hands of one holding it with notice, appropriates it to pay his debt; but, if it is beyond his reach, the wife should no more be made liable for it than if the husband himself had spent it in support of his family, or even of his own extravagance."

The case at bar is stronger than that. In this case true Mrs. Grumbles had the money held by the Court of Appeals to belong to her husband when she was garnished, but she gave it back to him, and he has disposed of it; how, is not fully shown. Shall her separate estate, if she has any, be now subjected to an execution on a personal judgment rendered in favor of her husband's creditor to satisfy his debt? This question is fully answered by the last sentence in the above quotation. *Trust Co. v. Sedgwick*, 97 U. S. 308, 24 L. Ed. 954; *Huntington v. Saunders*, 120 U. S. 78, 7 Sup. Ct. 356, 30 L. Ed. 580; *Clark v. Beecher*, 154 U. S. 631, 14 Sup. Ct. 1184, 24 L. Ed. 705.

I conclude that at law no personal judgment can be rendered against Mrs. Grumbles in favor of the plaintiff for her husband's debt or for the proceeds of the stock in question. This conclusion seems to have been acquiesced in by the bar for nearly 40 years, since no case in which the question is involved has ever found its way to the Supreme Court of Arkansas.

The findings are in favor of the defendant.

REID v. UNITED STATES.

(District Court, S. D. New York. May 14, 1908.)

1. ARMY AND NAVY—DISCHARGE OF SOLDIER—AUTHORITY OF PRESIDENT.

The contract of a soldier of the United States, made by his enlistment and oath to serve for a definite term, "unless sooner discharged by proper authority," is one terminable by the government at will, acting through an officer having proper authority, and the fourth article of war (Rev. St. § 1342 [U. S. Comp. St. 1901, p. 945]) which provides that "no discharge shall be given to any enlisted man before his term of service has expired except by orders of the President, the Secretary of War, the commanding officer of a department or by sentence of a general court martial," confers such authority upon, or recognizes it as existing in, the President of the United States.

2. SAME—TERMS OF DISCHARGE.

The terms of a discharge given to a soldier by order of the President, not being prescribed by any statute, are discretionary with the President, and such discretion, exercised by directing a discharge "without honor," cannot be reviewed by the courts.

Action under Tucker Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752). On demurrer to answer.

On July 18, 1904, the petitioner enlisted as a soldier in the army of the United States, and took oath to serve as such soldier "for the period of three years unless sooner discharged by proper authority." This enlistment oath, together with Reid's application to enlist and the record of his physical examination, constitute his enlistment papers, and embody whatever contract was made between him and the United States in respect of his engagement as a soldier. He was assigned to the Twenty-Fifth Infantry, and on August 13, 1906, was stationed, with a battalion of his regiment, at Fort Brown, which is in or contiguous to Brownsville, Tex.

During the night of August 13-14th, certain persons repeatedly discharged firearms in the streets of Brownsville. The firing was apparently at random, but resulted in the killing of one man and the wounding of several others. It was the general, if not the universal, belief of the citizens of Brownsville that this murderous riot was perpetrated by certain soldiers of the Twenty-Fifth. The disturbance was first investigated by an Inspector General under orders from the Military Secretary, and later, upon the President's own order, by the Inspector General of the army. This officer reported that in his opinion it had been established by careful investigation that the random firing aforesaid had been done by unidentified enlisted men of the Twenty-Fifth Infantry belonging to the garrison of Fort Brown. He further reported that the enlisted men of that command had failed to tell all it was reasonable to believe they knew concerning the riot, and concluded that "they (said enlisted men) appeared to stand together in a determination to resist the detection of the guilty." Upon the submission and approval of this report, an order was issued by the President's direction on November 9, 1906, requiring the discharge without honor of practically all the enlisted men comprising the garrison of Fort Brown. The men so discharged were by said order debarred from re-enlisting in the army or navy, but they were granted travel pay, and by a subsequent order of December 12, 1906, re-enlistment applications were permitted if made in writing accompanied by evidence that the applicant had not been implicated in the riot aforesaid, nor withheld any evidence that might lead to the discovery of the perpetrators thereof. Such applications, however, were to be submitted to the War Department for consideration and investigation before action could be taken by recruiting officers.

Reid, having received his discharge under these circumstances, brings this petition to recover the pay and emoluments which would have accrued to him from the date of such discharge to the expiration of his three-year term of enlistment, and, inasmuch as he brings suit under the Tucker act, it is neces-

sarily implied that claim is asserted upon a "contract express or implied with the government of the United States, or for damages * * * in a case not sounding in tort in respect of which * * * he would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable."

A separate defense contained in the answer sets forth at length the documents supporting the statement hereinabove made, and avers that the "order of the President and the said discharge (of Reid) were not made as punishment of the petitioner or of others but for the good of the service and for the maintenance of the morale of the army." To this defense there is a general demurrer.

Mellen & Woodbridge, for petitioner.

Henry L. Stimson, U. S. Atty.

HOUGH, District Judge (after stating the facts as above). Several matters discussed at bar must be laid aside as immaterial to the disposition of this cause. Whether Reid or his comrades, or any of them, were guilty of the riotous disturbance in question; or whether Reid personally committed any infraction of good order or military discipline; or whether he is in fact a desirable soldier; or whether he knew or withheld anything tending toward the discovery of the perpetrators of the Brownsville riot; or whether, so far as Reid or others are concerned, the President's action was unnecessarily severe, cruel, or unjust—are questions beyond this judicial investigation.

The material inquiries seem to me very few. The nature of a soldier's contract of enlistment has been sufficiently treated in *Re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. By his contract Reid assumed the burden of military service, not for a definite time, but for three years, "unless sooner discharged by proper authority." Nothing is expressed in the enlistment papers as to what reasons shall be sufficient for early discharge, and, if the engagement be treated merely as a civil contract of hire, the government would be entitled to dispense with Reid's services under it at any time, provided the authority, i. e., the officer directing discharge or dismissal, be "proper." In other words, if enlistment be no more than a hiring by civil contract, under this particular contract, the corporate master may discharge the servant whenever he pleases, and for or without cause, provided only the officer directing discharge be "proper authority."

I do not give assent to the assertion that a soldier's engagement is or bears much resemblance to a civil contract of hire; but, on the assumption (most favorable to petitioner) that it is such a contract, it is, on the part of the government, a general contract terminable at will, if that will be expressed through a proper officer. *Martin v. New York Life Ins. Co.*, 148 N. Y. 118, 42 N. E. 416. This petitioner was, so far as formalities attending his severance from the service are concerned, properly discharged; that is, his discharge paper was correct in form and signature, and so much is not denied. But the "authority" causing and directing his discharge was the President of the United States, who personally gave the order therefor, so that the final question, upon assumptions very favorable to petitioner, is whether the President, as Commander in Chief of the Army, is "proper authority" to terminate in invitum a soldier's enlistment. This question must be answered affirmatively, if either (1) there be in-

herent constitutional authority in the President, as Commander in Chief, so to do; or (2) there be such authority in the absence of congressional statutory action limiting, defining, or regulating the commander's power; or if (3) in this case the President acted in accordance with the various acts of Congress regulating the army and discharges therefrom.

As to the first and second of these last queries, no opinion is expressed, because the last question must in my judgment be answered unfavorably to the petitioner.

The articles of war constitute the only statutory declaration concerning discharges from the military service (Rev. St. § 1342 [U. S. Comp. St. 1901, p. 945]). Article 4 provides:

"* * * No discharge shall be given to any enlisted man before his term of service has expired except by order of the President, the Secretary of War, the commanding officer of a department or by sentence of a general court martial."

And this language has remained unchanged in the statutes since 1806.

I am quite unable to perceive how the President's right to terminate a soldier's engagement could be more explicitly recognized, and indeed conferred, if recognition seems to imply some antecedent right. This fourth article of war clearly assumes that discharges may be granted before expiration of service; the power to grant them implies the power to impose them, unless a soldier have some rights inherent in his contract or inferable from the nature of his occupation. This petitioner's contract is civilly but a hiring at the will of the employer, while the nature of his occupation, so far from varying that status, has been frequently so judicially defined as to leave no doubt of congressional intent. "The recruit is bound to serve during the full term of his enlistment, but * * * the government is not bound to continue him in service for a single day, but may dismiss him at the very first moment or at any subsequent period whether with or without cause for so doing." *United States v. Cottingham*, 1 Rob. (Va.) at page 629, 40 Am. Dec. 710.

The civil compact usually requires for its dissolution the mutual consent of the parties, but "the military compact may be dissolved at any moment by the supreme authority of the government." *U. S. v. Blakeney*, 3 Grat. (Va.) 405, cited in *Re Morrissey*, 137 U. S., at page 159, 11 Sup. Ct. 57, 34 L. Ed. 644. And this historical view of the soldier's relation to the government or the crown antedates the founding of this nation and is the accepted doctrine of the British military establishment upon which ours was modeled. In *re Tuffnell*, L. R. 3 Ch. Div. 173.

Even if, therefore, there be no inherent power of control over the military forces of the nation vested in its constitutional Commander in Chief, and even if, also, there be no grant of power contained in that title in the absence of congressional gift thereof (concerning which no opinion is expressed only because I do not find the discussion necessary for this case), the statutory grant contained in the fourth article of war must be interpreted in the light of military practices, customs, and procedure well known and judicially recognized long

before the date of the Revised Statutes, and, indeed, long before the adoption of our earliest articles of war, in 1806, and by those customs so recognized and approved by Congress, the soldier's engagement was but at the will of the government which he served, and that government by authority of Congress speaks through (for the purposes of this case) the President of the United States.

It is, however, further asserted that some infraction of law was wrought by forcing upon Reid a "discharge without honor." The phrase is not known to the statutes. It is found only in the army regulations, which are from time to time promulgated by the Secretary of War, but do not bind the Secretary that makes them, and much less the Commander in Chief. *Smith v. U. S.*, 24 Ct. Cl. 209. The exact method of this soldier's discharge and the quantum or kind of character that should be given him, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine, while that a discharge with a very bad character is not a punishment to the man discharged within the meaning of any federal statute is settled by *U. S. v. Kingsley*, 138 U. S. 87, 11 Sup. Ct. 286, 34 L. Ed. 896.

The demurrer is overruled, and, as that portion of the answer demurred to presents in my judgment a complete defense to the petition, final judgment is directed in favor of the government and against the petitioner.

LISMAN et al. v. MILWAUKEE, L. S. & W. RY. CO. et al.

(Circuit Court, E. D. Wisconsin. April 10, 1908.)

1. RAILROADS—BONDS—PROVISION GIVING OPTION TO EXCHANGE FOR STOCK—NATURE OF CONTRACT.

A provision of a bond issued by a railroad company, giving the holder the right to exchange the same at par for stock of the company, is no part of the bond, but is a separate and independent contract, which does not affect the negotiability of the bond, but is not itself negotiable, and when it passes by assignment the assignee takes only the rights of the assignor. Being merely an unaccepted offer, it is strictly construed, and an acceptance, to be effectual, must be strictly within the terms of the offer.

2. SAME—RIGHTS OF HOLDER—SALE OF PROPERTY BY COMPANY.

A railroad company issued mortgage bonds running for 20 years and containing a provision giving the holder of any such bond the right to exchange the same at par for common stock of the company within 10 days after the date fixed for the payment of any dividend on such stock. Some years later another company purchased, by exchanging its own therefor, all of the stock of the company issuing the bonds, and the latter conveyed to it all of its property; the purchasing company assuming its debts, liabilities, and obligations. The road then became a part of the purchaser's system, the stock was retired, and no dividends were thereafter declared or paid thereon. The sale and purchase were authorized by a state statute which was in force when the bonds were issued. *Held*, that the option contained in the bonds must be presumed to have been given and accepted with reference to such statute, and that it imposed no duty on the company to continue a going concern or to pay dividends and no restriction upon its right to sell its property; that upon such sale and the consequent ceasing of dividends the right of a

holder of the bonds to exercise the option terminated and could not be enforced against the purchasing company.

3. SAME—ACTION FOR BREACH OF CONTRACT—DAMAGES.

The purchasing company being liable for the payment of the bonds, its refusal on demand of a holder to exchange stock therefor, conceding it to be a breach of the contract, would not entitle such holder to recover damages without proof that the stock was of greater value than the bonds.

4. SAME—OFFER TO CONTRACT—EXPIRATION BY LAPSE OF TIME.

The purchaser acquired the stock of the selling company by means of an offer made through certain brokers to exchange its own stock therefor, which offer was limited to a certain time. *Held*, that a holder of such bonds, conceding his right to exchange the same for stock of the issuing company under the option given therein, could not demand stock of the purchasing company in lieu thereof 13 years after the time fixed in its offer of exchange had expired.

At Law.

This is a common-law action by the plaintiffs, as copartners, against the two companies above named, for damages growing out of the facts herein-after stated. A jury was duly waived.

Concerning the facts there is little dispute. On or about the 1st of February, 1887, the Milwaukee, Lake Shore & Western Railway Company (hereinafter to be designated as the "Lake Shore Company") issued a series of 2,000 5 per cent. debenture bonds of \$1,000 each, maturing February 1, 1907. The Central Trust Company of New York was named as obligee. The bonds were thereupon sold in the open market. The plaintiffs are the owners of three of such bonds, acquired for value and before maturity, and were such owners prior to and during the year 1906. Each bond contains the following stipulation:

"Said railway company agrees to transfer to the bearer at his option ten shares of one hundred dollars each of its common capital stock at any time within ten days after the date fixed for the payment of any dividend upon its common stock, upon the delivery to it in the city of New York of this bond and all unmatured coupons thereon in exchange for said stock, and thereupon this bond shall be canceled."

It was also provided that these debenture bonds should have the benefit of any later mortgage or trust deed executed by the Lake Shore Company, which stipulation reads as follows:

"Said railway company further agrees with whomsoever may be the owner and holder of this and all other bonds of this series, that no increased mortgage debt, excepting for the enlargement, improvement or extension of the company's property, shall be created without giving to the owner and holder of this bond equal security upon the same property with that given for such increased debt."

The present Lake Shore Company was organized and created by an amalgamation of two railway corporations theretofore existing; one being a corporation of the state of Michigan, and the other a corporation organized under the laws of the state of Wisconsin. The present corporation is organized and existing under the laws of both states and is operated and administered as a single organization with headquarters and general offices at Milwaukee, Wis. The Lake Shore Company duly operated its lines of railway until August, 1893, and for several years theretofore paid a dividend of 7 per cent. on its common stock annually.

In the latter part of the year 1891 and the early portion of 1892, the defendant Chicago & Northwestern Railway Company (hereinafter called the "Northwestern Company") acquired all the stock, both common and preferred, of the Lake Shore Company, and paid for the same by exchanging its own capital stock therefor on the following basis: Nine shares of preferred stock of the Lake Shore for ten shares of the common stock of the Northwestern Company; five shares of the common stock of the Lake Shore Company for four shares of the Northwestern Company common. The procedure adopted for such exchange was as follows: The Northwestern Company, through

certain brokers in New York, issued a circular letter addressed to the stockholders of the Lake Shore Company, whereby it proposed the exchange and limited the time therefor to the 1st day of February, 1892. By subsequent announcement addressed to stockholders, the time was enlarged until March 1, 1892.

On the 19th of August, 1893, the Lake Shore Company duly executed to the Northwestern Company a deed, whereby for the consideration of \$100 it transferred and made over to said grantee all and singular its lines of railway, both in Michigan and Wisconsin, its right of way, rolling stock, buildings, lands, and franchises—except only the franchise to exist—and all other property of every name, nature, and description, wherever situate, subject, however, to the lien and charge of all existing mortgages or trust deeds covering any portion of said property, which the Northwestern Company thereby assumed and agreed to pay. The Northwestern Company by the terms of said deed also assumed all existing debts, liabilities, and obligations of the Lake Shore Company, and said assumption was therein expressed to be a part of the consideration for such transfer. Thereupon the Northwestern Company took possession of such property, and made public announcement that thereafter the railway lines of said Lake Shore Company would become an integral part of the Northwestern system. Ever since that time said Northwestern Company has operated such Lake Shore Railway lines as a part of its own system, known as the "Ashland Division." The certificates of stock of the Lake Shore Company so acquired by such transfer were, by order of the directors of the Northwestern Company, stamped with a rubber stamp by Mr. Hughitt as president: "Canceled, the property of the Chicago & Northwestern Railway Company." Since such transfer, the Lake Shore Company has never operated any railway or acquired any new or other property of any kind, and has never declared any dividend, and no date for a dividend has ever been fixed by it. The organization of such corporation has not been dissolved, but the corporation is still existent.

On February 1, 1889, the Lake Shore Company executed a certain deed of trust to the Central Trust Company of New York, whereby it did secure the payment of these debenture bonds, with certain other bonds, and thereby these debenture bonds became a part of the mortgage indebtedness of the Lake Shore Company. On the 8th day of August, 1906, plaintiffs tendered to the president and secretary of the Lake Shore Company these three debenture bonds with unmatured coupons attached, and demanded for each of said bonds 10 shares of the common stock of the Lake Shore Company, which exchange the officers of said company refused to make. Thereupon demand was made by plaintiffs upon the president and treasurer of the Northwestern Company, respectively, for 10 shares of the common stock of the Lake Shore Company for each of such bonds, which offer was refused. Thereupon demand was made of such officers that, in exchange for said three debenture bonds, the common stock of the Northwestern Company should be issued to them on the same basis as the exchange was made when the stock of the Lake Shore Company was acquired by the Northwestern Company, namely, four shares of Northwestern common for five shares of Lake Shore common, all of which demands were refused.

At the time such several demands were made, a share of the Northwestern Company common stock of \$100 par value was worth \$206 in the open market, and has since that time been worth as high as \$220 per share. The claim of the plaintiffs is that, by such refusal to exchange their bonds for stock, they have sustained damages in the sum of \$3,600, to recover which this suit is brought.

No question is raised as to the liability of the Northwestern Company to pay these bonds which were assumed as a part of the bonded indebtedness of the Lake Shore Company; but defendants deny any obligation to respond to the claim for damages under the conversion option based upon the speculative value of Northwestern stock. The defendants also set up the bar of the statute of limitation under sections 4221 and 4222 of the statutes of Wisconsin for 1898.

Vilas, Vilas & Freeman (Delos McCurdy, of counsel), for plaintiffs.
Edward M. Hyzer (Lloyd W. Bowers, of counsel), for defendant.

QUARLES, District Judge (after stating the facts as above). It is insisted by the defendants that the act of the Lake Shore Company in making a 20-year conversion contract was ultra vires because of a positive prohibition in the statutes of Michigan.

The Lake Shore Company came into existence as the result of an amalgamation of two independent railroad companies; one chartered under the laws of Michigan, and the other under the statutes of Wisconsin. The consolidated company received its franchises under the laws of both states, although but one general office was maintained, which was kept in the city of Milwaukee, Wis. It is contended that, as the Lake Shore Company owed fealty to two sovereigns, it could not ignore or disregard the prohibition of either; and that, while the laws of Wisconsin were silent on the subject of option contracts to convert bonds into stock, the statute of Michigan (Laws 1873, p. 528, No. 198, art. 2, § 38) provided:

"And the directors of any such company may confer on any holder of any such bond or obligation, the right to convert the same into stock of said company at any time not exceeding ten years from the date of said bonds, on such terms and under such regulations as the company may see fit to adopt."

It is contended therefore that the conversion clause in the debentures could not be operative beyond the 10-year period, and that therefore the demand in 1906 for conversion was nugatory. This is an interesting question, which is not free from doubt; but the view I have taken of the case renders it unnecessary to pass upon this point.

Defendants also contend that, as the debentures in question were issued for less than par, it makes the executory contract of the Lake Shore Company to exchange its stock for bonds on even terms illegal and unenforceable. This contention is predicated upon section 1753 of the Statutes of Wisconsin for 1898, and a similar statute in Michigan (section 6344, Comp. Laws 1897), which statutes have been strictly construed by the state courts. This question has been elaborately briefed and ably argued on both sides; but it is unnecessary to decide it in view of other features of the case, to which we will now pass.

Plaintiffs are the assignees of an executory contract which amounts to an irrevocable offer to exchange common stock for debenture bonds during a period of 20 years. This contract, although appearing upon the face of the debenture, is in fact a separate independent agreement. It is no part of the bond proper. Its purpose is not to secure the payment of money. Its presence does not affect the negotiability of the bond. *Hotchkiss v. Bank*, 21 Wall. (U. S.) 354; 22 L. Ed. 645; *Welch v. Sage*, 47 N. Y. 143, 7 Am. Rep. 423. Its invalidity would not impair the liability of the obligor to discharge the debt. *Wood v. Whelen*, 93 Ill. 154. It gains nothing in force by reason of its association with the stipulations of the bond. It must be construed as though embodied in a separate writing. It is not negotiable, and when it passes by assignment the assignee steps into the shoes of the assignor. Being merely an unaccepted offer, it is strictly construed by the courts. An acceptance, to be effectual, must comply implicitly with the very terms and all the terms of the offer, and time is held to be of the es-

sence. These propositions are emphasized by Mr. Justice Harlan in *Waterman v. Banks*, 144 U. S. 397, 12 Sup. Ct. 646, 36 L. Ed. 479, cited by defendants, and are discussed in *Chaffee v. Middlesex Ry.*, 146 Mass. 224, 16 N. E. 34. Thus we have the general nature of the option contract which it is sought to enforce against the Northwestern Company by reason of its assumption of the "debts, obligations, and liabilities" of the Lake Shore Company.

Let us consider what are the terms of the offer which, under the authorities, must be implicitly complied with in case of acceptance. It was, in substance, a contract to transfer to the bearer at his option 10 shares of Lake Shore common at any time within 10 days after the date fixed for the payment of any dividend upon its common stock. Clearly, the obligation did not accrue, until and unless a dividend was declared. There can be no doubt of the right of the parties to impose this condition. Suppose there had been no sale of the railway, and the Lake Shore Company had remained in control during the 13-year interval, and then, after a demand and refusal in 1906, this suit had been brought against the Lake Shore Company. It is plain that there could have been no recovery without proof that a dividend period had been fixed for the common stock. It is conceded by counsel on both sides that by this contract the Lake Shore Company did not bind itself to declare any dividend at any time. The contract, with all its limitations and conditions, remains the same after assumption as before. The Northwestern Company simply stepped into the shoes of the original promisor. *Lenz v. C. N. W. Ry.*, 111 Wis. 198, 203, 86 N. W. 607. Why must not the same inevitable result follow in the instant case?

But let us consider whether, as matter of law, the option contract survived the practical demise of the Lake Shore Company. The theory of the complaint is that this unaccepted offer is a continuing obligation which was assumed by the Northwestern Company, and which has been breached by the defendants by their refusal in 1906 to exchange Lake Shore common stock for the debentures of the plaintiffs, some 14 years after the purchase by the Northwestern Company of the stock and property of the Lake Shore Company. It would seem that such an offer extended to a bondholder was intended to confer merely a chance for speculation if and when exceptional market conditions should arise. Does it impose upon the company the necessity of being at all times during 20 years ready to meet and satisfy a demand thereunder? Is it dominant or subordinate? Is it to hamper and obstruct the policy of the management and to give the debenture holder a veto upon the action of the majority, or is the offer made subject to any lawful corporate management the directors may in their discretion adopt? Must the majority decline an advantageous sale of its property because of these outstanding options?

These questions have been considered by the courts to some extent. In *Pratt v. American Bell Telephone Co.*, 141 Mass. 228, 5 N. E. 307, 55 Am. Rep. 465, the court say:

"The plaintiff argues that until the option was declared the company was bound to keep itself in a position to carry out either of the promises contained in the notes at the election of the holder. The contract does not make this

requirement. This case is not one where the option may be declared at any time, one which the company would be bound to hold itself in readiness to respond to the demand of the plaintiff every day and hour," etc.

In *Day v. Worcester Ry.*, 151 Mass. 302, 307, 23 N. E. 824, the court was considering a similar option contract where there occurred a consolidation of the Nashua & Rochester Railway, the promisor, with another railway company. The court say:

"For the purposes of this decision we assume that the bonds did not import a contract by the Nashua & Rochester Railroad Company to continue in existence until they were satisfied, that the contract in the bonds to exchange them for stock was only binding so long as the Nashua & Rochester Railroad Company was in existence. * * * The argument for the defendant tacitly assumes that the Nashua Railroad Company has ceased to exist to all intents and purposes, and concludes that therefore there is no longer any obligation to deliver stock for bonds, a conclusion which would follow by the premise which we have conceded."

But the court held that under the Massachusetts statute the railroad company survived.

In *Parkinson v. West End Company*, 173 Mass. 446, 53 N. E. 891, the court had before it a case where they could pass definitely upon the proposition mooted in the earlier case above cited, and they hold:

"When an option is given to take stock, instead of receiving payment of a bond, the contract is not exactly what it was supposed to be in the argument of the plaintiff. Even when embodied in the contract, it imposes no restriction upon the obligor in regard to the issue of new stock, although the issue may be upon such terms as to diminish the value of the right. It leaves the management of the company in accordance with its other interests unhampered. It is simply an option to take stock as it may turn out to be when the times for choice arrives. The bondholder does not become a stockholder by his contract in equity any more than at law. *Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 5 N. E. 307, 55 Am. Rep. 465. So, if the corporation which made the bond finds it for its interest to go out of existence at or before the maturity of the obligation, the option given to the bondholder will not stand in the way. The option gives him merely a *spec*, not an undertaking that the corporation will continue for the purpose of making it good. This being so, we are not prepared to admit that, if the corporation should be dissolved at the time fixed for the bondholder's choice, we would be entitled to claim a proportionate share of the assets of the company. We do not decide the question, but we do not think it clear that the contract operates except in the event of the corporation happening to remain a going concern, so that the promise can be fulfilled in a literal sense by the delivery of a certificate of stock."

This case is very much in point, and presents features quite similar to the instant case. It will be noticed that Judge Holmes in the opinion considers and distinguishes the earlier cases in Massachusetts where consolidations were effected in such manner that the new company was regarded in law to all intents and purposes as identical with the original promisor. It will be observed, in this connection, that in the present case it was not a consolidation, but a purchase. The Lake Shore Railway became an integral part of a great railway system, and the original Lake Shore Company disappeared as a going concern, although preserving its franchise to exist. In short, the case does not present a similar statute or any of the features of the earlier Massachusetts cases upon the strength of which the option contract was held to survive the consolidation.

The same doctrine is announced in *Tagart v. Railway*, 29 Md. 557. It has several times been held, along the same line, that the holder of

a convertible bond has no ground to complain of an increase of authorized capital stock, although such new issue may lessen or destroy the value of the option. *Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 5 N. E. 307, 55 Am. Rep. 465. Upon such high authority it would appear that the Lake Shore Company might, in the interest of its stockholders, go out of existence without giving the holder of a convertible bond any just cause of complaint.

Let us state the doctrine in another way. Chapter 293, p. 237, of the Laws of 1883 of the state of Wisconsin, was in force in 1887, when these debentures were issued. It recognizes and sanctions the right of two independent railroad companies to amalgamate or consolidate in either of two ways: First, by means of a technical consolidation, by filing with the Secretary of State articles of consolidation, etc.; second, a purchase by one railway company of the stock of another when the two can be operated as a continuous line—that is to say, when they are not parallel or competing lines. The option contract in question must be held to have been made with reference to this antecedent legislation of which the bondholder had constructive notice, and therefore the option contract must be read as though the statute had been incorporated therein as a proviso contemplating a possible consolidation or purchase which might render an outstanding offer nugatory and impossible of performance. *Walker v. Whitehead*, 16 Wall. (U. S.) 314, 21 L. Ed. 357. In other words, the sale of the Lake Shore stock and property was a lawful step which presumably was within the contemplation of the parties when the conversion clause was inserted in the bond. In the sale and purchase both railway companies were acting within their strict legal rights to promote the interests of their respective stockholders. This change of ownership was only one of several vicissitudes liable to happen during 20 years in the life of the corporation, which might render the outstanding option valueless, and still afford no cause of action to the debenture holder. Nothing has taken place which the debenture holders were not bound to anticipate. *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, 252, 22 L. Ed. 83. Any purchaser of railroad bonds is chargeable with notice of a statute authorizing a consolidation of railway companies and with the legal results flowing therefrom; among others, the right of the consolidated company to issue a new mortgage on the consolidated assets having priority over unsecured debentures of one of the consolidated companies. *Tysen v. Wabash R. R. Co.* (C. C.) 15 Fed. 762, 765. In the instant case, the debenture holders were bound to anticipate, not only that a consolidation or purchase under the Wisconsin statute might occur, but also that the practical collapse of the Lake Shore Company would probably follow. If thereby the hope of speculative venture on the stock market was extinguished, it is *damnum absque injuria*.

Two results followed the lawful act of the Lake Shore Company in disposing of its assets and franchise: First, the impossibility of any dividend period which by the terms of the offer was a condition to the ripening of the obligation; and, second, every share of its capital stock had been merged in the existence of the purchasing corporation. The old stock certificates were held by the Northwestern Company,

but the stock as distinguished from the certificates had been absorbed and had reappeared upon the stock market as shares in the Northwestern Company. Every dollar of its assets was thus represented, every share of stock reincorporated, and nothing of value remained to support a further issue of Lake Shore stock. This state of facts constituted a complete legal impediment to performance. This condition had existed for more than a year before the deed was executed (August 13, 1893), whereby the Northwestern Company assumed the "debts, liabilities, and obligations" of its grantor. The former officers of the company conducted the railway until September 1, 1893; but it was a railway with only one stockholder, and pending the transition period no new Lake Shore stock could have been issued. It required only a formal transfer of tangible assets, supported by a nominal consideration, to make the public record correspond with the stock books. *Rosenkrans v. La Fayette Ry.* (C. C.) 18 Fed. 513-516.

Under the reasoning of the cases cited, the option contract perished by operation of law before the Northwestern Company actually took over the management. Laying aside technical considerations, it must be apparent that all hope of speculative venture under the option was extinguished when the stock ceased to represent any value and had been withdrawn from the market; the stock certificates being stored away as a memento of a defunct enterprise.

Much ingenuity has been shown by counsel in construing the legend of the rubber stamp impressed on each certificate: "Canceled, the property of the Chicago & Northwestern Railway Company." In my judgment it should be read as an epitaph which indicated who had lawful custody of the remains. The demise having taken place in 1893, all efforts at resuscitation in 1906 must prove unavailing.

It is nevertheless insisted in argument that the Northwestern Company has rendered performance impossible and therefore must respond. This point is not well taken, as no fraud or deception is charged. *Cooley on Torts*, 497; *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *McCann v. Wolff*, 28 Mo. App. 447; *Walker v. Cronin*, 107 Mass. 555; *Angle v. C., M. & S. P. Ry.*, 151 U. S. 1-14, 14 Sup. Ct. 240, 38 L. Ed. 55.

Let us now concede, for the purposes of argument, that the option contract survived the collapse of the Lake Shore Company and was duly assumed by the Northwestern Company as a continuing obligation; and, further, that performance was rendered impossible by the voluntary acts of both railroad companies. The breach alleged was in 1906, and consisted in refusal to deliver common stock of the Lake Shore Company, the only thing that the plaintiffs could rightfully demand by the terms of the contract. We have already seen that in assuming the contract the Northwestern Company is not otherwise obligated than was the original promisor, namely, to furnish ten shares of Lake Shore common in exchange for one of those convertible bonds. What would be the measure of damages in such case? Ordinarily, it would be predicated upon the value of Lake Shore stock at the time of the breach. There is no specific evidence on this point. In the nature of the case there would be no substantial damages unless ten shares of common stock were

then worth more than one of these debentures. There is sufficient evidence to show that no such claim could be made for the Lake Shore stock, so that this cause of action breaks down, unless plaintiffs have shown themselves entitled to stock of the Northwestern Company whose market value would furnish a basis of recovery.

Now, to simplify this proposition: Suppose plaintiffs, pursuant to their demand, had obtained their quota of the stock of the Lake Shore Company. Upon what principle rests the supposed liability of the Northwestern Company to exchange its own stock therefor in 1906? No such contract is in proof. It is, however, assumed that the proposition made by the Northwestern Company in 1892 to exchange its own stock for the Lake Shore stock on the basis of four to five was still open and available. Such conclusion is untenable:

First. Because it appears by the evidence that the proposition so made by the Northwestern Company in 1892 was extended to the stockholders of the Lake Shore Company and to none others. The holders of convertible bonds were not stockholders. They were creditors. They had neither a legal nor equitable interest in the stock. *Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 230, 5 N. E. 307, 55 Am. Rep. 465. It is well settled that any such proposition can be accepted only by the class of persons to whom it is expressly made. *Indianapolis Ry. v. Miller*, 71 Ill. 463.

Second. The proposal was expressly limited as to time. The proposition in question was communicated through the instrumentality of certain brokers in New York City to the stockholders, and by its terms expressly expired on the 1st day of February, 1892. In *Schorstene v. Iselin*, 69 Hun, 250, 23 N. Y. Supp. 557, a similar proposition was made to stockholders of a railway that had been purchased on foreclosure sale by Iselin. Action was brought for damages for failure to exchange stock of plaintiff after the date fixed in the proposition. It was held that no action accrued unless by virtue of a precise acceptance of the offer within the time limited. The same strictness is observed as to the time limited in the offer. *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225, 4 L. Ed. 556; *Cummings v. Realty Co.*, 86 Wis. 384, 57 N. W. 43. There is no authority, precedent, or principle by which the time can be extended without the consent of the party making the offer. *Potts v. Whitehead*, 20 N. J. Eq. 55, 59. The relative value of the shares of the two railway companies must have been arrived at in 1892, by carefully balancing the considerations affecting values as they then existed. It would be highly unreasonable, even if the court had the power, to hold the Northwestern Company irrevocably bound for 14 years by its valuation in 1892. It is a matter of common knowledge that the fluctuations in railway stocks might in a few days render the former valuations inequitable and unreasonable. *Taggart v. Railway Co.*, 29 Md. 569.

There was no contract obligation on the part of the Northwestern Railway Company to purchase Lake Shore stock in 1906 upon any basis, and the court is powerless to supply such obligation. As we have seen, there is no evidence which furnishes a cause of action in tort. For these reasons the plaintiff cannot recover in this action.

Suitable findings may be prepared in accordance with this opinion.

THE HENRY O. BARRETT.

THE JAMES McCaulley et al.

(Circuit Court of Appeals, Third Circuit. May 8, 1908.)

No. 21.

1. COLLISION—CONFLICTING EVIDENCE—PROPER MANNING OF VESSEL.

Where there is a conflict of testimony as to whether one or the other of two vessels brought about a collision by negligent navigation, it is proper to consider the manner in which each was manned at the time.

2. SAME—TOW AND ANCHORED DREDGE—NEGLIGENCE OF TUG.

A heavily laden schooner being towed down the Delaware river at night on a hawser 80 fathoms long came into collision with a dredge engaged in dredging the new channel, and anchored between that and the old channel. The dredge was properly lighted, indicating that vessels should pass to the eastward through the old channel. There was a direct conflict of evidence as to whether the tug or tow was in fault; the tug claiming that she kept a course directly toward the dredge until within a mile, and then sheered to the eastward, and the schooner, failing to follow, gave her three several signals with her whistle, each time taking a course more to the eastward, until she was headed directly toward the New Jersey shore. The schooner claimed that the tug was on a course to the westward of the dredge until the schooner was within 700 or 800 feet, when she sheered directly across the channel and signaled, and that the schooner at once starboarded her wheel, but was unable to turn in the short distance. *Held* that, taking into consideration that the schooner was fully manned by experienced and competent seamen all of whom were fresh at the time, with a lookout, and that the navigation of the tug was, or at least had been up to immediately before the collision, in charge of an unlicensed deck hand, and that she had no lookout, the story of the schooner was the more probable, and, as it was corroborated to some extent by the watchman on the dredge, the tug would be held solely in fault.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Theodore M. Etting for American Dredging Company.

Edward F. Pugh and Edward S. Dodge, for schooner Henry D. Barrett.

F. C. Adler and John F. Lewis, for tug James McCaulley.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. On April 2, 1903, the schooner Henry O. Barrett, while being towed down the Delaware river by the tug James McCaulley, collided with and injured the anchored dredge Columbia. Thereupon the Columbia libeled the schooner. The schooner under the fifty-ninth rule petitioned to bring in the tug, and filed a libel against the tug and dredge. From both decrees, the Barrett appealed.

That schooner, en route from Philadelphia to Boston, carrying 2,800 tons of coal and drawing 24 feet, was being towed down the Delaware by the tug on an 80-fathom hawser. The time of the collision was shortly after 4 a. m. The night was dark, but lights were plainly visible. The tide was falling; it being about one-third ebb. The dredge was anchored at a point known as "Dan Baker shoals," where she had

been dredging a new channel. This new channel was almost, but not wholly, completed, and the dredge anchored on its eastern, and the old channel's western, side, and displayed a white anchor light and four red danger lights, in accordance with the regulations of December 4, 1905, prescribed by the Secretary of War for the Delaware river, as follows:

"(2) Vessels using the channel shall pass the dredges on the side designated from the dredge by the signals prescribed in paragraph 7 of these regulations."
"(7) Dredges shall display by night one white light on a staff in the middle of the dredge and at least thirty (30) feet above the water, to serve as the regulation anchor light, and four (4) red lights suspended in a vertical line from the outer end of the horizontal spar used by day for the suspension of the black ball, the lights to be set on the side of the dredge on which it is desired approaching vessels shall pass."

The dredge displayed another white light forward, but the District Court found, and we concur in that view, such light misled no one, and did not contribute to the accident. We also find the dredge rightly selected the old or eastern channel as the proper one for approaching vessels, and correctly marked that route by four vertical red lights. Being anchored properly, lighted, and without fault, the burden is on a striking vessel to exculpate itself. Consequently the controversy in this case has narrowed to one between the tug and her tow. The tug's explanation of the accident is that, seeing the lights of the dredge some two miles away, she bore down on them until within a mile distant, when she veered to pass to the eastward; that the schooner failed to follow her, whereupon she blew to her; that the schooner still failed to follow, whereupon the tug steered more to the east and blew again; that the schooner still failed to follow, whereupon the tug blew again a second and a third time, sheering off each time more to the east, whereupon the tug sheered off at practically right angles and blew again, but the schooner failed to respond, went straight ahead, and struck the dredge. The story of the schooner is that the tug headed slightly to the westward of the dredge lights until the schooner was about 700 or 800 feet distant from the dredge, when the tug took a sharp sheer to the eastward; that the schooner at once did everything possible to follow, starboarded her wheel, followed at once by hard astarboard; that the first whistle from the tug was when she was making this sheer; that, owing to the shortness of time and distance, the schooner was able to sheer but a little to the east, and struck the dredge through the fault of the tug. There is the usual conflict of testimony, and the ascertainment of the truth lies in a due regard, not only to the proofs, but to all the surrounding facts and circumstances.

The gist of this case lies in this: Whether the tug began her maneuver to the eastward soon enough, and whether the schooner failed to follow her. Now, the mistake of the tug in beginning her sheer, if mistake is shown, was one of misjudgment, while that of the schooner in failing to heed her warnings and follow was one of gross neglect. The question, therefore, is: Does the case point to a mistaken judgment of the tug or a gross disregard of duty by the schooner? In view of this the manning of the two crafts becomes important, for a due regard by a vessel in placing enough and capable men in the place

of duty raises a presumption of vigilance and care in performance, while an insufficient or incompetent manning shows a disregard or indifference to those factors on which the safety of vessels depends. Thus in *The Charles L. Jeffrey*, 55 Fed. 686, 5 C. C. A. 247, it was said:

"Everything about this vessel indicates a reasonable degree of vigilance; so that the probability that she complied with her duty under the law is *prima facie* established."

Now, in this case the schooner was fully manned. She was in charge of her mate who carried a master's license for all oceans, and whose oversight of the vessel was unhampered by other duties. She had as lookout a seaman of 11 years' experience. The wheel was in charge of a seaman of 10 years' experience. In addition to these, an extra seaman was on watch, who was not assigned to any particular duty. In view of the presence of these men, of the fact they were all fresh on watch, it does not seem probable that each of them would have lost sight for five minutes of the tug's lights sheering to the eastward, and have also ignored three sets of whistle warnings from her. To make this more probable, it is contended by the tug the schooner mistook the lights on the dredge for those of the tug. This theory of confusion of lights is based on the alleged admission of one man, the mate, but we think such confusion highly improbable, if not, indeed, impossible. The proof is that to the eastward of the white anchor light of the dredge were the four vertical red lights, so unusual a display in position and number that experienced seamen on the schooner admit that, other than indicating danger, they did not know what they meant. It is conceded by all hands the night was such that lights were plainly visible. Taking the dredge's lights for those of the tug would therefore involve the extraordinary fact that the tug had suddenly displayed four red vertical lights. Whatever credence might at first thought be given to the contention that the anchor light of the dredge might have been confounded with the towing light of the tug, it would seem clear that the presence of these four vertical red lights alongside would at once show those on the schooner that the cluster of different colored lights on the dredge were not those of the tug. But a study of the proofs satisfies us that the contention is not even supported by the weight of the proofs. The captain of the tug was asked: "How do you account for the collision, Captain?" and replied, "Why, they in charge of the schooner took the machine's lights for the tug's. There is no other way that I see." He was then asked: "Is that what the mate of the schooner told you he did?" and said: "That is what the mate of the schooner told Mr. Herron, that he had mistaken the dredge's lights for the tug's lights." This was followed by the testimony of Hornung, a deck hand on the tug, who says he heard the talk between the schooner's captain and Herron just after the collision:

"Well, Capt. Herron asked the captain of the schooner, 'What the trouble was, what was the matter, couldn't you see our lights?' and the captain says, 'I don't know nothing about it.' He says: 'I was below, but my mate was on watch'—and he referred to the mate, and the mate says— He didn't say anything, he meandered around, and he said: 'Yes: I took the machine's lights for the towboat's lights.' That is all the mate of the schooner says."

Herron says:

"I asked him [the mate] what he was trying to do. The mate of the schooner said he mistook the lights of the dredge for the tow's lights."

This alleged conversation was utterly denied by the captain and the mate, both of whom, as well as Smith, the lookout, Jorgansen, the wheelman, and Smith, the extra seaman, all testify they saw both the lights of the tug and the cluster of red and white lights on the dredge. Moreover, it is not without much significance that this alleged confusion of lights by the schooner was neither averred by the dredge in its libel, though Herron was connected with that company, or by the tug, though the witness Collins was its master. Had these witnesses then understood the mate of the schooner to have made such a statement in the presence of her captain, a statement which the tug captain says is the only explanation of the accident, it would naturally have been charged against the schooner in the pleadings. Its absence corroborates the testimony of the schooner's witnesses, not only that no such conversation took place, but that the clustered red and white lights on the dredge were seen by the schooner's lookout, and were not confounded with the white lights of the tug. The fact, then, being that the schooner did not mistake the lights but was following the light on the tug, and the testimony of five men on the schooner being that, as soon as the tug changed her course, the schooner's wheel was at once put to starboard, the case resolves itself into the question, at what point did the tug sheer to the eastward? She says a mile away. The schooner says about 700 or 800 feet. The tug says she whistled at intervals during a gradual and greater series of sheers. The schooner says the whistling was when the tug was making her first and only sheer. At this point the manning of the tug becomes an element. Now, in fact, the tug had no lookout, and the wheelsman, whom there is evidence tending to show was standing the mate's watch, was an unlicensed deck hand. It is urged the absence of a lookout is not material, because in point of fact the deck hand, who was at the wheel, saw the dredge's lights in ample time; and that the latter was an unlicensed man is immaterial because the captain himself was on watch, and directing the movement of the tug. But it will be observed it is by no means certain that the captain of the tug, and not the deck hand, was in charge of the watch. The master of the schooner proved the declaration of the tug captain that he had just come on deck. He says that, just after the collision, the tug came up to the schooner, and, being asked about the collision, "I said that I had just come on deck a minute before we struck the dredge, and the captain of the tug says that he had just come on deck too"—a statement which the captain of the tug did not deny when he came on the stand. Of course, if the testimony elsewhere of the tug's captain is true—that he was in charge—the fact that an unlicensed man was at the wheel is of no special significance, but the assumption of responsibility by the captain, while seemingly disingenuous, is in reality self-exculpatory, for it tends to relieve him from a blameworthy course, which up to that time he had been

pursuing that night of having the mate's watch in charge of an unlicensed man. This practice of an unlicensed watch which the captain had been pursuing that night and for a month past was in violation of Rev. St. § 4438 (U. S. Comp. St. 1901, p. 3034), and evidences not only his disregard of due safeguards, but also the necessity of self-exculpatory proof on his part. "The failure to comply with statutory requirements and regulations has frequently received the severest condemnation of the courts, and, when such an omission is clearly established, the presumption is that it did contribute to the collision, unless the contrary is obviously apparent, and this presumption attends every fault connected with the occurrence, and a further obligation is imposed to show, not only that it probably did not so contribute, but that it could not have done so," *The Eagle Wing* (D. C.) 135 Fed. 832. This self-exculpatory evidence is therefore to be closely scrutinized, for, as was well said by Judge Butler of this circuit in *The John H. May* (D. C.) 52 Fed. 882:

"These witnesses are interested. Swearing to exculpate themselves. I have yet to meet with an instance of collision where witnesses from the vessel in fault did not testify to a faithful discharge of their duties, and to the faultlessness of their vessel."

And, in any view, the lack of mate and lookout on this tug shows such a disregard of those legal requirements conducive to safety that a corresponding lack of that alert vigilance which a tug controlling the movement of a tow is bound to exercise is a not unlikely sequence. The schooner was of deep draught, was moving with the tide, was liable to be towed into shallower water, and the answer to her helm might be eccentric. The evidence of the wheelman does not show that these factors of uncertainty had due regard by him in determining the start of the tug's sheer. Now, the evidence of the witnesses on both sides shows that a point from a quarter to a half mile from the dredge was a proper distance to begin such sheer. That the captain and mate, without any reason for this departure from the usual course of pilots, agree the tug began its sheer a mile away, rather indicates they are proving too much; and it will be observed that, if such is the case, it is incredible that in the mile and from six to ten minutes which elapsed before the collision they were not able to make those on the schooner steer to the eastward of the dredge, for it will be observed that, on the tug's own contention that the schooner did not starboard her helm until just before the collision, even that short a time was sufficient for her to avoid a head-on blow. But the evidence satisfies us that the tug delayed her sheer too long. The schooner's witnesses prove the tug was heading slightly to the west of the dredge when she took a sudden sheer to the eastward, that the schooner tried to follow, and it was on this sheer the tug's whistle was first blown. Martin, the watchman of the dredge, was amidships when he first heard the tug whistle. He heard her blow twice, looked up, and she was then abreast the dredge with her stern pointed towards her. Martin at once blew the dredge's whistle and sang out. Now, if the tug's story is cor-

rect, that she had blown her whistle several times before, there is no reason why the attention of the dredge's watchman was not sooner attracted. That it was not is conceded by the dredge's answer, viz.:

"When the tug was first sighted by the dredge she was to the eastward of the dredge and clear of her; the schooner was astern of the dredge. The course of the two vessels was at right angles to each other. The respondent's servants heard the tug's whistle to her tow and the respondent's vessel likewise whistled in order to call the schooner's attention to the whereabouts of the dredge."

Martin's testimony strongly corroborates the schooner's men, who fix the first whistle as made on the tug's sheer when she was at right angles to the dredge. Thus Stuart, the schooner's mate, says:

"Q. Did you hear any whistles by the tugboat?

"A. I did, sir.

"Q. One whistle or several blasts?

"A. Several short blasts, toots.

"Q. How many sets of blasts did you hear?

"A. I could only distinguish one, sir.

"Q. When was that?

"A. Just before the collision.

"Q. Well, when was it with respect to the time you gave the order hard to starboard?

"A. It was almost at the same time, sir. * * *

"Q. How many sets of blasts did you hear from the dredge?

"A. One. * * *

"Q. And at the time you heard that set from the dredge the tugboat was well off to the eastward, was she?

"A. Yes, sir.

"Q. On your port bow?

"A. Yes, sir; on our port bow."

Smith, the schooner's lookout, says:

"Q. Did you hear any whistles from the tugboat?

"A. Yes, sir.

"Q. Were they before or after the mate gave the order hard to starboard?

"A. They were just about the same time as he gave the order, just about when he sang out.

"Q. How many blasts were there, if you remember?

"A. I can't say, sir.

"Q. You don't know how many toots?

"A. No, sir.

"Q. Well, were there one set of blasts or more?

"A. One.

"Q. Did you hear any whistles from the dredge?

"A. Yes, sir.

"Q. When was that?

"A. Just when we struck the dredge."

The account of Jorgansen, the wheelman, is:

"Q. Then you had starboarded your wheel before the mate gave the order to starboard?

"A. Yes, sir.

"Q. Did the mate give you any other order after the order to starboard?

"A. No, sir; he didn't give me any other order before the tug blew her whistles; at least, it was the same time when the tug blew."

Cullendar, the steward, said:

"Q. Did you hear any whistles blown by the dredge on the morning of this collision?

"A. Yes, sir.

"Q. How many times did the dredge whistle?

"A. I only heard it once.

"Q. How many times did you hear whistles from the tugboat?

"A. Once.

"Q. How soon after the tugboat blew her whistle did you hear the dredge whistle?

"A. Very shortly."

The testimony of the schooner's captain who came on deck just before the collision was:

"Q. Captain, you said you heard whistles from the McCaulley?

"A. I heard a whistle as I came out.

"Q. Did you hear whistles more than once?

"A. I think I did.

"Q. How many times?

"A. I would not be sure whether I did or not. I think I heard some from the tug and some from the dredge; but I could not distinguish them apart.

"Q. How many times did you hear whistles blown before you came out on deck?

"A. I think once or twice.

"Q. What kind of whistles were they?

"A. Kind of short toots.

"Q. Are they what is generally known among seafaring people as 'attention whistles'?

"A. They are just what little tugboats use just when they are going across the bow. They give whistles to get out of the way.

"Q. How many blasts are blown in succession?

"A. Two or three.

"Q. They are what are generally known among seafaring people as short whistles?

"A. Yes, sir.

"Q. As I understand, you can't say now whether you heard those whistles once or twice?

"A. No, sir; I do not know whether I heard several short blasts once or twice.

"Q. That is before you got on deck?

"A. Yes, sir.

"Q. What is your best recollection whether you heard them once or twice?

"A. I said that I heard them once or twice. I heard some toots, and that is all I can say about it. Whether they were two sets I don't remember.

"Q. How long were they apart?

"A. Just 'toot,' 'toot,' like that.

"Q. How long were the different sets of toots apart?

"A. I could not say, as I can't swear that I heard more than one. Everything happened so quick that it all seemed to happen right together."

Now, this testimony, as we said, is corroborated by that of Martin, its watchman, who was called by the dredge:

"My attention was drawn to the whistle of this boat McCaulley, the tugboat.

"Q. Where was she when she whistled?

"A. She was about abreast of the machine to the eastward.

"Q. How far to the eastward do you think she was, and how far?

"A. 200 or 300 feet probably.

"Q. Was she presenting her side to you or stern?

"A. The stern to the dredge, heading toward Jersey; to the eastward, I suppose you would term that.

"Q. Where was the schooner?

"A. The schooner was astern of the dredge bearing down on the dredge, showing both side lights.

"Q. What did you do?

"A. I commenced to blow whistles, to blow the dredge's whistles to draw their attention; and also hollowed. * * *

"Q. What was it attracted your attention to the tugboat?

"A. I heard the whistle blowing.

"Q. What position was she from you—about opposite your stern to the eastward?

"A. Yes, I judge so, heading for the Jersey shore to the eastward. * * *

"Q. And nothing attracted your attention until you saw the tug sharp off to the eastward?

"A. No, sir; that drew my attention, hearing those whistles. I knew there was something approaching."

Now, while the tug's witnesses place the whistles away back on the course, the testimony of Martin is in accord with those on the schooner, that the tug whistled first when she was making the sharp sheer to the east and when she was abreast the dredge. We are satisfied that the tug, instead of beginning the sheer a mile away, began it when it was too late for the schooner to avoid the dredge, and that, after she began the maneuver, the schooner did all in her power to follow her. Her duty was to follow the tug, and, having done all in her power to do so, she fulfilled her duty.

After a careful examination of all the testimony, we are clear in the opinion that the cause of this collision was the improper delay of the tug in starting to sheer to the east of the dredge. The decrees of the court below must therefore be reversed, and the case remanded, with directions to dismiss the libel filed by the dredge against the schooner, and to enter a decree in favor of the dredge against the tug, and in favor of the schooner on the schooner's libel, one-half of all the schooner's costs to be taxed on each bill.

NORTHWESTERN NAT. LIFE INS. CO. OF MINNEAPOLIS, MINN., v. GRAY.

GRAY v. NORTHWESTERN NAT. LIFE INS. CO. OF MINNEAPOLIS, MINN.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1908.)

Nos. 2,662, 2,672.

1. INSURANCE—REINSURANCE BY LIFE COMPANY—RIGHTS OF POLICY HOLDER.

A contract of reinsurance between two life insurance companies, by which one transfers all of its assets to the other and ceases business, thus disabling itself from performing its executory contracts with its policy holders, while the other assumes such contracts on terms agreed upon, is not binding upon such policy holders, in whose favor a right of action at once arises against their own company for breach of contract. Such a policy holder is, however, put to his election, and if he accepts the reinsurance offered he is bound by the terms of the contract between the two companies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1807.]

2. SAME—ELECTION—ACCEPTANCE OF POLICY FROM REINSURING COMPANY.

Defendant, a life insurance company on the fixed premium plan, took over the assets of an assessment company under a contract by which

it assumed all the liabilities of the other company, but subject to the provisions of its own articles of incorporation and by-laws, as they then existed or as they might thereafter be amended. It thereupon amended its by-laws, as affecting policies or certificates assumed, by providing that "the premium to be paid thereon by the insured shall be the single premium according to the life expectancy or single premium rate table adopted by the company at the attained age of the insured at the time of issuing or assuming such policy, * * * which single premium may be paid in any installments agreed upon or fixed by the board of directors. * * * Any excess thereof [interest], being in payment and extinguishment of the principal amount of said lien, and in the event of the death of the insured occurring at any time before a sum equal to the single premium as aforesaid, with $4\frac{1}{2}$ per cent. interest per annum in advance from the date of such assumption, shall be paid in cash to this company, there shall be reserved from the face of such certificate or policy, and charged as a lien thereon, a sum equal to the unpaid portion of such single premium and interest." Plaintiff was the holder of a certificate of the reinsured company, and received from defendant a notice of the reinsurance, a copy of such by-law, and a new policy, with a statement of the amount of the lien thereon, and giving him the option to pay the same in cash or to pay certain bimonthly installments, which, however, were less than the accumulating interest, so that, although the installments were paid, the lien constantly increased, and the value of the policy diminished. Plaintiff paid such installments until the maturity of his policy. *Held*, that he must be presumed to have known his legal rights, and that by accepting the policy and making the payments thereunder he became bound by its terms.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action at law, instituted by Gray against the insurance company, to recover on a matured certificate of membership for \$4,000 originally (in 1883) issued to him by the Northwestern Mutual Relief Association of Wisconsin. The Wisconsin company did business on the assessment plan, whereby on the death of a member an assessment was made upon surviving members to raise a fund to pay the beneficiary of the deceased member. In 1899 it availed itself of the provisions of the act of the Legislature of Wisconsin (chapter 270, p. 460, Laws 1899), changed its name to the Northwestern National Life Insurance Company, and reorganized so as to do business on the stipulated premium plan, whereby premiums are payable not as a result of assessments on the happening of the death of a member, but in certain sums at fixed periods. In 1901 the defendant company was incorporated under the provisions of chapter 178, p. 233, of the Laws of Minnesota of 1901, to do business on the stipulated premium plan, with power to assume and reinsure the risks and members of other companies and to make by-laws and amendments not inconsistent with the Constitution and laws of the state. On August 29, 1901, defendant entered into a contract with the Wisconsin company by virtue of which it took over all the assets of that company and reinsured its risks. The contract after providing for the assumption of obligations of the Wisconsin company contained the following: "And the assuming of each policy or certificate by the party of the first part [Minnesota company] is expressly subject to the provisions of the articles of incorporation and by-laws of the party of the first part as the same now exist, or as they may hereafter be amended, * * * all whereof constitute and form a part of each certificate and policy hereby assumed." It also contained the following stipulation: "And said party of the first part agrees that all moneys and property received by it, and now constituting or representing the mortuary funds of the party of the second part [the Wisconsin company], and all moneys hereafter collected by it from members of the party of the second part for mortuary purposes, which under their present contracts are applicable to and should be set aside for a mortuary fund, will be by said party of the first part segre-

gated, set aside, and used for and applied to the payment of the new valid and existing death, disability, or maturing claims of the party of the second part and expenses incurred until the same shall have been paid, settled, or discharged in full." The result was that 1,310 members of the Wisconsin company, including Gray, accepted re-insurance by the Minnesota company. Of that number 74 held assessment certificates similar to Gray's certificate, and 1,228 had originally held assessment certificates, but had surrendered them to the Wisconsin company and accepted in lieu thereof stipulated premium policies after its reorganization in 1899.

By way of inaugurating its business the defendant company on August 28, 1901, adopted a by-law known as section 6 of article 10, which is as follows: "In all cases" where the policy or certificate of another company is assumed "the premium to be paid thereon by the insured shall be the single premium according to the life expectancy or single premium rate table adopted by the company at the attained age of the insured at the time of issuing or assuming such policy, certificate, or contract by this company, which single premium may be paid in any installments agreed upon or fixed by the board of directors. * * * Any excess thereof [interest] being in payment and in extinguishment of the principal amount of said lien, and in the event of death of the insured occurring at any time before a sum equal to the single premium as aforesaid, with four and one-half per cent. interest per annum in advance, from the date of such contract or such assumption, shall have been paid in cash to this company there shall be reserved from the face of such certificate or policy and charged as a lien thereon a sum equal to the unpaid portion of such single premium and interest, and payment of a sum equal to the face of the policy, less the amount of said lien and interest, shall be payment in full of claim under said policy and the full measure of liability of the company thereunder."

On September 2, 1901, the president of the defendant company issued a circular letter, advising the members of the reinsured company of the assumption by his company of the policies or certificates of insurance previously issued by the reinsured company to them. That letter contained the following statement: "Under the provisions of this contract the Northwestern National Life Insurance Company, of Minneapolis, Minn., assumes your policy or certificate of insurance subject to its terms and provisions in all respects, thereby constituting you a member of this company, subject to its articles of incorporation, by-laws, and the laws of the state of Minnesota. * * * We hope, therefore, that you will appreciate the desirability of maintaining your policy or certificate with the Northwestern, and beg to assure you," etc. "As soon as possible a proper and appropriate certificate of reinsurance will be furnished, to be attached to your policy or certificate, showing that the same is continued as the policy of this company."

On September 3, 1901, the defendant company, by its president and secretary, executed and delivered to the plaintiff, Gray, the following certificate: "This is to certify that the Northwestern National Life Insurance Company, of Minneapolis, Minnesota, did upon the 29th day of August, 1901, by a contract of consolidation, receive into its membership as members and did re-insure all living members of the Northwestern National Life Insurance Company, of Madison, Wisconsin, who upon said date appeared upon the books of said last-named company, to be and who actually were members in good standing thereof and therein, including policy No. 682 on the life of Robert Gray, Schuyler, Neb., subject to their several policies or certificates issued by said company, of Madison, Wisconsin, and to the terms and conditions of said contract of reinsurance; it being expressly stipulated that all of said contracts are to be construed as contracts of the state of Minnesota, and in accordance with the laws of said state, and are assumed subject to the by-laws and articles of incorporation of the reinsuring company, as they now or hereafter may exist, and to the laws of the state of Minnesota, and especially to chapter 178 of the Laws of 1901."

On December 31, 1901, the defendant company adopted a resolution, a part of which is as follows: "Whereas, this company has under a certain contract of reinsurance reinsured or assumed the outstanding risks of the Northwestern National Life Insurance Company, of Madison, Wisconsin,

including those carried upon their books as post mortem assessment certificates or policies: Now, therefore, be it resolved that in accordance with section six (6) of article (10) of the by-laws of this company [partly quoted above] premiums payable on account of each thousand dollars represented by the face of each of said policies or certificates, shall be the single premium provided by the agent's manual, or premium rate book, of this company for policies issued on the life expectancy plan, such single premium being based upon the age of the assured on August 29, 1901; that the holder of each such policy now in force be permitted to pay said single premium in cash at his option but that if not paid, and until so paid, payments on account thereof may be made in bimonthly installments, payable on the 10th day of February, 1902, and bimonthly thereafter, each of which said installments shall be as fixed by the following table, said installments being based upon the age of the insured at the date of original issue of the policy by the said Northwestern National Life Insurance Company, of Madison, or Northwestern Relief Association, its prior name." Then follows a table fixing the installments according to age at the date of original issue, and in effect scaling or commuting all certificates of the old series issued before January 25, 1890, to \$3,000 and all certificates issued after 1890 to \$4,000.

On January 2, 1902, a copy of this resolution was sent to plaintiff, Gray, by the defendant company. The letter transmitting the same reads as follows: "Minneapolis, Minn., Jan. 2, 1902. Dear Sir: Inclosed herewith we hand you copy of a resolution adopted by the board of directors of this company at its regular meeting held at its home office in this city on the 31st day of December, 1901. In accordance therewith your policy No. 52,795 is charged with a lien of \$2,096.94 [this sum was fixed on the assumption that the policy had been scaled down to \$3,000], "the same being the single premium referred to and imposed by virtue of said resolution as authorized by section six (6) of article ten (10) of the by-laws of the company, copy of which by-laws is also inclosed herewith. The bimonthly premium which you are required to pay on February 10, 1902, and every two months thereafter, is \$14.10, and, if not paid when due your policy becomes ipso facto null and void from date of default in such payment. You have the privilege of paying full single premium in cash at any time while the policy is in force, in which event in case of death the policy will be worth to the beneficiary named its full face, * * * but, if death occurs before the lien is fully paid, the unpaid part thereof will be deducted from the face of your policy at your death. the balance constituting the full measure of the company's liability thereunder. Under the terms of the policy as existing heretofore, its value at death was limited to the net proceeds of an assessment upon members of the company holding policies of the same kind or class, amounting to only \$414.60 from last assessment. Under and by virtue of this resolution said policy, after deducting the present amount of the lien, is worth net \$903.06. * * *

It is stipulated that the single premium necessary to buy \$1,000 of insurance at the age of 68, which was Gray's age at the time of reinsurance, was \$698.98, and also that Gray paid the defendant company the sum of \$14.10 every two months from and after February 10, 1902, until May 17, 1906, when his certificate matured and became payable. Plaintiff's suit, against the reinsuring company only, is predicated upon the original certificate of membership in the Wisconsin company, which matured in 1906, the contract of reinsurance made between the Wisconsin company and the defendant company, and the certificate issued by the defendant company to him, and seeks to recover the full sum of \$4,000 specified in the original certificate of membership. This is on the theory that the scaling of his policy from \$4,000 to \$3,000, and the fixing of a lien for the payment of the single premium, were unauthorized and void. Defendant, without conceding any want of authority or illegality in scaling down the policy from \$4,000 to \$3,000, for the purposes of this case waives any claim by virtue of that scaling, but contends that the lien fixed against the policy of \$698.98 for each \$1,000 insured was proper and legal, and that the amount thereof, with interest, less any amounts paid thereon by Gray in the shape of bimonthly payments between the years 1902 and 1906, when it matured, should be deducted from the face of the policy.

The court below directed a verdict for the plaintiff for \$3,157; that is, for \$3,000, the face of the policy as scaled, together with interest. Each party prosecuted a writ of error.

Frank E. Parkinson (George W. Wertz, on the brief), for plaintiff.

Ralph W. Breckenridge (Charles J. Greene and Thomas H. Matters, on the brief), for defendant.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). Gray had a contract, made in 1883, consisting of a certificate of membership with the Wisconsin company, whereby he was obligated to pay certain assessments which might be made by the company on the occasion of the death of his associate members, and to continue doing so until the maturity of his certificate. The company on its part obligated itself to pay Gray in 1906 80 per cent. of an assessment that might be levied and collected upon its members, not exceeding, however, \$4,000. To say nothing of the reorganization of the Wisconsin company in 1899, whereby it abandoned the principle upon which its business had theretofore been conducted, by entering into the reinsuring contract with the Minnesota company in 1901 and transferring its assets to the latter company, it thereby disabled itself to perform its part of the executory contract with Gray and renounced its obligation. A cause of action at once accrued to Gray for breach of the contract. *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. What his remedies were for the breach need not be dwelt upon. Suffice it to say he did not avail himself of any of them. However binding and obligatory the contract of reinsurance was as between the two insurance companies, it could not and did not obligate any of the original certificate holders of the Wisconsin company to accept contracts of reinsurance from the Minnesota company. Whether they should do so, or whether they should resort to other remedies for securing relief occasioned by the breach of their contracts, was optional with them. *Lovell v. St. Louis Mutual Life Ins. Co.*, *supra*.

Gray, on September 2, 1901, shortly after the reinsurance contract was executed, was advised by the Minnesota company of its assumption of his certificate, and the hope was expressed that he would deem it desirable to maintain his policy or certificate with the Minnesota company. He was also at the same time advised that a certificate of reinsurance would soon be issued to him. To these announcements he made no objection. Soon thereafter the Minnesota company executed and delivered to him its own certificate, reciting therein its execution of the reinsurance contract, the fact that Gray was a member in good standing in the reinsured company, and obligating itself to reinsure him on the terms and conditions of the contract of reinsurance and subject to the by-laws and articles of incorporation of the reinsuring company as they then or thereafter might exist. This certificate, also, was received by Gray without objection, and he counts on it in

this action. Soon thereafter the Minnesota company adopted the resolution of December 31, 1901, fixing the single premium to be paid by holders of assessment certificates, or to be charged as liens against their certificates, and also fixing the bimonthly installments to be paid thereon by the insured; and finally, on January 2, 1902, the defendant company notified Gray that the amount of such single premium on his certificate was \$698.98 for each \$1,000, or \$2,096.64 on the \$3,000 certificate as scaled down; and that the amount of bimonthly installments to be paid by him on account of that fixed single premium was \$14.10. To this he made no objection, but complied with its requirement, and made the bimonthly payments regularly, beginning February 10, 1902, and continuing until May 17, 1906, when his certificate matured. His contention now is that the by-law (section 6 of article 10), and the proceedings taken thereunder, fixing the single premium and charging the same as a lien against his certificate, were unauthorized and void.

A lengthy argument is made in support of this contention, but we find it unnecessary to consider its merits. The case is solvable on simpler grounds. No advantage appears to have been taken of Gray by any one. Notwithstanding the reinsuring company had no power to do new business on the assessment plan, it seems to have made provision by which the rights of members of the reinsured company, who continued to hold assessment certificates, should be respected, if they concluded not to accept new certificates. It provided, in substance, that all money received by the reinsuring company, constituting the mortuary fund of the reinsured company, and all money thereafter to be collected from members of the old company for account of such a fund, should be set aside and used to pay death, disability, or maturing claims, until they should be all paid, settled, or discharged in full; but with a view of bringing about a novation of the old contracts, which obviously was the general purpose of the reinsuring contract, it devised a scheme for doing it. Few assessment certificates only of those which had originally been issued by the old company had not been converted into stipulated premium policies before the reinsuring contract was made. To secure an adjustment of them to the new business methods of the reinsuring company it devised a scheme providing for a fixed premium for the entire term of the certificate and payment of the same in cash by bimonthly installments, or to make the payment thereof a charge against the policy at its maturity, and submitted this scheme as a proposition to the members of the reinsured company for their consideration, acceptance, or rejection. Without hesitation, so far as this record discloses, and presumably with full knowledge of the provision made for him in the event he concluded not to accept the proposition, and with like full knowledge of the remedies available to him for the breach of his contract, Gray elected to accept and did accept the terms offered to him by the new company. He entered upon the performance and continued in the performance of the terms agreed upon for a period of $4\frac{1}{2}$ years, until his certificate matured. This amounted to a novation, a new contract voluntarily entered into by Gray, and he cannot now repudiate it. His election was final and conclusive. *Iversen v. Minnesota Mut. Life Ins. Co.*

(C. C.) 137 Fed. 268; Supreme Council A. L. H. v. Lippincott, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803; Davitt v. National Life Ass'n, 36 App. Div. 632, 56 N. Y. Supp. 839.

We have carefully examined and considered the case of Smith v. Northwestern Nat. Life Ins. Co. of Minneapolis, Minn., 123 Wis. 586, 102 N. W. 57, in which the reinsuring contract involved in this case was considered by the Supreme Court of Wisconsin, but it affords us no aid. The proof must have been different from that before us. The court there said:

"In this instance the consolidation agreement expressly assumes all the liabilities of the Madison company, subject only to the articles and by-laws of the defendant; but no such articles or by-laws were offered in evidence, except a statute of Minnesota which, perhaps, enters into them, and which provides that in case of consolidation the new company shall be liable for the payment of all obligations of the consolidated companies. Hence there is no proof to limit the complete assumption by defendant of the Madison company's liability to plaintiff. Any such question is, however, foreclosed by the finding of fact that such assumption was made, since defendant reserved no exception thereto."

With such a record the conclusion in that case was inevitable.

Gray originally had a certificate of membership in the old assessment company, depending for its value upon changeable and uncertain facts. An assessment company, unlike an old line company, organized on the stipulated premium plan, does not agree to pay a definite sum on the occasion of the death of a member or maturity of his certificate, but only to make an assessment of a certain amount upon all the members and to pay the beneficiary a certain percentage of that aggregate sum. As membership diminishes necessarily the amount to be realized by an assessment diminishes accordingly, and the cost of insurance secured increases correspondingly. With the loss of members in the old Wisconsin company, occasioned by the abandonment of its assessment feature and adoption of the old line stipulated premium feature, Gray's certificate became comparatively of small value. Only 74 of the old assessment members actually remained at the time the reinsurance contract was entered into. Under no theory advanced by learned counsel for Gray would he have been entitled, apart from the provisions of the contract of reinsurance, to any such sum as \$4,000, or \$3,157 as allowed by the trial court. In the letter of defendant's president to Gray of date January 2, 1902, the value of his policy was stated to be \$414.60. Whatever its value may have been, the fact was (and it doubtless was well known to Gray) that his rights under the old assessment certificate were small and uncertain. Accordingly, when the defendant company offered him a policy of \$3,000 maturing in 1906, subject to a lien of \$2,096.94 for a single premium, representing the cost of insurance for one of Gray's attained age of 68 years for the period of four years, or a policy of \$4,000 subject to a like lien of \$2,795.92, as an inducement for him to reinsure with it, it certainly made no unfair proposition. It practically offered to him approximately \$1,000 for what was then not considered of half that value. Moreover, it offered him what, according to the facts stipulated to be true in this case, was insurance at the usual and accepted cost thereof.

Treating the certificate in suit to be for \$4,000 according to the concession of counsel for the defendant company, the single premium to carry that amount of insurance until the maturity of the certificate in May, 1906, was \$698.98 per \$1,000, or a total of \$2,795.92. Gray paid between 1902 and 1906 in bimonthly installments a total sum of \$408.92. Charging him with interest on the amount of the single premium, and crediting him with the payments made and interest thereon, a net balance of \$2,997.77 is found to have been due the defendant company, at the time the certificate matured, as unpaid premium thereon. This amount, therefore, being deducted from the face of the certificate, leaves a net balance due Gray of \$1,002.23. This, with interest from May 17, 1906, to the date of judgment in the court below, April 18, 1907, makes the total sum of \$1,057.35 which the plaintiff was entitled to recover, instead of \$3,157, for which judgment was rendered. In other words, plaintiff was allowed to recover \$2,099.65 too much.

Our conclusion, therefore, is that the judgment must be reversed unless within 40 days after the filing of this opinion the plaintiff files in the clerk's office of the court below a remittitur of \$2,099.65, and within 10 days thereafter files with the clerk of this court a certified copy of the record showing the filing of such remittitur. If such remittitur and certified copy thereof be filed, a judgment will then be entered affirming the judgment below to the extent of \$1,057.35. If such remittitur and certified copy be not filed within the times aforesaid, the judgment will be reversed, with directions to grant a new trial.

KAHN et al. v. W. A. GAINES & CO.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1908.)

No. 2,700.

1. TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—PRIOR USE.

The right of defendants to use in their trade the words "Old Crow," or "Crow," as applied to whisky, could not be measured by the extent to which they employed it, it being sufficient, to protect them from a charge of infringement of plaintiff's alleged monopoly of such term as a trade-mark, that defendants used the same in connection with their business as whisky dealers prior to any appropriation thereof by complainant, and continued so to use it; nor could defendants' right to use it *ad libitum* be destroyed by the greater amount of complainant's sales under the designation of "Old Crow," or by the asserted superiority of complainant's product.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 24, 25, 31.]

2. SAME—EVIDENCE—RECORD IN OTHER CASES.

Where, in an action for infringement of complainant's right to the use of the terms "Crow" and "Old Crow" as a name for whisky and for unlawful competition, complainant claimed that defendants' whisky sold under such brand was fraudulent, impure, and deleterious, the record and evidence in a prior case brought by complainant for infringement of its trade-mark, to which defendant was not a party, while inadmissible

as proof of the issues on trial, was competent for the information of the chancellor as to the scope of the decision in the prior case as a precedent.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper Bros.*, 30 C. C. A. 376.]

3. SAME—UNFAIR COMPETITION.

In an action for infringement of plaintiff's alleged trade-mark and for unlawful competition, evidence held insufficient to show that defendants' whisky, sold under the name of "Old Crow," or "Crow," in competition with plaintiff's whisky, sold under the same name, was deleterious or fraudulent, or that defendant was guilty of unfair competition in the use of such names.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

For opinion below, see 155 Fed. 639.

Jacob Klein and Luther Ely Smith (Warwick M. Hough and A. J. Freiberg, on the brief), for appellants.

James L. Hopkins (Daniel W. Lindsey, on the brief), for appellee.

Before SANBORN, Circuit Judge, and PHILIPS, District Judge.

PHILIPS, District Judge. The appellee (complainant below), obtained decree in the Circuit Court establishing its asserted claim to the words "Old Crow" as a trade-mark, enjoining appellants (defendants below) from the use thereof in their business, finding the defendants guilty of unfair competition in business, and ordering an accounting.

The original bill was filed in November, 1904. The bill alleges that the complainant is the sole and exclusive owner of a trade-mark for whisky consisting of the words "Old Crow," which words were open to adoption as a trade-mark for whisky in the year 1867, when the complainant's predecessor in business, Gaines, Berry & Co., adopted and commercially applied the said trade-mark for whisky distilled by them, and that it acquired by assignment said trade-mark, which has been continuously applied by it and its predecessors in business upon packages containing whisky from the year 1867 to the time of filing the amended bill. The bill further alleges that in 1835 one James Crow became domiciled upon Glenn's creek, Woodford county, Ky., when and where he began the manufacture of whisky of superior quality, which became designated about that time as "Crow," or "Old Crow," and that he was continuously engaged in the distillation of whisky as "Crow" or "Old Crow" to his death in 1855; that at that time a considerable quantity of said whisky remained upon the market and was commercially known and dealt in until the year 1867; that no whisky was produced during said period anywhere to which the word "Crow," or "Old Crow," was applied as a trade-mark; that in that year a predecessor of complainant, to wit, Gaines, Berry & Co., began the production on said Glenn's creek of their whisky, using the same process and material theretofore used by said Crow; that from 1835 to this time the words "Old Crow" have been applied continuously to whisky produced by the process of Crow, and to no other whisky whatever; that the distillation and produc-

tion of said whisky has always been on said Glenn's creek, and not elsewhere. The bill further alleges that Abraham M. Hellman and Moritz Hellman, the defendants, had been guilty of fraudulent acts and unfair competition in selling a spurious compounded liquor as and for the complainant's whisky, to its damage in the sum of \$5,000, and prayed for an accounting.

The answer denied specifically the allegations of the bill and alleged the ownership of the word "Crow," "Old Crow," "J. W. Crow," and the celebrated "Crow Bourbon," together with a figure of a crow, in connection with their own business upon packages of whisky in their and their predecessor's business, and so continued the use thereof from the year 1863 and prior thereto; alleging that the whisky sold by complainant under the words "Old Crow" was an unrefined, harmful, and deleterious article, and that the whisky sold by them was a blend largely free from impurities. The replication was general. The defendants filed a cross-bill, claiming the trade-mark in question and asking for an injunction. This need not be considered, as at the hearing the defendants' counsel declined to insist upon any affirmative relief.

The evidence tended to show that a man named James Crow, usually called "Jim Crow," and sometimes known as "Crow," or "Old Crow," began the manufacture of whisky in Woodford county, Ky., about the year 1850. The evidence does not show that he ever owned or operated any distillery in his own right, but worked for persons owning distilleries. He died about 1855. Prior to his death he worked at various distilleries in that neighborhood, to wit, at the Edwards distillery, at Anderson Johnson's distillery, at Jack Johnson's distillery, at Johnson & Yancey's, at Oscar Pepper's distillery, and at Capt. Henry's distillery. Whisky made by him was called "Crow," or "Old Crow," as stated by one of the witnesses, just as whisky made by Taylor was called "Old Taylor." The process employed by Crow was what is known as "hand-made" whisky; but there was no secrecy about his process, nor did it differ materially from that employed by other distilleries of the same period. He used in the manufacture the grain grown in the neighborhood, which was not different from that grown in the Western states. When he worked at Johnson & Yancey's distillery, it was not known as "Crow's" whisky, but as "Johnson & Yancey's." The old Oscar Pepper's distillery, at which Crow at one time worked, was run by various distillers from 1855 to 1865. This whisky was called "Old Oscar Pepper," and was sometimes called "Old Crow." The men who worked with him understood the process employed by Crow and used it in other distilleries.

The copartnership firm of Gaines, Berry & Co. began business as distillers in Woodford county, Ky., in 1867 and operated the old Pepper distillery as claimed successor. This concern was later succeeded by W. A. Gaines & Co. a copartnership, which on the 9th day of July, 1882, filed in the Patent Office at Washington, D. C., application for registering the following as a trade-mark:

"Old Crow Distillery, Woodford County, Kentucky. Copper Distilled Whisky. W. A. Gaines, Distiller."

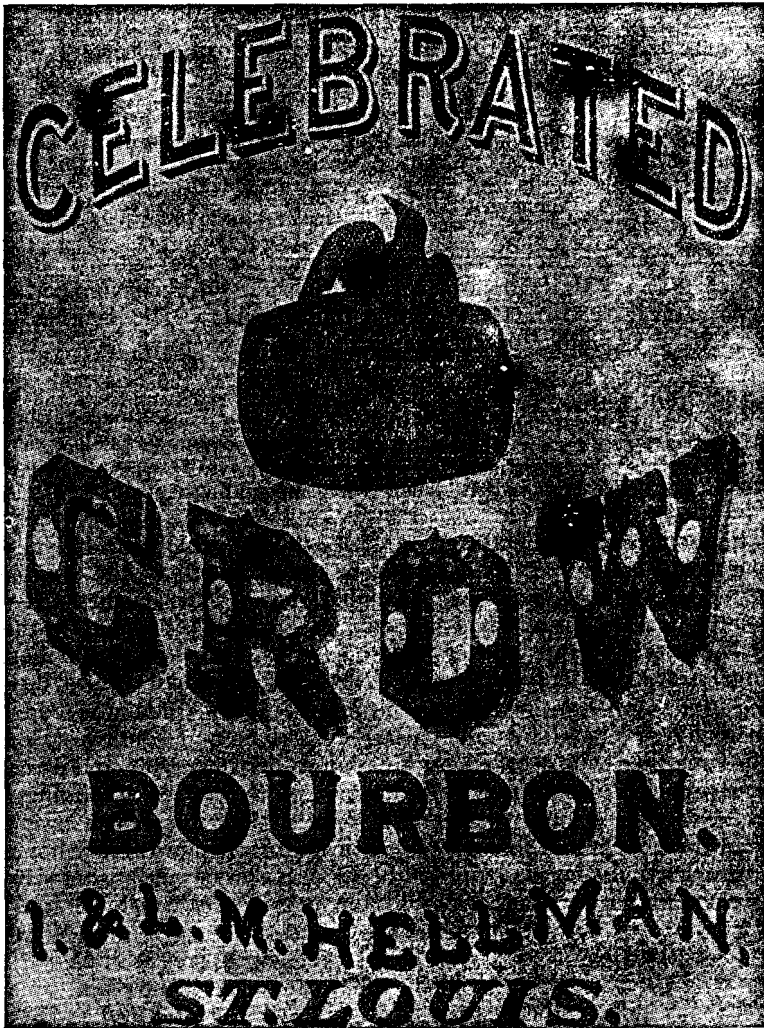
Accompanying this application was the statement that "this trade-mark we have used in our business since January, 1870." In 1887 W. A. Gaines & Co. incorporated under the same name. In June, 1904, shortly before the institution of this suit, and after controversy had arisen between the complainant and the defendants respecting the use of the name of "Crow," or "Old Crow," in business, the complainant corporation filed in the Patent Office application to register as a trade-mark the words "Old Crow." The sworn statement of the officer of the company accompanying the application asserted that:

"This trade-mark has been continuously used by the said W. A. Gaines & Co. and its predecessors since the year A. D. 1835."

To say the least of it, these different statements show some juggling with facts and disclose inconsistent positions. The record does not show any written devolution of title or right of trade-mark passing from Gaines, Berry & Co. to W. A. Gaines & Co., and from the latter to the complainant corporation. Be this as it may, no unprejudiced mind can read the evidence in this case without the impression that the conception of a trade-mark in the words "Crow," or "Old Crow," did not enter the mind of Gaines, Berry & Co. prior to 1870; and they may not, under the issues presented by the pleadings, lay any claim thereto anterior to 1867. It is to be conceded that after 1870 Gaines, Berry & Co. and W. A. Gaines, and their successors, W. A. Gaines & Co., built up a large, successful business in the manufacture of whisky, which has extended throughout the country, and that their whisky, under the designation of "Old Crow," attained wide celebrity. The question remains, however, to be answered: Has the complainant maintained by proof the assertion that the defendants, or their predecessors in business, wrongfully invaded its exclusive right to the use of the words "Crow," or "Old Crow," in business?

The evidence, without contradiction, establishes the following facts: That as early as 1862 the firm of I. & L. M. Hellman, composed of Isaac Hellman and Louis M. Hellman, were engaged in the wholesale liquor business on Pine street, in the city of St. Louis, Mo.; that as early as 1862 or 1863, on the whisky barrels employed in their trade, they had a bird with wings spread, in imitation of a crow, burnt into the head of the barrel, and the word "Crow," or the words "Old Crow," were burnt beneath this figure. This fact is affirmed by the testimony of Mr. Herman A. Haeussler, an attorney at law of St. Louis, whose reputation for intelligence and integrity is such as to entitle it to full credence. The firm of lawyers with which he was connected, whose office was the next door to the business house of the Hellmans, acted as counsel for I. & L. M. Hellman in the conduct of their business. Mr. Haeussler testified that as early as 1862-63, they had a brand of "Crow Whisky"; that he saw the barrels on the sidewalk ready to ship, with the figure of a crow either on the barrels or on the signs (and he thinks the barrels), with the word "Crow." The evidence further shows that as early as 1865 they had signs in frame prepared, displayed in the windows

of their storehouse, like Exhibit No. 6, represented by the following cut, large numbers of which were used in connection with their whisky trade:



Some of the books of said firm kept at that time were in evidence, and showed sales of whisky, sometimes designated as "Crow," and "J. W." or "J. C. Crow." That they used also the designative term "Old Crow" appears in the testimony of several witnesses. Mr. Charopin of Covington, La., testified that he entered the employ of I. & L. M. Hellman about November, 1866, and continued therein until 1870; that he traveled first through Illinois and parts of Missouri, and afterward in the South as far as New Orleans, and in Tennessee,

Arkansas, and Mississippi. He gave the names of parties to whom he had sold Hellman's whisky, and deposed that he sold to customers "Old Crow" whisky which the Hellmans handled, and that he remembered it was the brand used at the house at the time. Mr. Schaeffer, of Yazoo City, Miss., testified that he had dealings with I. & L. M. Hellman in 1866, and probably the latter part of 1865, and that he purchased liquor from them under the name of "Crow," or "Old Crow."

"Q. Will you describe what marks, if any, these barrels bore? A. They had on one end of the barrel a bird, with wings spread out, burnt in the head of the barrel, and the words 'Old Crow' were burnt under them. They were all burnt, not marked; burnt in the wood."

Mr. Heron, of Memphis, Tenn., testified that he entered the employ of I. & L. M. Hellman, in September, 1865, and remained with the firm until 1882 or 1883, as assistant rectifier. He identified Exhibit No. 6 as similar to the one used when he went there.

"Q. Now, will you state, Mr. Heron, how frequently the firm sold whisky as 'Old Crow' whisky during the time you were in the employ of the firm? A. Well, I couldn't say how often I sold it; but, to the best of my knowledge, there was very seldom a month or week that some did not go out. Q. By whom was the 'Old Crow' sold by the firm made? A. It was blended right in the house. You could call it blending or compounding right in the house."

This condition continued up to 1867, during which the bill alleges the claimed trade-mark had not been appropriated by the complainant. In August, 1867, Isaac Hellman died. The business of this house has been continuously conducted in St. Louis, up to the time of this litigation, by the brother and their sons, who succeeded thereto, doing business under the name of I. & L. M. Hellman, employing the same brands and designation in business. Their trade was confined principally to states down the Mississippi river and southwest. Several of the men who worked for this house between 1862 and 1870, as well as several of the traveling salesmen of the house, are living and gave their depositions in this case. Since 1867 this house has conducted its business as theretofore, with no knowledge carried home to its members that the complainant, or its predecessors in business, were asserting any proprietary right to the use of the word "Crow," or "Old Crow," in trade. The evidence fails to show that the Hellmans, prior to this controversy, ever heard of Glenn's creek, in Woodford county, Ky. The whisky sold by them carried with it, plainly marked on the packages, the fact that it was the whisky of I. & L. M. Hellman, of St. Louis, Mo., or the name of the firm at the time in business. There is not a particle of evidence in this record to warrant the imputation that at any time or place the defendants ever represented that their whisky was manufactured on Glenn's creek, or that it was the manufacture of the complainant. There is no evidence that any purchaser from them was ever deceived into the belief that he was obtaining from them whisky manufactured by the Glenn's creek monopoly. There is, therefore, no foundation in fact or law for the charge of unfair competition.

After alleging in the bill of complaint that by reason of the defendants' unfair competition the complainant has been damaged in the sum of \$5,000, and its vast business jeopardized and threatened with destruction by the defendants' competition, its counsel, to impair the evidence that the Hellmans had sold whisky as far back as 1863 under the name of "Crow" and "Old Crow," tacked course in argument by asserting that this use was so rare as to subject it to the maxim "*de minimus lex non curat*." The right of the defendants to use in their trade the designative words "Old Crow," or "Crow," cannot be measured by the extent to which they employed it, whether more or less frequent at times. It is sufficient to protect them from the charge of an unlawful invasion of the complainant's claimed monopoly that they used in connection with their business as whisky dealers the trade-name in question prior to any appropriation thereof by the complainant, and that they have so continued to use it. Neither can their right to use it *ad libitum* be destroyed by the overshadowing comparative amount of the complainant's sales under the designation of "Old Crow" whisky, nor by the asserted superiority of its product.

Passing by the criticism made by defendants' counsel of the words "Old Crow" as a trade-mark, on the ground that in its origin it referred merely to the name of "Crow" as the compounder of that grade of whisky, and that its later use was merely designative of the quality of the article, and, therefore, it might not constitute a technical trade-mark if the complainant employed the words "Old Crow" and "Crow" in its trade as designating the quality of the whisky sold by it, the defendants are not guilty of an invasion of the asserted exclusive monopoly of the complainant.

The bill stigmatizes the defendants' business as fraudulent, in imposing upon the public a blended whisky, impure and deleterious. And what it lacks in proof of this its counsel has undertaken to supply by invective and epithets. The learned trial judge, from his opinion in the record, seemed impressed as to this charge of the bill by the opinion of the Kansas City Court of Appeals in the case of *W. A. Gaines & Co. v. E. Whyte Grocery Fruit & Wine Co.*, 107 Mo. App. 570, 81 S. W. 648. It is assigned for error that the court admitted in evidence the entire record, including the voluminous evidence in the bill of exceptions, in that case. In view of the conclusion reached by us on the merits, we may pass by this criticism with the observation that, while the evidence in that case could not be employed as proof of the matters in contestation in the case here under review against this appellant, who was not a party to that suit, it could be considered by the chancellor for his information as to the scope of the decision in that case as a precedent. *Liebig's Extract of Meat Co. v. Libby et al.* (C. C.) 103 Fed. 87-89; *N. Y. Filter Mfg. Co. v. Jackson* (C. C.) 112 Fed. 678-680; *Liebig's Extract of Meat Co. v. Walker* (C. C.) 115 Fed. 822-825; *American Bell Tel. Co. v. Wallace Electric Co.*, (C. C.) 37 Fed. 672; *Rose v. Fretz* (C. C.) 98 Fed. 112; *Adams v. Tannage Patent Co.*, 81 Fed. 179, 26 C. C. A. 326

The evidence, especially on the part of the defendants, in the case under review, is so materially different in character and effect from

that in the case tried in the Jackson county circuit court, as also in that of *Gaines & Co. v. Leslie*, 25 Misc. Rep. 20, 54 N. Y. Supp. 421, cited by complainant's counsel, as to render them of no controlling force on the facts involved in and the principles of law applicable to this case. The only evidence touching the character of the whisky sold by the Hellmans is that it was blended whisky—a mixture of so-called straight whisky with refined spirits from which, the blend-ers claimed, the largest possible percentage of impurities were removed. Whether this made it better or worse than that manufactured by the complainant does not affect this case. No customer of the Hellmans is complaining, and the complainant has failed to show that the defendants palmed off their whisky on anybody as that of the complainant's manufacture.

The complainant lays much stress upon the situs of its distillery on Glenn's creek, in Woodford county, Ky., as if there were some peculiar virtue in the air and water of that place adapted to the distillation of whisky, which it had in some way wholly appropriated. The evidence does not show that Glenn's creek in any way entered into the composition of the whisky. The water used came from the springs some distance from the creek, in nowise different from other springs in the limestone region of the Blue Grass district of Kentucky. We fail to perceive the relation of all this to the claimed trade-mark. As there was no secret about the process of distillation employed by James Crow, which the complainant assumes to follow, as "hand-made" whisky (and there was some evidence that the complainant now employs machinery in some material respect in the process of manufacture), the use of which process is not secured to the complainant by any patent, and as the defendants have not claimed to use either Kentucky corn, water, or air in the composition of their blended whisky, and did not represent that it came from Glenn's creek, all these matters are quite immaterial on the issue of unfair competition in trade.

After a careful consideration of the mass of relevant and irrelevant evidence in this record, our conclusion is: (1) That inasmuch as the defendants' predecessors in business, prior to the use or the adoption of the designative word "Crow," or the words "Old Crow," as a trade-mark, employed those words as descriptive terms in connection with their business as dealers in whisky in St. Louis, Mo., and said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trade-mark; and (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business.

It results that the decree of the Circuit Court must be reversed, and the cause remanded, with direction to the Circuit Court to dismiss the bill of complaint.

MUNDY v. SHELLABERGER.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1908.)

No. 2,648.

1. HOMESTEAD—CONTRACT BY HUSBAND ALONE TO CONVEY—MISSOURI STATUTE.

An executory contract to convey a homestead, signed by the husband alone, is within Rev. St. Mo. 1899, § 3616 (Ann. St. 1906, p. 2034), which provides that every sale or alienation of a homestead by the husband shall be null and void, and such a contract can neither be enforced in equity nor be made the basis of an action for damages for nonperformance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 191-202.]

2. SPECIFIC PERFORMANCE—ENFORCING PARTIAL PERFORMANCE—EXCESS OVER HOMESTEAD LIMIT.

Under Rev. St. Mo. 1899, § 3616 (Ann. St. 1906, p. 2034), which makes any alienation of a homestead by the husband alone null and void, an executory contract by a husband to sell homestead property which exceeds in value the statutory limitation of \$3,000 will not be specifically enforced by a court of equity as to the excess in value, which was not the contract made, nor will damages be awarded in lieu of performance as to such excess; both parties being chargeable with knowledge that the contract was void when it was signed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 20-25.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

For opinion of the court below, see 153 Fed. 219.

Halbert H. McCluer (Omar E. Robinson and John T. Harding, on the brief), for appellant.

M. A. Fyke and A. S. Marley, for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. This action was brought by appellant to enforce the specific performance by appellee of the following contract:

"Kansas City, Mo. June 18, '04.

"Kirk L. Shellaberger, Kansas City, Mo.—Dear Sir: I herewith contract with and agree to deliver to you one hundred thousand shares of the Logan Oil & Gas Company stock, of the par value of one dollar each, full-paid and nonassessable, also sixty thousand shares of the Northern Petroleum Company stock, par value one dollar each, full-paid and nonassessable, also thirteen thousand one hundred and twenty-five shares Clermont Oil Company stock, par value one dollar, full-paid and nonassessable, for your Winifred Court, 541 Brooklyn avenue, upon which are sixteen brick cottages, and your residence, 135 Park avenue; said properties free from all mortgages. Rents from Winifred Court to come to me from date of delivery of deed; you to retain possession of your residence for 90 days, if necessary, free of rent. Deeds for said properties to be delivered within ten days from this date, or as near that date or sooner if possible. You to bring abstracts down to date. All stock I agree to deliver to you inside of ten days. Dated this 18th day of June, 1904.

J. F. Mundy.

"Witness: W. Peard Thomas.

"I accept the above proposition and agree to carry out same.

"K. L. Shellaberger.

"Witness: W. Peard Thomas."

It is conceded by appellant that the property described in said contract as 135 Park avenue was on June 18, 1904, the homestead of appellee, occupied by himself and family to the knowledge of appellant. The property described in the contract is located in Kansas City, Mo. Section 3616, Rev. St. Mo. 1899 (Ann. St. 1906, p. 2034), provides that the homestead of every housekeeper or head of a family in cities like Kansas City shall not include more than 18 square rods of ground or exceed in value \$3,000. Then follows this additional provision:

"The husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void: Provided, however, that nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying, mortgaging, alienating, or in any other manner disposing of such homestead, or any part thereof."

Appellant refuses to accept a decree for the specific performance of the contract for the Winifred Court property alone, and it necessarily results that, if no relief can be granted as to No. 135 Park avenue, the bill must be dismissed. Appellant, while conceding that specific performance of the contract cannot be had as to No. 135 Park avenue, insists that the court for that reason may, if it finds the contract wholly void as to such property, grant him compensation therefor in the way of damages. He further insists that, as No. 135 Park avenue is shown to be of the value of about \$10,000, the contract to convey the same was at least good as to the excess in value of said property over and above the sum of \$3,000, the homestead limitation, and that, as sections 3624, 3625, and 3626 of the Revised Statutes of Missouri (Ann. St. 1906, pp. 2046, 2047), provide that judgment creditors may have the homestead set off if the land claimed as such is larger in area than that provided by law for a homestead, or, where property is not susceptible of division without injury to the rights of the parties, may have the same sold and the amount of the homestead in value paid to the owner thereof and the excess paid to the creditors, the court may enforce the contract herein in a similar way as to the said excess in value. These contentions by appellant raise the following questions:

First. Is the contract to convey No. 135 Park avenue, treating the same as simply a homestead, wholly void for want of the signature of the appellee's wife, and, if so, can this court award compensation by way of damages for the failure of appellee to convey?

Second. Is the contract valid so far as the value of said homestead exceeds the sum of \$3,000, and, if so, will the court proceed to enforce the contract as to such excess in some appropriate manner?

Section 3616, above quoted, declares every sale, mortgage, or alienation of the homestead made by the husband alone to be null and void. If an executory contract of sale can be held to be fairly within the denunciation of this law, then it also must be held null and void. No decision of the Supreme Court of Missouri has been cited, nor have we been able to find any, passing upon the question as to whether an executory contract of sale is within the statute. We are of the opinion, however, that upon principle and authority, where a present sale of the homestead is contemplated, as in the case at bar, an executory

contract for the sale of the homestead is within the statute, and therefore null and void when signed by the husband alone. In the case of *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431, the Supreme Court of that state had occasion to pass upon the validity of an executory contract of sale of the homestead when signed by the husband alone. In reference to this question the court said:

"The court below held, and we think correctly, that the contract made by the plaintiff was void, and that the note and money given and paid thereon by the defendant were without consideration. The Constitution of the state, as well as the statute relating to exemptions, provides that the homestead shall not be alienated without the joint consent of the husband and the wife, when that relation exists. In interpreting and applying the above provisions, it has been uniformly and consistently ruled by this court that, so long as the premises are impressed with the homestead character, no lease, mortgage, or deed, or other contract, intended to alienate the homestead or interfere with its use and occupancy as a homestead, made and executed alone by the husband and without the consent of the wife, is valid or effectual for any purpose whatsoever. * * * If a party cannot convey the homestead by mortgage or deed without the consent of his wife, he certainly cannot make a contract agreeing to convey that will be valid or binding without her concurrence."

In *Silander v. Gronna*, 15 N. D. 552, 108 N. W. 544, the Supreme Court of North Dakota held an executory contract for the sale of a homestead null and void for all purposes when signed by the husband alone. In *Lichty v. Beale*, 75 Neb. 770, 106 N. W. 1018, the Supreme Court of Nebraska held that an executory contract for the sale of a homestead entered into by one spouse alone is utterly void. Upon principle we do not see, where a present sale is contemplated, how an executory contract for the sale of the homestead can be looked upon in any other view than a selling or alienating thereof. Especially would this seem true in an action where one of the parties to the contract is asking the court to compel the other party to execute a conveyance in accordance with the contract. Treating the contract, therefore, as being within the statute, we come to the consideration of the question as to whether the contract is wholly void, and, if so, whether damages may be awarded for the failure on the part of the appellee to make a conveyance in accordance therewith. We are of the opinion that, both by the words of the statute itself and by the great weight of authority, the contract which appellant is seeking to enforce, treating No. 135 Park avenue as embracing nothing but a homestead, is wholly void. *Waples on Homestead and Exemption*, pp. 383, 384, states the rule to be as follows:

"Under the general rule that the husband alone cannot sell or encumber his dedicated homestead, all alienation of it in any form by his act, when the property itself is not liable in rem, is absolutely void, not only as to the rights of his wife, who does not join him in the deed, and as to the children, to whom the law gives the protection of shelter and the comforts of a habitation, but also as to himself. His act is a nullity, and he escapes the consequences which would follow it, so far as his own right and title is concerned, but for the equitable rights and interests of his family. His deed of contract is as though it was never written or designed."

Numerous authorities are cited in support of this statement of the author. We think Judge Philips stated the correct view of the matter

when, in deciding the case in the Circuit Court, he used the following language:

"When the text-writers and the courts speak of the right to commute in damages as to a part of the contract not susceptible of specific performance, they have in mind a contract of a party sui juris, which he had a right to make, not forbidden by law, and which he could perform if he had the title, or where he has by some act disqualified himself from performance. The ascertainment and awarding of damages in lieu of the specific thing in equity presupposes a contract valid and one enforceable in an action at law. Whether the suit be in equity for specific performance, with the incidental jurisdiction to proceed to the complete adjustment of the subject-matter of the controversy by awarding damages as to that part of the property embraced in the contract not capable of being conveyed for want of title, or the like, or whether it be an action at law for damages consequent upon failure to entirely perform the underlying basis of the right to relief is the existence of a valid contract. It is inconceivable to the judicial mind how a contract void, especially when it contravenes the public policy of the state where made, can ever form the basis of a suit recognizable either in equity or law."

The following authorities have been examined, and they sustain the view that a contract such as is now under consideration, treating No. 135 Park avenue simply as a homestead, is null and void and cannot be used as a basis for the recovery of damages either at law or in equity: *Silander v. Gronna*, 15 N. D. 552, 108 N. W. 544; *Lichty v. Beale*, 75 Neb. 770, 106 N. W. 1018; *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842; *Meek v. Lange*, 65 Neb. 783, 91 N. W. 695; *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802; *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431; *Hodges & White v. Farnham*, 49 Kan. 777, 31 Pac. 606; *Webster v. Warner*, 119 Mich. 461, 78 N. W. 552; *Phillips v. Stauch*, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374; *Gadsby v. Monroe*, 115 Mich. 282, 73 N. W. 367; *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817; *Cowgell v. Warrington*, 66 Iowa, 666, 24 N. W. 266; *Barnett v. Mendenhall*, 42 Iowa, 296; *Barton v. Drake*, 21 Minn. 299.

It would seem useless to cite further authority, but the language of Judge Mitchell in the case of *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817, is so clear and forceful that we quote from the opinion as follows:

"But, notwithstanding some respectable authority to the contrary, it seems to us that to hold that a person is liable in damages for the nonperformance of a contract which he is under no legal obligation to perform would be illogical, and without analogy or precedent in the law. The very proposition involves a legal inconsistency. We think that on legal principles such a contract must be held void for all purposes, and not to constitute the basis of any action against the obligor. There are also strong practical considerations in favor of this view. While it is true, as counsel suggests, that to hold the husband liable for damages would not deprive him or his family of their homestead, yet to force him to the alternative of securing his wife's signature to the conveyance or being mulcted in damages for not doing so, and to place the wife in the dilemma of either having to sign the deed or see her husband thus mulcted in damages, might, and naturally would, often indirectly defeat the very object of the statute. There is nothing unjust to the obligee in holding such a contract absolutely void for all purposes. He is bound to know the law, and he always has actual notice, or the means of obtaining actual notice, of the fact that the land with which he is about to deal is a homestead."

In this connection we also quote from the opinion of Beck, C. J., in *Cowgell v. Warrington*, 66 Iowa, 669, 24 N. W. 268:

"The district court held that the specific performance of the contract in suit could not be enforced, but awarded damages against defendant. We think, under the plain language of the statute (Code, § 1990), the contract is invalid, and the defendant incurred no liability thereon. It is declared in the section just cited that a conveyance for the sale of the homestead, unless the wife concurs in and signs it, 'is of no validity.' Defendant bound himself to execute a conveyance which, under the law, would have been void. Surely plaintiff can recover no damages for the failure of defendant to execute a void deed. But, if the contract is to be regarded as a conveyance, it is equally plain that defendant is not liable for damages thereon, for the reason that it is void."

We have considered the decisions cited from the Supreme Courts of California and of Texas, but do not think that under the Missouri statute, which provides that the alienation of the homestead by the husband alone shall be null and void, such decisions can be held to be the rule in Missouri. Decisions such as *Gee v. Moore*, 14 Cal. 472, and *Stewart v. Mackey*, 16 Tex. 56, 67 Am. Dec. 609, and others, are rested on the ground that the entire object of the homestead provision is to secure a homestead, and that it was not intended to infringe upon the husband's rights of property any further than is necessary to accomplish that object. In these decisions the alienation of the homestead by the husband alone is held good as to the reversionary interest, or, in other words, that the conveyance or contract is good as soon as the property ceases to be occupied as the homestead. As we have heretofore said, we do not think that such a rule can be established in a jurisdiction where the statute itself makes such alienation of the homestead absolutely void.

In what we have heretofore said in regard to 135 Park avenue we have treated that property as being a homestead, and nothing more. We now come to the claim of the appellant that, as the property is worth more than the homestead limitation in value, we may secure to the appellant the excess in value of said property over and above the homestead limitation. There are cases which hold that the excess above the monetary limitation is under no restraint as to sale or mortgage. But the question, when it has been so decided, has not arisen in cases where specific enforcement of an executory contract of sale was asked, except in two or three cases. We will refer to the cases cited by counsel for appellant in support of this last contention.

Thorpe v. Thorpe, 70 Vt. 46, 39 Atl. 245, was an action to foreclose a mortgage. It was decided in that case that a husband who owns land surrounding the house which he occupies with his family for a home, and which together with the house is of more value than the homestead exemption, may select out and convey, free from homestead rights, a portion of such surrounding land by his sole deed, provided the land conveyed had not been, and was not then, used for any homestead purposes, or any purpose in connection with the home or dwelling, although it was so located that it might be used for such purposes. *Goodloe v. Dean*, 81 Ala. 479, 8 South. 197, was an action to foreclose a mortgage. The amount of land mortgaged was 240 acres. The homestead limitation was 160 acres. It was decided that

the mortgage was good for the excess in area. *De Graffenried v. Clark*, 75 Ala. 425, and *Butts v. Broughton*, 72 Ala. 294, are cited to support the above decision. *Neiman v. Schuster* (Tex. Civ. App.) 43 S. W. 1075, was an action to recover the possession of 4 acres which were a portion of a tract of 200 acres claimed as a homestead. It was alleged that at the time Neiman conveyed the 4 acres they were part of the homestead, and that the conveyance by Neiman was void for want of the signature of Mrs. Neiman. The court decided that as the entire tract of land owned by Neiman contained more than 200 acres, and as there was no such use of the 4 acres in controversy as necessarily constituted it a part of the home, the conveyance was good without the consent of the wife. *Wallace v. Harris*, 32 Mich. 399, was a suit in equity to settle certain disputes over real estate. The Constitution of Michigan limits the homestead to 40 acres, when not included in any town plat, city, or village. It was decided in this case that a conveyance of one entire tract of 80 acres was good as to that part of the tract that did not constitute the homestead. In *State Nat. Bank of Louisiana v. Lyons*, 52 Miss. 184, it was decided that a mortgage on land, which was a homestead and worth \$10,000, would be enforced as to the excess over \$2,000, the homestead limitation. *Coles v. Yorks*, 31 Minn. 213, 17 N. W. 341, was a case decided by the Supreme Court of Minnesota. Yorks and his wife resided upon a block of land in the city of Stillwater, which block was subdivided into 12 lots. Yorks executed a mortgage upon the property without the wife's signature. The rightful homestead of Yorks was one lot. It was held in this case that the mortgage was good for the quantity of land in the block, excepting one lot. In *Boyd v. Cudderback*, 31 Ill. 113, it was decided that a mortgage by a husband alone on property including the homestead was good as to the excess. In *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129, it was decided that a deed by a married woman to a tract of land including her homestead was good as to the excess value of the homestead tract. In *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, the Supreme Court of Wisconsin held that a conveyance by the husband alone which reserved all homestead rights was not void under the statute of Wisconsin.

The case of *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613, is the only case cited where an executory contract of sale of real estate including the homestead was enforced. It appeared in this case that the homestead limitation of value in Illinois was \$1,000. The court in this case held that, if the parties seeking to enforce the contract would accept a conveyance subject to the homestead, the court would decree a specific performance. On the other hand, in *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842, it was held that the value of the property did not change the rule making a contract to convey the homestead by the husband alone absolutely void. *Phillips v. Stauch*, 20 Mich. 369, is to the same effect. In *Hall v. Loomis*, 63 Mich. 711, 30 N. W. 374, Campbell, C. J., used the following language:

"The fact that the property contained more in value than a homestead, and that the contract may have been valid for the excess, will not avoid the difficulty. In *Phillips v. Stauch*, 20 Mich. 369, a similar question came up, and this court refused to attempt any specific performance as to the residue,

which complainant was willing to accept with compensation, because it was not the contract the parties made, and would require new arrangements not convenient for a court of equity to frame. Mrs. Loomis could not have enforced the contract as it stood, and could not be bound when Hall was not. The consideration was not based on a money valuation, and could not, therefore, be apportioned with any certainty."

There being no controlling authority upon the proposition now under consideration, we must arrive at a conclusion which shall appear to be just and equitable. The specific performance of a contract by a court of equity cannot be claimed as an absolute right. The granting of the equitable remedy is, in the language ordinarily used, a matter of discretion—not of an arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Pomeroy's Equity Jurisprudence, § 1404. In view of the statute of Missouri, which makes the alienation of the homestead by the husband alone in any manner whatever null and void, ought a court of equity by its decision to increase the ability of the husband to dismember and break up the home? Ought the chancellor to exercise his legal discretion for that purpose? Has the court the power to do so?

Appellant stands in no such position as a judgment creditor. When this court is asked to decree a specific performance of a contract, it must be shown that the contract is perfectly fair, equal, and just in its terms, and that the enforcement of it will not be harsh and oppressive. Again, our power to grant any relief whatever must arise from the contract the specific performance of which is sought to be enforced, and that relief cannot go beyond the contract which the court finds the parties have made. How can the court, in decreeing the specific performance of a contract between appellant and appellee, disturb the homestead rights of Mrs. Shellaberger, who was not a party to the contract nor to this litigation? The fact that the lawmaking power has authorized a judgment creditor to carve out a homestead and possess himself of the excess in area or value of a tract of land confers no authority upon this court to do the same under the pretense of decreeing the specific performance of a contract, especially where the wife and family, the principal beneficiaries of the homestead law, are not before the court. We are of the opinion that we have no power in this case to decree a destruction of the homestead without the consent of the wife. So far as the question of damages is concerned in lieu of performance of the contract as to the excess in value, we do not think the appellant stands in a position where he can maintain such a claim. At the time of the making of the contract appellant knew that No. 135 Park avenue was a homestead. Being charged with a knowledge of the law, he knew that appellee could not convey such homestead. He cannot, therefore, be heard to say now that he had been damaged by reason of the inability of the court to disturb the homestead, nor can he with any reason claim that the agreement to convey 135 Park avenue formed any part of the consideration for the contract, as he knew it was void. We have not dis-

cussed the whole merits of the case; but the evidence has all been read, and we cannot say that the view we have taken of the homestead question has led to an inequitable result.

The decree of the court below must be affirmed; and it is so ordered.

COBB et al. v. CRITTENDEN.

(Circuit Court of Appeals, Third Circuit. May 7, 1908.)

No. 7.

1. CONTRACTS—ILLEGALITY—DEFENSES.

Where plaintiff tendered certain railroad bonds for delivery under a contract of sale, and defendant refused to receive the bonds, on the ground that plaintiff had obtained them under a void contract with the railroad company, such contract being void in fact, plaintiff could not recover for defendant's refusal to receive the bonds, plaintiff, in order to make a foundation for his suit, being forced to establish an unlawful contract, which the courts would not enforce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 681, 682.]

2. SUBROGATION—SCOPE OF REMEDY—LIEN.

A railroad company having become indebted on certain notes, bonds to the amount of \$60,000 were placed in the hands of C., as trustee, to secure the payment of the notes. Thereafter C. paid the indebtedness, took up the notes, and afterwards, on the foreclosure of the mortgage, received the pro rata of \$19,000, leaving a balance of \$12,000 still due. *Held*, that C. by paying the notes became subrogated to the rights of the creditors against the bonds, on which he had a valid lien for the balance of the debt until payment; and hence the bonds, while subject to such lien, were not deliverable to C. and another under contract for the sale of the bonds of the railway company by the owner.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Thos. H. Murray, Jas. P. O'Laughlin, Hazard Alex. Murray, Willis I. Lewis, Archibald F. Jones, and Robert R. Lewis, for plaintiffs in error.

W. K. Swetland and A. S. Heck, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below (156 Fed. 535), Crittenden, the defendant in error, brought suit against William and Theodore Cobb, to recover on a contract between them, which, after arranging for the sale of certain stocks of the same road by Crittenden to the Cobbs, provided for the sale of certain bonds thereof as follows:

"Said Crittenden further sells and assigns to the said Theodore and William Cobb all of the bonds owned by him, issued by the New York & Pennsylvania Railroad Company to Franklin D. Sherwood and Fred C. Leonard, as trustees. It is impossible to describe in this contract the bonds owned by said Crittenden, for the reason that some of them are undivided bonds, but it is the intention of this agreement that Crittenden shall sell all that he owns whether divided or undivided, but this contract shall apply only to

the bonds now owned by Crittenden, and he shall not have the right under its terms to acquire other bonds and seek to deliver them to the Cobbs under the provisions of this contract."

A number of bonds so stipulated for were taken and paid for by the Cobbs, and this suit was brought to recover the stipulated price of 75 cents on the dollar, viz., \$26,700, for \$35,000 of additional bonds, liability to take which the Cobbs denied. On the trial the jury found a verdict of some \$11,000 for the plaintiff. Judgment having been entered thereon, defendants brought this writ of error.

There are three principal questions under the assignments of error, the first of which concerns the plaintiff's right to recover for the price of a proportionate part of \$58,400 bonds paid by the railroad for the construction of its Millport Extension. The contention of Crittenden is that he and the defendants entered into an agreement, whereby Theodore Cobb was to take a construction contract from the railroad for the construction of the Millport Extension, for which Cobb was to receive in part payment, the foregoing bonds; that plaintiff was interested in said contract, and was to receive part of said bonds; that Cobb took the contract, built the road, and received the bonds from the railroad; that he never accounted for them, but had them in his hands. Crittenden claimed these bonds were covered by the contract in suit, and thereby Theodore and William Cobb purchased them at 75 cents on the dollar. The defendants denied Crittenden had any interest in the contract, and that, if he had, being a director of the road, the contract was illegal and void. That such contract is illegal and void is conceded; but the court held that fact was not material, as this suit was not brought to enforce the contract, but to recover the fruit of it. Its position is best explained by its own words in the opinion refusing a new trial:

"The remaining controversy was over the bonds received for the building of the Millport Extension, some \$58,400. The contract with the company for building this road was taken by Theodore Cobb, as the other had been by J. B. Rumsey, but the plaintiff claimed an interest by virtue of an arrangement, proposed, as he testified, by the defendants, by which he, they, Rumsey, McConnell, and Richardson were to participate, each to put up \$5,000 to cover the cost, which was estimated at \$30,000. McConnell and Richardson admittedly never went in, and Rumsey dropped out soon after the work started. But the others went on, according to plaintiff, he superintending the construction, and doing practically all that was done by any one in that direction, the defendants furnishing the money, including his share, which he had arranged to raise, but was excused by them from doing. All this, of course, was denied, but the jury have accepted it, and it is therefore to be taken as true. * * * It is objected that Crittenden was a director in the road, as were the others, the defendants, with the rest, and was therefore prohibited by both Constitution and statute from having any interest in its construction. Const. Pa. art. 17, § 6; Act May 15, 1874 (P. L. 178). But we have passed the point where that would be material. Suit is not brought on the asserted arrangement between the parties, with regard to building the road, to recover a share of the profits, nor yet for the bonds representing this, but for the price of the bonds, which simply accrued to the plaintiff out of it, which the defendants agreed to buy. It is the same as if, the transaction having been completed, and the stock and bonds coming to the plaintiff having been turned over to him, the defendants had offered him a certain sum for them, which he had agreed to take. It would be no answer in that case,

to an action by the plaintiff on the sale, that the bonds came from a tainted source, or that he became entitled to them in an unlawful way. Nor is this changed by the fact that at the time of the bargain, as well as of suit brought, the bonds were in the defendants' hands. It is true that, in consequence of this, the prohibited arrangement has to be resorted to, to establish and determine the plaintiff's interest, and that, except for it, he would have none. But as already stated, the thing trafficked in and now sought to be enforced is not the gains coming to him out of it, but the bonds into which they had ripened, or rather the price of them, which the defendants agreed to pay. Suppose, to put it in another way, the defendants had said: 'You have so many bonds due you from the building of the Millport Extension, for which we will give you so much,' and the plaintiff had accepted the offer. Can there be any question but that the defendants would be bound?"

In the view indicated by this extract from the opinion of the court below we cannot concur. Theodore Cobb's contract was a lawful one. With Crittenden's interest therein it was an unlawful one. Cobb stood on the legality of his contract, and denied Crittenden's right to participate therein and to recover thereby in this case. To recover Crittenden was therefore forced to establish an unlawful contract, and to make the foundation of his suit that which statute law and public policy forbade. This brought his case within the ban of *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, wherein it was said:

"In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."

It is therefore apparent the court erred in denying defendants' point that:

"Under the pleadings and evidence there can be no recovery by the plaintiff on account of the \$58,400 of bonds issued for the extension of the road to Millport."

So also was there error in permitting a recovery by Crittenden of any portion of the \$60,000 of bonds which Theodore Cobb held as trustee. By a paper of January 16, 1897, signed, *inter alia*, by Crittenden, the Cobbs, and others not parties to this suit, that in consideration of certain outstanding bills, payable of J. B. Rumsey, in the shape of notes in certain banks, aggregating \$32,100, and on which the signers were liable as indorsers, accommodation makers, or in other ways, it was agreed that said \$60,000 of bonds were "to be placed in the hands of Theodore Cobb, as trustee, as security for the payment of the above indebtedness, said bonds to be negotiated by the said Theodore Cobb, if necessary, when authorized by the undersigned, or by a majority of the undersigned." Subsequently, Cobb paid off all of said indebtedness, and holds the notes. On foreclosure, by the trustee, of the mortgage given to secure these bonds Cobb collected the pro rata of some \$19,000 awarded these bonds, but has not been reimbursed for any part of the \$12,000 balance. No settlement, accounting, or adjustment between the signers of said paper has been made, or the several amounts due by each ascertained. The trustee, by the terms of the trust, was bound to apply such amount to the bills payable, and in relief of the sureties;

and, having paid the debts himself, he had a right to be subrogated to the rights of the nonpaying sureties. The remedy of subrogation is no longer limited to sureties and quasi sureties, but includes so wide a range of subjects that it has been called the "mode which equity adopts to compel the ultimate payment of a debt by any one who in justice, equity, and good conscience ought to pay it." *Harris on Subrogation*, § 1.

It is therefore clear that under such circumstances Crittenden had no right to recover the bonds from Theodore Cobb, or to recover the price thereof from William and Theodore, and that the defendants' fifth point, viz.:

"The payment of Theodore Cobb, shortly after January 5, 1900, of the notes for which the \$60,000 of bonds had been pledged under the agreement of January 26, 1897, as modified by that of September 8, 1898, did not release the bonds from the pledge. He, being trustee at the time of the payment, and holding the bonds as trustee, would be entitled to the benefit of the bonds as security for the money so paid by him until reimbursed by payment to him; and, never having been so reimbursed, there can be no recovery in this action against the defendants on account of those bonds"—should have been affirmed.

This view of the case renders a reversal imperative, and in awarding a venire we express no opinion on the question whether the plaintiff can maintain an action at law for the third element which went to make up the verdict.

UNITED STATES v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. May 18, 1908.)

No. 1,518.

1. PUBLIC LANDS—ORIGINAL TITLE.

The original title to lands in the United States was not in the Indians; their rights being mere rights of possession or occupancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 1.]

2. INDIANS—RESERVATION TREATY—CONSTRUCTION—INDIAN LAND—TITLE—EJECTMENT.

The Indian agreement of 1883 between the United States and Chiefs Moses and Sar-sarp-kin of the Columbia reservation provided for the removal of the tribe at their election, for their surrender of certain reservation lands, and for the allotment in severalty of one square mile of land to each head of a family or male adult, in the possession and ownership of which they should be guaranteed and protected. The agreement was ratified by Act Cong. July 4, 1884, c. 180, 23 Stat. 79, providing that, if the Indians elected to remain on the Columbia reservation, the Secretary of the Interior should cause the quantity of land stipulated in the agreement to be allowed them, which, when selected, should be held for the exclusive use and occupation of the Indians, and the remainder of the reservation be restored to the public domain. *Held*, that Indians to whom lands were allotted in severalty under such treaty acquired a mere right of possession and use, the title remaining in the United States, and that the government was therefore entitled to maintain ejectment against a third person, who had ousted the Indian allottees from possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, §§ 25-30.]

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

For opinion below, see 154 Fed. 712.

A. G. Avery, U. S. Atty.

James F. Moore, E. K. Pendergast, and R. W. Starr, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The court below sustained a demurrer to the complaint in this case and dismissed it. The question for decision, therefore, is the sufficiency of that pleading. Upon its face it shows that the action was brought at the request of the Secretary of the Interior and the Commissioner of Indian Affairs and under the direction of the Attorney General. It alleges that, acting in accordance with Act Cong. July 4, 1884, c. 180, 23 Stat. 79, 80, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes," the President of the United States did on May 1, 1886, by executive order set aside as an individual reservation in favor of and for one Quo-lock-ons, an Indian and a ward of the government, a certain specifically described tract of 640 acres, more or less, situate in Okanogan county, state of Washington; such land having been theretofore selected in accordance with the provisions of the act mentioned under the direction of the Secretary of the Interior and designated "Allotment No. 7." The complaint further alleges that the tract in question was prior to such allotment a portion of the Columbia Indian reservation theretofore set aside by executive order for the use and occupancy of Indians; that the aforesaid Quo-lock-ons was, at the time the said individual reservation was so set aside for him, a member of the Columbia tribe of Indians, and resided in the state of Washington on the said Columbia Indian reservation; that during the year 1890 the said Indian, Quo-lock-ons, died intestate, leaving as his only heirs two sons, named, respectively, Frank, alias Dominique, Te-kom-tarl-ken, and Sam Pierre; that thereafter the said Sam Pierre died intestate, without issue, leaving a widow, named Jennie, who is an Indian, and a member of the Columbia tribe of Indians, and then and now residing on the said reservation. The complaint further alleges that at all times heretofore the plaintiff was and still is the owner in fee simple and entitled to the immediate possession of the said specifically described tract of land, subject only to the rights of the said Frank, alias Dominique, Te-kom-tarl-ken, and the said Jennie, to use and occupy the same as an individual Indian reservation and as wards of the plaintiff; that about the month of August, 1904, the defendant, without right or authority, entered upon and took possession of the said 640-acre tract of land, and ousted the said Frank, alias Dominique, Te-kom-tarl-ken, and the said Jennie, and the plaintiff therefrom, and ever since has unlawfully withheld, and still does unlawfully withhold, the possession thereof from the plaintiff and from the said Frank, alias Dominique,

Te-kom-tarl-ken, and the said Jennie, to their damage in the sum of \$2,000; that the value of the rents, issues, and profits of the premises from the month of August, 1904, and while the plaintiff has been excluded therefrom by the defendant, is \$2,000. The prayer is for the recovery of the possession of the demanded premises, for the sum of \$2,000 damages for the withholding of the possession thereof, for \$2,000 as rents, issues, and profits of the land, and for the costs of the action.

It is manifest that the complaint states a perfect case, unless it be, as is contended on behalf of the defendant in error and as was held by the court below, that the plaintiff conveyed all of its right and title to the tract of land in controversy, and severed all of its relations to the Indians named, prior to the institution of the action. It is too late to talk about the original title to all of the lands in the United States having originally been in the Indians. The contrary was long ago settled. "Undoubtedly," said the Supreme Court in the comparatively recent case of *Jones v. Meehan*, 175 U. S. 18, 20 Sup. Ct. 4, 44 L. Ed. 49, "the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only. The ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to any one but the United States, without the consent of the United States"—citing *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25; *Worcester v. Georgia*, 6 Pet. 515-544, 8 L. Ed. 483; *Doe v. Wilson*, 23 How. 457-463, 16 L. Ed. 584; *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210; *United States v. Kagama*, 118 U. S. 375-381, 6 Sup. Ct. 1109, 30 L. Ed. 228, *Buttz v. Northern Pacific R. Co.*, 119 U. S. 55-67, 7 Sup. Ct. 100, 30 L. Ed. 330.

But the courts, as well as Congress, are careful to guard and protect the Indians in all of their rights; the Supreme Court saying, in *Jones v. Meehan*, supra, in respect to a treaty then under consideration:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

And in concluding a review of various of its previous decisions upon the subject the court, in the case from which the foregoing quotations have been taken, said:

"The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe and as part of the consideration for the

cession by the tribe of a tract of country to the United States make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property. The reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

The question, then, for decision here is: Did Congress by its act of July 4, 1884, above referred to, in ratifying and confirming an agreement entered into on the 7th of July, 1883, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, in the then territory of Washington, part with the fee-simple title to the lands therein referred to, or leave the title thereto in the United States for the protection of the Indians in the exclusive use and occupation of such lands? The agreement is as follows:

"Agreement with the Columbia and Colville, 1883.

"In the conference with Chiefs Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

"Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte creek to accommodate one hundred (100) pupils, and a physician to reside with them, and \$100 (one hundred) to himself each year.

"Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and, in addition to the ground they now have under cultivation within the limit of the fifteen-mile strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile, or to remove onto the Colville reservation, if they so desire; and in case they so remove, and relinquish all their claims to the Columbia reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

"All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

"The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars (\$1,000.00) for the purpose of erecting a dwelling house for himself; also to construct a sawmill and gristmill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

"And, on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars (\$1,000.00) per annum during his life.

All this on condition that Chief Moses shall remove to the Colville reservation and relinquish all claims upon the government for any land situate elsewhere.

"Further, that the government will secure to Chief Moses and his people, as well as to all other Indians who may go onto the Colville reservation and engage in farming, equal rights and protection alike with all other Indians now on the Colville reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of

himself and his people; that until he and his people are located permanently on the Colville reservation his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected; or, should they move onto the Colville reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia reservation.

"All the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement, and also, with the understanding that Chief Moses, or any of the Indians heretofore mentioned, shall not be required to remove to the Colville reservation until Congress does make such appropriation, etc.

"H. M. Teller,

"Secretary of the Interior,

"H. Price,

"Commissioner of Indian Affairs.

his

"X Moses.

mark.

his

"X Sar-sarp-kin."

mark.

The act of Congress of July 4, 1884, provided as follows:

"For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, in Washington Territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: Provided, that Sar-sarp-kin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated, or remove to the Colville reservation; and provided, further, that in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

It is to be borne in mind that at the time of the agreement of 1883, and at the time of the act of Congress in question, section 2079 of the Revised Statutes was in force, declaring that:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The agreement of 1883 expressly recites that what Sar-sarp-kin asked for was—

“to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and, in addition to the ground they now have under cultivation within the limit of the fifteen-mile strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile, or to remove onto the Colville reservation, if they so desire; and in case they so remove, and relinquish all their claims to the Columbia reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.”

And after the provisions with respect to Chief Moses and his people comes that so much relied upon by the defendant in error:

“All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected.”

The agreement itself recites that it was entered into upon condition that Congress should confirm it, and necessarily only to the extent that Congress should confirm it. *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299.

Looking at the agreement alone, we do not think that either party to it could have understood from its language that it was contemplated that the government was to sever its relations to such of the Indians as should remain on the Columbia reservation, any more than with those who should remove to the Colville reservation—to cease to be their guardian. On the contrary, the agreement expressly recites that the Indians were to be “protected” by the government and by it guaranteed in the possession and ownership of the respective tracts of land to be set apart to them in severalty. How could the United States afford such protection but by remaining the guardian of the Indians? We think it the plain meaning of the agreement itself that it should do so, and that no party thereto could have otherwise understood. That it was to the interest of the Indians that the government should retain such title and continue as the guardian of the Indians was recognized by the learned judge of the court below, where he said in his opinion that his conclusion had—

“been reached with much reluctance, for no doubt it would be better for the Indians to sustain the plaintiff’s contention. They are not qualified to cope with the white race, and the result of this decision, should it be sustained in the higher courts, will no doubt be prejudicial to their best interests. It is to be regretted that so commendable an effort should not have been made before the agreement received the approval of Congress, or at least before the rights of purchasers had attached; but the Supreme Court has said that the courts are not concerned with these considerations.”

That Congress took the same view in respect to the interest of the Indians is, we think, manifest from its confirmatory act in question, in which it provided that, should the Indians then residing on the Columbia reservation elect within the time limited in the statute (one

year) to remain on that reservation, the Secretary of the Interior should cause the quantity of land, stipulated in the agreement to be allowed them, to be selected in as compact form as possible, "the same when so selected to be held for the exclusive use and occupation of said Indians." To be "held" by whom? Obviously by the United States, their guardian, and to the end that they might be "protected" against the tricks and acts of designing persons. Such act on the part of Congress was in accord with its general policy upon the subject; and that such is its true meaning finds strong support in the fact that the act was so construed by President Cleveland in his executive order of May 1, 1886, directing:

"That the tracts of land in Washington Territory surveyed for and allotted to Sar-sarp-kin and other Indians, in accordance with the provisions of said act of July 4, 1884, which allotments were approved by Acting Secretary of the Interior April 12, 1886, be, and the same are hereby set apart for the exclusive use and occupation of said Indians; the field notes of the survey of said allotments being as follows," etc.

It is further confirmed by the interpretation put by Congress itself upon the act of July 4, 1884, by its subsequent acts of March 3, 1905 (33 Stat. 1064, c. 1479), and of March 8, 1906 (34 Stat. 55, c. 629), providing for the conveyance of the government title by patents to certain of the allottees under the agreement and act in question. The legislative construction of its own act is always potent. "If it can be gathered," said the Supreme Court in *U. S. v. Freeman*, 3 How. 556-564, 11 L. Ed. 724, "from a subsequent statute in *pari materia*, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." And in the case of *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. 20, the Supreme Court of Pennsylvania said:

"If a contemporaneous construction by the Legislature of the same words can be discovered, it is high evidence of the sense intended."

That the acts of July 4, 1884, of March 3, 1905, and of March 8, 1906, above referred to, are in *pari materia*, is perfectly plain, for they relate to the same subject-matter and are parts of the same legislative purpose. In respect to such statutes, Sutherland, *St. Const.* 283, says:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in *pari materia*, are treated prospectively, and construed together, as though they constituted one act. This is true, whether the acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared, harmonized, if possible, and, if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate together, so far as possible, consistently with the evident intent of the legislative enactment."

And in *Endlich on the Interpretation of Statutes*, § 43, it is said:

"Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it belongs."

The judgment is reversed, and the case remanded to the court below, with directions to overrule the demurrer to the complaint, with leave to the defendant to answer.

DELAWARE & H. CO. v. LARNARD.

(Circuit Court of Appeals, Third Circuit. May 5, 1908.)

No. 17.

1. RAILROADS—ACCIDENTS AT CROSSINGS—EFFECT OF OPEN GATES.

The fact that safety gates maintained by a railroad company at a highway crossing are open is an implied invitation to persons traveling the highway to enter upon the crossing; and, while it does not absolve them from the duty of taking reasonable precautions to avoid injury by moving trains, it qualifies that duty to the extent that they may reasonably presume that the company's servants have performed their duty in ascertaining the safety of the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Railroads, § 1072.]

2. SAME—NEGLIGENCE—ABSENCE OF FLAGMAN AT DANGEROUS CROSSING.

The four tracks of defendant railroad company and those of two other companies crossed a street near each other. There were yards near, and the tracks were largely used for switching purposes. Defendant maintained gates at the outer sides of the entire group of tracks; they being 224 feet apart. Plaintiff's husband and his son approached the crossing on foot, with two wagons following, loaded with lumber, which was to be loaded in a car. The gates were open, and deceased and his son went ahead as a further precaution against trains which might be approaching. When they reached the center of defendant's tracks, they saw a train approaching on one of the inner tracks and started back, when a freight train on the outer track backed, and plaintiff's husband was struck and killed by the caboose, which was being kicked back onto a switch. The son testified that the car was standing still and was started suddenly. The conductor testified that it was moving slowly, and that he stood on the rear platform of the caboose and called a warning to the deceased. *Held*, that under such evidence the jury were justified in finding that the crossing was an unusually dangerous one, and required extraordinary care on the part of defendant, and that, in view of the open gates, the failure to station a man at the crossing, either permanently or temporarily, to give warning of the movement of the switching train, was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 972-977, 1072.

Duty to give warning signals at crossing, see note to Chesapeake & O. Ry. Co. v. Steele, 29 C. C. A. 90.]

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question of contributory negligence is for the jury, unless the evidence to establish such negligence is clear and uncontradicted, and such that no reasonable man could come to a contrary conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

4. RAILROADS—ACTION FOR INJURY TO PERSON AT CROSSING—INSTRUCTIONS.

In an action to recover for the death of a person killed at a railroad crossing by a switching train, a statement in the charge of the court that, if a member of the crew had been stationed at the crossing to warn persons on the highway of the movements of the train, it might have prevented the injury, was not reversible error, in connection with clear instructions as to the province of the jury and giving the claims of the

respective parties, and where the evidence was such as to warrant a finding that the failure to so station a man was negligence.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

James H. Torrey, for plaintiff in error.

Paul Sherwood, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The material facts disclosed by the record brought before us by the writ of error in this case are as follows:

The defendant in error (hereinafter called the plaintiff) brought her action in the court below against the plaintiff in error (hereinafter called the defendant) to recover damages for the death of her husband, who was killed while walking on the highway across the tracks of the defendant company, near the Dickson City station, in November, 1906. The highway in question was called Boulevard avenue, and ran nearly north and south where it crossed the tracks of the defendant company, and that of two other railroad companies in close proximity thereto. From a northerly direction, it first crossed, at right angles, the Delaware, Lackawanna & Western Railroad, which, at that point, ran due east and west. It then continued through an open space of nearly 99 feet, to the tracks of the Ontario & Western Railroad, where there were two tracks, and a switch at the crossing branching out towards the west into a number of yard tracks, and a depot building on the northern side of said tracks and on the easterly side of said avenue, not more than 20 or 30 feet therefrom. These tracks, as well as those of the defendant company, crossed the avenue, not at right angles, as those of the Delaware, Lackawanna & Western did, but somehow diagonally, nearly (though not quite) in a northeasterly and southwesterly direction.

After crossing the tracks of the Ontario & Western, the avenue crosses an open space of nearly 58 feet, between the latter tracks and those of the defendant company. These tracks are four in number, the north and south, or the two outside ones, being freight tracks, and those in between passenger tracks. These four occupy a space of 51 feet across. It was at the crossing of the northerly track that the accident in question happened. In the space last mentioned, between the Ontario & Western tracks and those of the Delaware & Hudson, about 20 or 30 feet easterly from the avenue, stood a gatehouse, high enough for the gatekeeper to look over the tops of cars on the several railroads. It appears from the evidence that a gatekeeper was employed by the defendant company, to operate two safety gates which stood to the north of the Delaware, Lackawanna & Western and south of the Delaware & Hudson railroad. There were thus only two gates, one to the north and one to the south of this group of railroads, the distance between the two being about 224 feet.

On the day in question, the plaintiff's husband, with his son, a man about 24 years of age, were coming south on the Boulevard avenue, accompanying two wagons loaded with lumber, owned by the deceased, who was in the lumber business. The wagons were on their

way to the south side of the defendant company's railroad, to load the lumber onto cars standing on a switch of the defendant company on the said south side, a little to the east of the avenue. As the teams approached the tracks of the Delaware, Lackawanna & Western Railroad, the gates were up, but the deceased and his son, as a matter of greater precaution, as testified by the son, walked across these tracks, and the head team followed them, into the open space between these tracks and those of the next railroad. According to the testimony of the son, the team was halted in this space while he and his father walked on across the tracks of the Ontario & Western, and onto and across the northern track of the defendant company. He says, as they were stepping from this track, they saw a passenger train coming from the west on the next track but one of defendant's road, and started back onto the freight tracks from which they had just stepped, when a train of cars, which they had observed upon their left hand and close to the crossing, started with a jerk towards them, striking his father with fatal result, he himself just escaping. There is some testimony to corroborate this of the son, especially as to the sudden movement or jerk of the freight train that was being backed across the highway.

The testimony of the defendant is that a draft of 19 freight cars, with a caboose attached at the rear, had, a short time before, been drawn east of the crossing, in order to back onto certain switches, both east and west of said crossing. That, in coming back, and within a few feet of the crossing, while proceeding slowly, the caboose was uncoupled from the train, in order that it might be shoved back and across a switch west of the crossing, before the rear of the freight train reached it. To accomplish this maneuver, or "kick-back" as it is sometimes called, it was either necessary, if the train were moving at sufficient speed, to stop or slow up, so as to allow the caboose to get away from it, or, if the train was not going fast enough at the time of the uncoupling, to give a shove or start for a little distance, so that the caboose might have the requisite momentum to carry it past the switch ahead of the train. It does not appear with entire certainty how, according to defendant's testimony, the maneuver was accomplished. The plaintiff's testimony, however, seems positive that the train was standing just east of the siding, and started back with a sudden jerk when four or five feet away from the deceased. The plaintiff's counsel has argued that the latter may have been what really occurred, and the sudden acceleration of speed just at the crossing, was equivalent in its results, and might have been mistaken by plaintiff's witnesses for a sudden start from a state of rest. The plaintiff's witnesses, however, were positive that the train was standing still within a few feet of the crossing, and started back with a sudden jerk, which caused it to strike the deceased.

We are not prepared to say that there was no evidence sufficient to support one or the other of these theories propounded by the plaintiff, whatever may be our view as to the weight of the testimony in contradiction of them. Defendant's testimony established the fact that the train was adequately manned with a conductor and brakeman. These all testify that the train, when it started back, continued to move

at a slow rate of speed, uniformly and without acceleration, until the time of the accident, and this testimony is corroborated by that of two engineers or employes on engines standing on the tracks of the other roads alongside of the defendant's. The conductor also testifies that he was at the rear end of the caboose, as it approached the crossing, and saw the deceased standing on the track, and shouted at him twice before the collision, though the son testified that he heard no such warning or other signal. There was also the usual conflict of testimony between those on the train and some who were standing by, as to the hearing of any signal by a bell or whistle, and little importance is to be attached to the testimony of those who can merely say that they did not hear what others positively say they did hear.

There were other facts, however, of a pregnant character, which properly entered into the consideration of the case by the jury, such as, that when deceased and his son and the first team approached the railroads, the safety gate was open, and there was thus presented what the law and common sense concur in designating an "invitation" by those in charge of the railroads, to the deceased and his teams, to enter upon the crossing. While such invitation did not absolve those entering upon the railroad enclosure from the duty of taking reasonable precautions to be watchful as to possible danger from moving trains, it certainly qualifies that duty to the extent that there might be a justifiable presumption by the user of the highway, that the railroad's servants had performed their duty in ascertaining the safety of the crossing. There is the further testimony of the son, that the deceased and himself had gone ahead of the timber wagons, notwithstanding the open gate, for the very purpose of assuring themselves as to the safety of the crossing, and that they stopped, looked and listened before crossing any of the tracks. There is also the evidence tending to show that this crossing occupied by this group of important railroads, upon which there was a heavy freight and passenger traffic and a constant movement backwards and forwards of the engines and cars of three different railroads, was a more than usually dangerous one. If this were so, there was in consequence imposed upon the companies, so far as they controlled it, as well as upon the user of the highway, a duty of care proportionate to these circumstances of danger.

Nor can we say that the jury would be unwarranted in coming to the conclusion, upon all the evidence, that, by reason of the implied invitation of an open safety gate, the defendant company owed a duty of greater care to those who were on its tracks, than was performed by such warning as could be given by the person stationed at the rear of a backing freight train. As we have said, three important railroads were transacting, not only the usual business of running regular freight and passenger trains across this highway, but, there was also a constant movement of engines and cars on all of them, backwards and forwards across it, incident to the shifting in connection with stations and freight yards.

It was with reference to an admitted situation of this character, and the contention by plaintiff's counsel, that the reasonable care required of the defendant company, under the circumstances, demanded

some other precaution than was actually taken to preserve those who were legally using this crossing, from the dangers arising from such a situation, that the court below used the language to which exception is taken in the first specification of error. As this specification presents what seems to us the most serious question in the case, we quote it in full, as follows:

"First. The learned court erred in that part of its charge to the jury which is as follows: 'It is contended, again, that the company should give warning, but it is answered in reply, that that also was done, not only by the whistle and the bell, and the continual ringing of the bell, but, as testified by the conductor, by calling out, by standing there on the hind platform of the caboose, and endeavoring to give a warning; that he said he did give, when the train was still 150 feet away, and again called out a second time when it was too late. Now, was this sufficient? One party says "Yes," and the other "No." The matter is for you to consider and settle in your own minds. I can conceive that if there had been a brakeman or a flagman or conductor, standing there, instead of being upon the train, that a warning might have been given that would have been more effective. It is true that all the men of that train were occupied; one man had been dropped off—Lannan—in order to protect the train from the south as it crossed over; another had been dropped at the upper end on the other side of the crossing to protect the train from anything in that direction; the middle brakeman was on the box car next to the caboose not only to cut it off from the rest of the train, but to receive signals, if any were required in order to stop the train, and to pass those signals on to the engineer; and the conductor was on the caboose in a position to give any warning as it approached. Still, if there had been another man, either a flagman permanently established at that crossing, to give warning, or temporarily supplied at the time, as I say, I can conceive that that would have been a safeguard of the place that might have prevented this accident.'"

A careful examination of the testimony convinces us that the jury might warrantably believe that the crossing here in question presented more than the usual dangers. While the evidence shows that the train that backed over the crossing was equipped with a sufficient crew to properly handle it, it does not appear that any one of them was specially designated for, or specially stationed at, this crossing, for the purpose of warning those who were using the highway, and we may presume that the crew were charged only with those duties which concerned the handling and movement of the train, and were probably necessary for that purpose, without reference to the guarding of crossings. However that may be, it does not seem that any member of the train crew was stationed at this crossing, for the purpose of protecting those who were using it, and it seems to us there was evidence before the jury, from which they might reasonably infer that there was the absence of reasonable care on the part of the defendant company, in not providing a flagman or watchman for that purpose, and that this, taken in connection with the open gate, was such a dereliction of duty as supported the charge of negligence made by the plaintiff.

It was in dealing with this feature of the case, that the learned judge of the court below said:

"I can conceive that, if there had been a brakeman or a flagman or conductor standing there, instead of being upon the train, that a warning might have been given that would have been more effective. * * * Still, if there had been another man there, a flagman permanently established at that

crossing to give warning, or temporarily supplied at the time, as I say I can conceive that that would have been a safeguard of the place that might have prevented this accident."

We do not think this portion of the charge, in the connection which we have explained, constituted error. It had relation to the facts of the case and to the situation as disclosed by the testimony. While dissociated from the context the language just quoted may seem to intimate a personal opinion on the part of the trial judge, it is in reality only a suggestion of what might be believed in plaintiff's view of the testimony. It is immediately preceded, after stating what in substance is the controversy between the parties, by the instruction to the jury, that the matter was for them to consider and settle in their own minds, and is followed immediately and throughout the charge by statements of the other side of the controversy, and clear instructions to the jury as to their province in dealing with the facts of the case, and insistence upon their plenary duty and power to deal with them according to their own judgment.

Considering the charge as a whole, it did not permit the jury to embark upon a sea of speculation, as contended for by the plaintiff, in error, nor permit them to hold that the company was required to place "such number of employes at the crossing, and so stationing them as to make it a physical impossibility for the plaintiff (deceased) to go upon the track in front of the cars." The inference permitted to the jury was that the absence of such a guard or flagman, under the circumstances, was negligence on the part of the company, and that the presence of such a precaution would probably (not necessarily) have prevented the accident, and such an inference was not, in our opinion, upon all the evidence, an unwarranted one. It is not necessary to show that the presence of such a guard or watchman would have prevented the accident, but only that, under the circumstances, it was a precaution which due care required to be made, and that it probably would have prevented the injury complained of. In dealing with the question, what inference upon a given state of facts it is permissible for a jury to draw, no hard and fast rule can be laid down for the guidance of a trial judge. The circumstances of the particular case, as well as the rules of law that may be applicable thereto, must furnish the ratio decidendi in such cases, and thus viewing the action of the court below, we think no right of the defendant has been violated. On the contrary, the charge throughout was as favorable to the defendant, as it had the right to demand.

The second and third assignments of error relate to the refusal of the court to give the jury binding instructions, that upon all the evidence they should find a verdict for the defendant, the contention of the learned counsel for the defendant being that there was no evidence to support the charge of negligence against the defendant, or, assuming that such negligence was shown, it clearly appeared from all the evidence, that the deceased was guilty of contributory negligence. The first branch of this contention, involving the propriety of the submission of the question of defendant's negligence to the jury, has been disposed of by what we have already said.

The general rule is that the question of contributory negligence is one for the jury, and can only be departed from where the evidence to establish such negligence is clear and uncontradicted, and such that no reasonable man could come to a contrary conclusion. The same principles are therefore involved in considering the duty of the court, whether the question relates to the negligence of the defendant, or the contributory negligence of the one suffering the injury.

We think little is required to be said as to this latter branch of defendant's contention. To have withdrawn the case from the jury on the ground that deceased clearly contributed to his own injury by his own negligence, would have been to ignore entirely the testimony of the son of the deceased, of several of the witnesses, and also certain facts and presumptions belonging to the plaintiff's side of the case; such facts, for instance, as the open gate, the presence of engines on the various tracks, with their escaping steam, and the approach of a train on an adjoining track of defendant's road, and the presumption that ordinarily arises, that a reasonable being will take due precautions to guard against manifest danger to life and limb, a presumption reinforced in this case by the uncontroverted fact that the deceased and his son had proceeded through the open gate and were crossing the various tracks of the different railroads, for the very purpose of ascertaining whether the way was clear for the teams they had in charge. With the weight of testimony on either side, the court below had, of course, nothing to do, but, after a careful examination of all the evidence, we are of opinion that it did not err in its refusal to withdraw the case from the jury.

The fourth specification of error regards what the court said as to defendant's point, that the fact of the safety gates being open, had a "tendency at least to give the traveler the impression that all is safe, and thereby blunt the edge of his caution," the language of the court being as follows:

"That applies a good deal more when a person is driving than when he is walking because, as I have said to you, and as you well know, it is a good deal more difficult in one case to look about you and govern your action, than it is in the other. It is true, however, in both cases, that if a safety gate is there, and the safety gate is up, the natural tendency of it is to throw one off ordinary precaution; and you may take that into consideration, if the facts are such as suggested in this point, in disposing of the questions which are involved here."

It may be gathered from what we have already said, that, in our opinion, this is a correct statement of the law. The suggestion made by the learned trial judge, that a greater responsibility rests upon one who walks across the railroad track, where the gate is open, than upon one who drives across, was altogether in favor of the defendant. We find, therefore, no error in the judge's charge in this respect, and the fourth assignment is without merit.

The fifth assignment of error relates to certain portions of the court's charge regarding the measure of damage. No argument has been presented in plaintiff's brief, in regard to this assignment, but this court has carefully considered that portion of the charge covered by it, and finds no error therein.

It only remains to say that the charge, which was an elaborate one, fairly summarized the evidence on both sides for the benefit of the jury, and correctly stated the principles of law that should govern its deliberations. It was eminently fair to the defendant.

The judgment below is hereby affirmed.

STANDARD STEEL CAR CO. v. McGUIRE.

(Circuit Court of Appeals, Third Circuit. May 13, 1908.)

No. 16.

1. MASTER AND SERVANT—SERVANT OF INDEPENDENT CONTRACTOR—INJURIES—METHOD OF WORK.

Where the servants of a contractor for the erection of an addition to defendant's car shops had been accustomed to use the runway of a traveling crane in the mill to move scaffolding from one truss to another, which method of work had been pursued in the presence of defendant's superintendent, without objection, it would be considered as having been followed with defendant's express permission.

2. NEGLIGENCE—CARE REQUIRED.

Where defendant had consented to the use of a crane runway in defendant's mill by plaintiff, a servant of an independent contractor, in moving scaffolding from one truss in an addition to the mill to another, plaintiff in so using the runway was not a trespasser, but was within the class of persons present in dangerous premises by the owner's express permission, as to whom defendant was chargeable with an affirmative duty to take special precautions against injury that might happen to plaintiff by reason of the operation of the crane on that part of the runway on which he was standing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 20.]

3. SAME—ASSUMED RISK.

Where plaintiff, a servant of an independent contractor, was permitted with defendant's consent to use the runway of a traveling crane in altering the position of scaffolding in defendant's mill, plaintiff did not assume the risk of defendant's negligence in operating the crane on such portion of the runway where plaintiff was standing, without notice to him, though plaintiff was also bound to guard himself against obvious dangers.

[Ed. Note.—Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. SAME—ANTICIPATED DANGER.

Where defendant had invited the servants of an independent contractor to use a traveling crane runway in altering the position of scaffolding in the mill, defendant was bound to anticipate the presence of such servants on the runway and to guard against dangers incident thereto.

5. SAME—QUESTIONS FOR JURY.

In an action for injuries to a servant of an independent contractor by being struck by defendant's traveling crane, used with defendant's permission for the removal of scaffolding from one place in the mill to another, whether defendant was negligent in failing to use reasonable precautions to prevent such injury, and whether plaintiff was negligent, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-346.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

W. W. Smith, for plaintiff in error.

L. E. Porter, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The defendant in error, who was plaintiff below and hereafter called the plaintiff, recovered a verdict in an action of trespass for personal injuries claimed to have been caused by the negligence of the plaintiff in error, which was defendant below and hereafter called the defendant. The material facts of the case, as disclosed by the record, are as follows:

Defendant was engaged in the manufacture of steel cars, at Butler, Pa. Plaintiff was an employé of McClintock Marshall Construction Company, an independent contractor engaged in building for the defendant an addition to its shop. The original shop, which was of very large dimensions, was as to its frame at least, constructed of iron, as was also the addition under course of construction, one side of the old shop forming one side of the addition. This side had been so stripped as to leave only the framework of iron, upon the top of the columns of which, iron trusses in sections about 24 feet long by 9 feet deep were being placed, the columns of the old building serving also for that side of the new. These columns were 50 feet in height. The trusses were raised to the top of the column, and temporarily attached, but had to be riveted, which was done by the use of pneumatic tools, the compressed air for which was furnished by the defendant. Against the inside of these columns, on both sides of the shop, were placed runways, which were about 12 inches in width, and on which were tracks carrying trucks at either end of traveling cranes. These runways were 25 or 30 feet from the ground, and as the building was some 1,800 feet in length, there were several of these cranes in use.

The contractor erecting the addition referred to, had two gangs of four men each engaged in riveting the trusses to the tops of the columns, each gang working independently of the other. In the prosecution of their work, it was necessary for the men to stand upon a scaffolding. This scaffolding, which was about the length of the truss, say 24 feet, was constructed with what were called needle beams, or sticks of that length, suspended from the top of the truss by ropes, and upon which the floor of the scaffold was laid. When so suspended, the scaffold was 12 feet or more from the top of the crane runway, which lay directly underneath it and against the columns upon which the work was being done. When the work of fastening one section of the truss was finished, it was necessary to move further on to the adjoining space between two columns, to fasten another. For this purpose, two of the men, during the five days they had been so employed, would drop down onto the crane runway, and the scaffolding sticks were lowered with the ropes by the two men who remained on the bottom strut of the truss. The ropes were then dropped and coiled up by the men on the runway, and carried with the scaffolding sticks

along to the next truss, where the rope was thrown up to the men on the truss, and the scaffolding sticks hoisted into place.

This was not only the obvious and convenient method of proceeding with the work, but no other seemed to have suggested itself, that would not have involved much trouble and great delay in the prosecution of the work in hand, and it was in evidence that defendant's superintendent was on the floor of the mill, from where he could and did observe, without objection, this method of moving the scaffolding. The scaffolding had been so moved several times a day for the five days that this work had been going on. During this time, it happened more than once that the crane moved along the runways at a time when the plaintiff and another workman were walking thereon, while engaged in making one of these movements of the scaffolding. In each case, they were warned of the approach of the crane by several distinct and loud signals from a bell controlled by the crane operator. On the day of the accident, however, while plaintiff, together with his co-employé, was carrying one of these needle beams along the runway from one truss to the other, the crane approached without any signal being given by bell or otherwise, and without warning from any one, and struck and ran over the plaintiff, who had one end of a needle beam on his shoulder, with his back turned from the direction in which the crane was coming. Plaintiff testifies that, after getting down on the runway, before beginning to move the scaffold, he looked up and down the runway to see if it were clear. The crane in question was operated by a boy stationed in a cage hanging from the end of the crane on the opposite side of the mill to that where the plaintiff was working. It was in evidence on the part of defendant, that printed instructions were given to its own workmen not to go upon the crane runways, but no such instructions or other warning in this respect were given to the contractor or to his employés engaged in doing this work for the defendant.

It was also testified, by the boy who operated the crane from the cage hanging below it on the opposite side of the mill, that he had general instructions to look out for the defendant's employés at work upon the floor of the mill below him, but was not instructed to look out for those engaged on the trusses, and who might be on the crane runway; that at the time of the accident he was watching the men on the ground, and not thinking of giving any warning to anybody else. "I wasn't thinking of giving any warning to anybody else but the men on the ground." He also testified that he did not sound the bell at the time of the accident, which on previous occasions had given warning of the approach of the crane to those on the runway. There was testimony tending to show that the work upon which plaintiff was engaged was done in the presence of a superintendent and general manager of defendant, and that the scaffolding had been moved in the manner described about 12 times. It is not in dispute that this use of the crane runway by the men when moving the scaffolding, was known to those in control of defendant's mill, or that no protest or objection on their part was made thereto. There was certainly testimony tending to show acquiescence on the part of the defendant, in this use of the crane runway, for the purpose and in the manner described, and

also that any other method of moving the scaffolding would have been exceedingly inconvenient, if not impracticable. At the conclusion of plaintiff's testimony, defendant moved for a nonsuit, which was refused, and before the case was submitted to the jury, a request for binding instructions was submitted by defendant's counsel, which was also refused.

The principal assignment of error is to the refusal of the court to charge the jury that, under the pleadings and evidence in the case, the verdict must be for the defendant. Several of the other assignments of error may be grouped under this first assignment. We have therefore carefully considered all the evidence in the case and summarized it as above.

We agree with the learned judge of the court below, that the method of moving the scaffolding from one truss to another, had been adopted by the contractors in the necessary discharge of their work, in the presence of the superintendent and by what, under the testimony must be considered the express permission of the corporation itself. We think, therefore, it must clearly appear that the plaintiff, as an employé of the contractor, engaged at defendant's request in constructing the addition to its mill, was not a trespasser upon defendant's premises generally, or upon the crane runway in particular, under the circumstances shown by the evidence; that while at work on the trusses at the tops of the columns, and also in the incidental and temporary use of the crane runway immediately underneath the same, he was in the class of those who are present on dangerous premises, by the express invitation of and for the purposes of their owner, upon whom, on that account, the law imposes a special duty of care to guard the one thus present from the dangers incident to the situation.

In this state of the case, the duty imposed upon the defendant required special precaution against injury that might happen to the plaintiff by reason of the operation of the crane on that part of the runway upon which he might be standing. Upon reasonable precautions to be taken by the defendant in this regard, we think the plaintiff had a right to rely. The more so, perhaps, that there was testimony tending to show that on the three or four previous occasions, the approach of the crane, while those engaged in riveting the trusses happened to be upon the runway, was signaled by a loud sounding bell. While plaintiff was not relieved from the duty of care on his part to guard himself against obvious dangers, he did not assume, as contended by defendant, all the risks of the situation as being incident to his employment, and certainly not the risk of defendant's negligence and want of care.

The court below was therefore clearly right in refusing defendant's point embodied in his third assignment of error, to wit, that defendant was not bound to anticipate the presence of plaintiff on the crane runway at the time of his injury. Having, under its contract for the repair of its mill, invited the plaintiff and others into situations that would be dangerous, if its operations were continued while the repairs were going on, if it decided, under the circumstances, to continue those operations, it was bound to reasonably guard against the dangers

incident thereto, or, in the felicitous language of the learned trial judge:

"It assumes an obligation that the operations of its mill will be subordinated in a reasonable degree to the operations made necessary on the part of the contractor, in order to perform those repairs."

Whether there was a lack of such care as amounted to negligence on the part of the defendant, was a question properly to be submitted to the jury. This, and the question whether the method adopted for moving the scaffolding, which required that some of the workmen during the process of removal should stand upon the crane runway, was a reasonable discharge of their duty under the premises, or involved contributory negligence on the part of the plaintiff, together with other questions raised by the defendant, were properly submitted to the jury by the learned judge of the court below. The exceptions to specific portions of the charge of the court below, covered by the several assignments of error, have been dealt with in what we have said in our general discussion of the case, and do not require more particular consideration.

The judgment of the court below is affirmed.

INDIANA & ARKANSAS LUMBER & MFG. CO. et al. v. MILBURN et al.*
(Circuit Court of Appeals, Eighth Circuit. April 18, 1908.)

No. 2,625.

1. TAXATION—TAX LIEN—FORECLOSURE—NATURE OF PROCEEDING.

The overdue tax suit for the foreclosure of a tax lien, authorized by Acts Ark. 1881, p. 63, is a judicial proceeding, and the sale pursuant thereto is a judicial sale.

2. SAME—MISDESCRIPTIONS.

Misdescriptions of land, which would be fatal to an ordinary tax proceeding, do not render a sale pursuant to a judgment in an overdue tax suit, authorized by Acts Ark. 1881, p. 63, invalid after confirmation.

3. SAME—LIMITATIONS.

An attack on the sale of land under a decree in an overdue tax suit is barred by the five-year statute of limitations prescribed by Kirby's Dig. Ark. § 5060.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1588.]

4. JUDICIAL SALE—VACATION—POWER.

A court has power to vacate an order of confirmation of a judicial sale at the same term at which it was rendered.

5. TAXATION—TAX SALES—CONFIRMATION—EFFECT OF ORDER.

After various decrees and orders, and vacations thereof, in proceedings for the sale of land for the nonpayment of taxes, it appeared that the money paid by the purchasers had been distributed and was beyond their reach; and, the purchasers having neither money nor deeds to the land, a chancery court directed the commissioner to make a statement showing his disposition of the proceeds, and, this being done, confirmed the report of sales and ordered the commissioner to execute deeds to purchasers, conveying only such title as the decree or decrees were competent to pass. *Held*, that such order only confirmed sales of lands made to individuals, and did not apply to lands struck off to the state.

*Rehearing denied June 29, 1908.

6. SAME—NECESSITY OF CONFIRMATION.

A sale of land for taxes pursuant to a decree in an overdue tax suit, authorized by Acts Ark. 1881, p. 63, vests no title in the purchaser until confirmation.

7. SAME—LIMITATIONS.

The statute of limitations does not commence to run in favor of a purchaser's title to land purchased pursuant to a decree in an overdue tax suit, authorized by Acts Ark. 1881, p. 63, until confirmation of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1593-1595.]

8. SAME—QUIETING TITLE—LACHES.

Where land in controversy was wild and uncultivated, and neither complainants, the fee owners, nor the defendants, claiming under a tax sale made in 1881, were in possession, and defendants, aside from paying taxes, did nothing with reference to the land from a sense of security caused by complainants' inactivity, complainants were not barred by laches for maintaining a suit to quiet title as against defendants' alleged claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1593-1595.]

9. SAME—VACATION OF TAX SALE—CONDITIONS.

Where defendants had paid taxes on land purchased at a tax sale for many years, complainants were only entitled to a decree setting aside such sale on condition that they reimburse defendants for the tax payments so made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1612.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

H. F. Roleson and N. W. Norton, for appellants.

T. E. Hare (Hunsdon Cary, on the brief), for appellees.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. The Milburns, as fee-simple owners, sued the Indiana & Arkansas Lumber & Manufacturing Company to quiet their title to a tract of land in Crittenden county, Ark., and obtained a decree from which the defendant took this appeal. The title of defendant which was attacked was based upon a sale under a decree of a local chancery court in a suit brought in 1881 by the state, on the relation of the county, for the enforcement of delinquent taxes. Other lands were also involved in that suit and sold at the sale; but the particular tract in question here was struck off and certified to the state for lack of other bidders. The state afterwards granted it to the board of directors of St. Francis levee district, which in turn conveyed it to defendant. Complainants assert that no title passed by the sale to the state, because (a) of fatal misdescriptions of the land at various stages of the suit; (b) when the sale was made there was no decree authorizing it, all decrees of the chancery court having been previously vacated; and (c) there was no confirmation of the sale.

The overdue tax suit was authorized by an Arkansas statute (Acts 1881, p. 63). It was a judicial proceeding, and a sale pursuant thereto was a judicial one. *Neal v. Andrews*, 53 Ark. 445, 448, 14 S. W. 646. It is true there were such misdescriptions of the land as would have

been fatal in an ordinary tax proceeding (*Salinger v. Gunn*, 61 Ark. 414, 33 S. W. 959; *Cocks v. Simmons*, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28; *Montgomery v. Birge*, 31 Ark. 491; *Crane v. Randolph*, 30 Ark. 579), but not so in a judicial proceeding followed by a judicial sale and confirmation (*Doyle v. Martin*, 55 Ark. 37, 17 S. W. 346). Besides this, complainants' attack on the sale upon the ground of misdescription of the property was barred by the five-year statute of limitation (*Kirby's Dig.* § 5060) long before the suit to quiet title was begun.

As to the other objections to defendant's title: There is much confusion in the record of the overdue tax suit, arising from the number of decrees and orders confirming the sales that were entered, and decrees and orders setting them aside. But the decree upon which defendant's title must rest, if it has basis at all, is that of December 23, 1882. The sales under that decree were confirmed at a subsequent term of court; but shortly thereafter, and before the term ended, the order of confirmation was vacated, and the prior decree was itself set aside for want of jurisdiction, though the jurisdictional defect does not appear in the record before us. In view of our conclusion upon the third ground of attack on defendant's title, we need not consider whether the decree of December 23d was lawfully annulled, or whether the order vacating it was void because made at a subsequent term. The facts remain that the court vacated the order of confirmation at the same term it was rendered, its power to do so cannot be doubted, and no confirmation was afterwards had of the sale of the land involved in the present suit. Defendant relies upon a confirmation order made in 1885, about two years after the commissioner's report of sales was presented to the court; but we think that order clearly related to other lands sold to individuals, and not to those struck off and certified to the state for want of bidders. After various decrees and orders, and vacations thereof, were entered of record, it appeared that the money paid by purchasers had been distributed and was beyond their reach. They had neither money nor deeds. The chancery court, therefore, directed the commissioner to make a statement showing his disposition of the proceeds, and, this being done, confirmed the report of sales, and ordered him "to execute deeds to purchasers, conveying only such title as the decree or decrees were competent to pass." That this was not intended to apply to lands struck off to the state appears from the fact that it was not required to, and did not, pay the commissioner the amount of tax liens adjudged against them (*Acts 1881*, pp. 69, 70, §§ 10, 12), and instead of a deed to the state, as was required to be given individual purchasers, there was merely provision for a certificate by the commissioner to the clerk of the county, whose duty it was to send copies to certain state officers. *Doyle v. Martin*, *supra*. It seems clear that the confirmation relied on was solely for the benefit of those purchasers whose money had been paid and distributed, and who, therefore, sought deeds for what they bought.

What, then, is the effect of the lack of confirmation? In *Neal v. Andrews*, *supra*, it was held that when lands were struck off to the

state confirmation was as necessary as in the case of sale to an individual. The court said:

"The sales in these cases conferred no title upon the state, for the reason that they were not confirmed by the chancery court, and the state is only a preferred bidder until confirmation which is necessary to complete her title."

In *Apel v. Kelsey*, 47 Ark. 413, 419, 2 S. W. 102, 103, it was said:

"Now, a judicial sale passes no title until it is confirmed; and confirmation will not be presumed, but must be shown. The court is the vendor, and what takes place before final approval is in the nature of a bid which may be accepted or rejected."

According to these decisions, which control us in a case of this kind, there was no completed sale until confirmation. Consequently the statute of limitations did not commence to run. In *Cowling v. Nelson*, 76 Ark. 146, 150, 88 S. W. 913, 914, it was said:

"This court has held that the five-year statute does not apply to judicial sales, unless they are confirmed, because there is no sale until that act. *Lumpkins v. Johnson*, 61 Ark. 80, 32 S. W. 65; *Morrow v. James*, 69 Ark. 539, 64 S. W. 269. When confirmed, and the court has jurisdiction over the parties, the five-year statute runs in favor of the purchaser at such sale against the parties thereto, although the sale is void. It is a statute of repose, and, if valid, the purchaser needs no limitation to ripen his title, and the manifest purpose of the Legislature was to apply it to avoid sales within the limitations mentioned."

Nor can the doctrine of laches defeat complainants' suit. The land in controversy was wild and uncultivated, neither party was in possession, and, aside from paying taxes, defendant did nothing upon the land, from a sense of security caused by complainants' inactivity. The mere payment of taxes gave no title to the land. *Rannels v. Rowe*, 74 C. C. A. 376, 145 Fed. 296; *Penrose v. Doherty*, 70 Ark. 256, 67 S. W. 398. There is another matter. The defendant, relying upon a course of judicial proceedings, paid taxes for a period covering many years, and so performed an obligation to the state which rested upon the true owners of the land. The land having greatly appreciated in value, the owners now call upon a court of equity to clear their title; but, before obtaining what they seek, they themselves should be required to do justice. To the entry of a decree in favor of complainants the trial court should attach the condition that within a specified time they reimburse defendant for the amount of its tax payments as ascertained by the court, and if they make default their bill should be dismissed.

The decree is vacated, and the cause is remanded for further proceedings in conformity with this opinion.

MUTUAL RESERVE LIFE INS. CO. v. HEIDEL.*

(Circuit Court of Appeals, Eighth Circuit. March 2, 1908.)

No. 2,697.

1. INSURANCE—PREMIUM—DELIVERY OF POLICY ACKNOWLEDGMENT OF PAYMENT OF FIRST PREMIUM.

The delivery of an insurance policy which recites that the company agrees to pay the indemnity in consideration of the first annual premium of \$145.45 to be actually paid in cash on or before its delivery, and that the contract shall not take effect until the delivery of the policy and the payment of the first premium, is an acknowledgment of the payment of the premium, and the delivered policy is competent evidence of that fact.

2. SAME—ACKNOWLEDGMENT ESTOPS FROM AVOIDING CONTRACT FOR NONPAYMENT, BUT IS REBUTTABLE EVIDENCE OF PAYMENT ON OTHER ISSUES.

An acknowledgment of the payment of the first premium conclusively estops the company from avoiding the policy for the failure of the insured to pay the first premium when due. But it does not estop it from proving by written contract made before or at the time the policy was delivered that an extension of time for the payment of a part or of all of the first premium to specific dates was given and an agreement made that, if the deferred payments were not then made, the insurance should cease, and the policy be forfeited.

3. SAME—EXTENSION OF TIME OF PAYMENT OF FIRST PREMIUM WAIVES FORFEITURE FOR NONPAYMENT IN ABSENCE OF EXPRESS CONTRACT TO CONTRARY.

An extension of the time of payment of the first premium without a written agreement at or before the delivery of the policy, or a subsequent contract for a valuable consideration, that the insured shall make the deferred payments at specific times and that if he fails to do so the insurance shall cease, or the policy be forfeited, waives all forfeiture for nonpayment of every part of that premium.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 914.]

4. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—TRIAL—REJECTION OF ADMISSIBLE EVIDENCE FATAL, THOUGH RECORD SHOWS IT FUTILE IF RECEIVED.

The fact that it appears from the record of a trial wherein evidence was erroneously rejected that such evidence would have been futile does not show that its rejection was not prejudicial, because the proposer might have introduced other evidence or have otherwise changed his course at the trial if his rejected evidence had been received, and the court had ruled accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4189-4193.]

5. TRIAL—RIGHT RULINGS ESSENTIAL TO LAWFUL TRIAL—ERROR PRESUMPTIVELY PREJUDICIAL—NEW TRIAL ONLY REMEDY.

Right rulings at the trial are essential to a trial according to the course of the common law. Errors are presumed to be prejudicial. It is only when it appears beyond doubt that they are not so that they may be disregarded. The only remedy for prejudicial error in a trial at law in a national court is a new trial. The appellate court cannot re-examine the facts and render the judgment it deems right.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

*Rehearing denied June 19, 1908.

J. Lionberger Davis (Jones, Jones, Hocker & Davis and S. T. Tyng, on the brief), for plaintiff in error.

Clark Varnum (W. H. Cocke and W. Hall Trigg, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. On June 10, 1901, Gustave Heidel surrendered to the defendant a policy of life insurance for \$5,000 which had been issued to him in 1882, and the defendant delivered to him a new policy, whereby it promised to pay, subject to certain conditions and stipulations, to Nettie Heidel, on his death, \$5,000. Heidel died on April 29, 1902. Nettie Heidel brought this action on the policy. The defense was that Heidel had failed to pay an alleged bimonthly premium which was due on August 1, 1901, and that the policy had been abandoned by mutual consent. At the trial the parties agreed that Heidel paid all his premiums under the original policy, that he made an application for that policy and another application for the second policy, and the defendant admitted in its answer that it issued the second policy "whereby, in consideration of premiums then and thereafter to be paid, it insured the life of said Heidel, and promised and agreed, subject to the terms of an application therefor and the terms of the constitution and by-laws of said association, to pay, upon the death of said Heidel, to plaintiff, his wife, if living at the time of said death, the sum of \$5,000." The policy contained these provisions:

"[The company] in consideration of the application originally made to this association, which is hereby made a part of this contract, and of the surrender of policy or certificate No. 7469 and of the first premium of \$145.45, to be actually paid in cash on or before the delivery hereof hereby continues Gustave Heidel of St. Louis county of state of Missouri, hereinafter called the insured, as a member of said association, and upon the condition of the payment in advance of the same amount on the first day of the month of June in every year during the continuance of this policy, there shall be payable to Nettie Heidel of St. Louis county, of state of Missouri, if living at the time of death of said insured, otherwise to the executors or administrators of said insured the sum of \$5,000.00. * * * This contract shall not take effect until this policy is delivered to the insured in person and the first premium is paid in cash hereon during his lifetime and while policy or certificate No. 7469 is in full force, which policy or certificate shall be rendered null and void by the act of placing this policy in force."

The defendant offered evidence which it claimed tended to show that after the policy was issued "Heidel paid the first bimonthly premium of \$17.45 and the interest on the lien \$7.66 on July 1, 1901, and that the subsequent bimonthly premiums for the same amount during the remainder of the year 1901 were not paid by Heidel." The court below sustained objections to this evidence, on the ground that proof that Heidel paid a part of the first annual premium, \$145.45, and owed the remainder, was not admissible because by the delivery of the policy the defendant estopped itself from denying the payment of the entire premium for the year in question.

The provisions of the policy that in consideration of the surrender of the original policy, and "of the first premium of \$145.45 to be ac-

tually paid on or before the delivery hereof," the defendant will pay the \$5,000, that "this contract shall not take effect until the policy is delivered to the insured in person and the first premium paid in cash hereon during his lifetime," and the delivery of the policy, constituted an acknowledgment by the company that the first annual premium had been paid, and the delivered policy was competent and persuasive evidence of that fact. *Massachusetts Ben. Life Ass'n v. Sibley*, 158 Ill. 411, 42 N. E. 137; *Germania Fire Ins. Co. v. Muller*, 110 Ill. App. 190, 193. The delivery of the policy and this acknowledgment conclusively estopped the company from denying that the contract of insurance was in existence and that it was effective from the time of the delivery of the policy until it was forfeited for some other reason than the failure to pay the first annual premium when it became due. *Roberts v. Security Company, Ltd.*, Q. B. Division, Law Reports, 1897, p. 111, 115; *Basch v. Humboldt Mutual, etc., Co.*, 35 N. J. Law, 429, 431; *Dobyns v. Bay State Ben. Ass'n*, 144 Mo. 95, 109, 110, 45 S. W. 1107.

But they did not estop this company from proving by a written contract made before or at the time the policy was delivered that an extension of time for the payment of a part or of all of this first premium to specific dates was given, and an agreement made that, if the deferred payments were not then made, the policy should cease, and the failure to make such deferred payments at the times specified by such an agreement would be fatal to the continuance of the policy. *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Life Ins. Co. v. Pendleton*, 112 U. S. 696, 707, 5 Sup. Ct. 314, 28 L. Ed. 866; *Mooney v. Insurance Co.*, 80 Mo. App. 192, 195; *Leeper v. Insurance Co.*, 93 Mo. App. 602, 67 S. W. 941; *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22, 24; *Snyder v. Nederland Life Ins. Co.*, 202 Pa. 161, 51 Atl. 744; *Duncan v. Missouri Life Ins. Co.* (filed March 27, 1908, C. C. A.) 160 Fed. 646.

Competent evidence that this annual premium was not paid by Heidel when the policy was delivered, and that a portion had never been paid, was therefore admissible, though in itself insufficient evidence to sustain the defense. If supplemented by a written contract made before or at the time of the delivery of the policy that this premium should be subsequently paid at definite times, and that, if not then paid, the insurance should thereupon cease, and by proof that it was not paid at such times, it might have proved sufficient to prevent a recovery by the plaintiff. The written agreement evidenced by the policy, it is true, is that the premiums shall be paid annually, and evidence of a parol contract made before or at the time of the delivery of the policy that they were to be paid bimonthly is incompetent, because it contradicts the terms of the written contract. *Thompson v. Insurance Co.*, 104 U. S. 252, 259, 26 L. Ed. 765; *Chamberlain v. Wright* (Tex. Civ. App.) 35 S. W. 707; 17 Cyc. 659. An extension of the time of payment of the first premium without a written agreement at or before the delivery of the policy, or a subsequent contract, for a valuable consideration after its delivery, that the insured shall make the deferred payments at specific times, and

that, if he fails to do so, the insurance shall cease or the policy be forfeited, waives all forfeiture for nonpayment of every part of that premium. *Thompson v. Insurance Co.*, 104 U. S. 252, 257, 26 L. Ed. 765; *Insurance Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443; *Dobyns v. Bay State Ben. Ass'n*, 144 Mo. 95, 108, 109, 110, 111, 45 S. W. 1107; *Perry v. Bankers' Life Ins. Co.*, 47 App. Div. (N. Y.) 567, 570, 62 N. Y. Supp. 553; *Lawrence v. Penn. etc., Ins. Co.*, 113 La. 87, 36 South. 898, 899; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 872, 17 Am. St. Rep. 233; *McAllister v. New England, etc., Ins. Co.*, 101 Mass. 558, 561, 3 Am. Rep. 404; *Northwestern Life Assur. Co. v. Schulz*, 94 Ill. App. 156, 161, 163. After the court had rejected the evidence that the premium was not paid, the defendant obtained permission to introduce that and other evidence, to the effect that notice that an alleged bimonthly premium had become due August 1, 1901, that, if not paid, the policy would lapse and the insurance would be forfeited, was given to Heidel in July, 1901; and that in September, 1901, notice of his failure to pay this premium and of the alleged forfeiture of his insurance was given to him, but this evidence was all introduced under the ruling which has been considered and under the further statement by the court that it should, at the close of the trial reject all the evidence for the defendant, and it did so and directed a verdict for the plaintiff. Counsel for the plaintiff contend that, in the light of the rules of law which have been stated, there was no substantial evidence offered to sustain a verdict for the defendant, and hence that the rulings rejecting its evidence, even if some or all of them were erroneous, were not prejudicial. But conceding, without deciding, that all the evidence offered by the defendant was insufficient under the law to sustain a verdict in its favor, this court is forbidden to examine this question of fact and to render such judgment as it deems right. The defendant was entitled under the seventh amendment to the Constitution, which reads that, "In suits at common law where the value in controversy shall exceed \$20.00 the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," to a trial of its cause according to the course of the common law. A trial according to the course of the common law is a trial before a jury under right rulings made by the trial judge in the presence of the jury, and the only remedy for prejudicial errors in such a trial in a national court is a new trial. *Parsons v. Bedford*, 3 Pet. 433, 446, 448, 7 L. Ed. 732; *Barreda v. Silsbee*, 21 How. 146, 166, 16 L. Ed. 86; *Justices v. Murray*, 9 Wall. 274, 277, 19 L. Ed. 658; *Miller v. Life Ins. Co.*, 12 Wall. 285, 300, 20 L. Ed. 398; *Insurance Co. v. Comstock*, 16 Wall. 258, 269, 21 L. Ed. 493; *Insurance Co. v. Folsom*, 18 Wall. 237, 249, 21 L. Ed. 827; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31, 25 L. Ed. 531; *Lincoln v. Power*, 151 U. S. 436, 438, 14 Sup. Ct. 387, 38 L. Ed. 224; *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226, 246, 17 Sup. Ct. 581, 41 L. Ed. 979; *Capital Traction Co. v. Hof*, 174 U. S. 1, 9, 19 Sup. Ct. 580, 43 L. Ed. 873.

The legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error challenged did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect. *Deery v. Cray*, 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Peck v. Heurich*, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; *Smith v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717; *Moore v. Bank*, 104 U. S. 625, 630, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; *Railroad Co. v. O'Brien*, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299; *Mexia v. Oliver*, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Railroad Co. v. McClurg*, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863; *Association v. Shryock*, 20 C. C. A. 3, 11, 73 Fed. 774, 781; *Railroad Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458; *Armour & Co. v. Russell*, 75 C. C. A. 416, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 602. It does not appear beyond doubt that the defendant was not prejudiced by the first ruling which has been discussed. If the court had admitted the evidence rejected, the defendant might have proved a written agreement made at or before the policy was delivered that the \$145.45, which constituted the first annual premium, should be paid at subsequent fixed times, that a failure to pay it at those times should forfeit the insurance and that the insured failed to pay it at the times specified. It might have established the fact that an agreement subsequent to the delivery of the policy for a valuable consideration to the same effect was made and with the same result. Again, if that evidence had been received, either the court or the jury would have decided whether or not that and all the other admissible evidence presented at the trial was sufficient to sustain the defense, a question which has never yet been considered by either court or jury. The fact that it appears upon the record of a trial, wherein evidence is erroneously rejected, that the rejected evidence would have been futile if received, does not show that its rejection was not prejudicial, because the proposer might have introduced other evidence or have otherwise changed his course at the trial if the ruling of the court had been right and his rejected evidence had been received. *Deery v. Cray*, 72 U. S. 795, 806, 807, 18 L. Ed. 653; *Peck v. Heurich*, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302. There is therefore no escape under the law from a reversal of the judgment below.

It is accordingly reversed, and the case is remanded to the Circuit Court, with directions to grant a new trial.

STERNBERGH v. DURYEA POWER CO.

(Circuit Court of Appeals, Third Circuit. May 8, 1908.)

No. 19.

1. BANKRUPTCY—CORPORATIONS—UNPAID STOCK—RIGHTS OF TRUSTEE.

On a corporation becoming a bankrupt its trustee acquires no higher rights to recover stock liabilities from stockholders than the bankrupt had.

2. CORPORATIONS—STOCK SUBSCRIPTIONS—PAYMENT FOR STOCK—PATENTS.

Pa. Act April 29, 1874 (P. L. 81, § 17), provides that corporations, created thereunder or accepting its provisions, may take patent rights necessary for their business, and issue stock to the amount of the value thereof in payment, and that the stock so issued might be declared and taken as full-paid stock, without liability for further calls or assessments. *Held*, that where a corporation increased its capital stock to \$100,000, \$85,000 of which was issued in payment for certain patent rights, and S. contributed \$10,000, which was applied to the purchase of certain of the patent interests, and also \$15,000 representing the balance of the corporation's capital, such transaction having been unchallenged by all the parties in interest for six years, the stock, as against the corporation, should be treated as fully paid, it being immaterial that S., in the division of the stock, in fact secured 810 shares for a cash contribution of \$25,000.

3. SAME—RETURNS TO STATE DEPARTMENT.

Where the capital stock of a corporation was issued for patents and cash, a return of the transaction, made to the state department, that the capital stock of the corporation had been increased from \$1,000 to \$100,000, the additional stock being issued for cash and property, having been received by the department without objection, was sufficient, in the absence of bad faith or fraud.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy.

Cyrus G. Derr and John G. Johnson, for petitioner.

Andrew A. Leiser and George W. Wagner, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the bankruptcy proceeding of the Duryea Power Company in the court below, Sternbergh, the petitioner for review, sought to prove his claim of \$14,000, and to vote in the election of trustee. The referee held Sternbergh was indebted to the company in \$26,000, on 510 shares of its stock, and rejected his claim. On hearing, the court approved the action of the referee. Thereupon Sternbergh petitioned for review.

The facts are not in dispute, and the substantial question involved is the alleged liability of Sternbergh on the stock. After a careful study of the facts we are of opinion the referee failed to grasp the significance of the transactions as a whole, and what the agreements between the parties sought to effect. No question of good faith is involved, nor is there any doubt that what the parties had in view could lawfully be done by fitting papers and proceedings. Mr. Hiester, a lawyer of high standing, has testified to the purpose of the parties,

and frankly assumes the blame if the papers and proceedings fail to effect such purpose. The entire matter was one between the four men, Sternbergh, Duryea, Mulholland, and Crowther. No one else was interested, and no question is involved of any outside party buying stock in the Duryea Power Company, the present bankrupt. Duryea and the Duryea Manufacturing Company of Peoria, Ill., had some patents, which the four parties contemplated acquiring, with a view to making auto-freight trucks at Reading, Pa. To obtain license under these patents it was necessary for Duryea to pay the Peoria Company \$10,000. Presumably, Mulholland and Crowther had some interest in the patents, or rendered Duryea some service in carrying out the proposed arrangement, for otherwise it cannot be explained how they got their \$19,000 of minority stock in connection with Duryea. They contributed no part of the money, which Sternbergh furnished. The latter was the moneyed man of the four, and it was arranged that he contribute \$25,000 to a proposed company of \$100,000 capital. For this he was to receive 510 shares, the majority, of full-paid shares of \$100 each. Duryea was to contribute the patents, and was to receive \$10,000 in cash, to enable him to get the patent licenses from the Illinois Company, 300 shares of full-paid stock, and employment at \$3,000 per year. Mulholland and Crowther were to get 190 shares of full-paid stock. All parties were to assign to the company inventions made by them. From this it is clear that the substance of the arrangement was that the patents were capitalized at \$85,000. Sternbergh furnished \$10,000 in cash, by which licenses could be obtained from the Illinois Company, and his \$15,000 constituted the working capital of the proposed company. For this Sternbergh obtained the majority stock, and Duryea the minority, which for some, to him presumably sufficient, reason he divided between himself, Mulholland, and Crowther. The papers were drafted, and the proceedings had in furtherance of this general plan. The agreement between the four was entered into February 13, 1900; in pursuance thereof the Duryea Power Company, the bankrupt, was chartered on April 6, 1900, with a capital of \$1,000. On April 20, 1900, that company voted to increase its capital stock to \$100,000, and evidently deferred making return of such increase until the patents were acquired. On June 11, 1900, Duryea and the Duryea Manufacturing Company of Peoria, Ill., entered into an agreement, with the Duryea Power Company of Reading, Pa., to license under the patent, in consideration of the payment of the \$10,000 to the Peoria company and the stock to Duryea. On October 29, 1900, the return of the vote to increase stock was sworn to. On October 31st it was accepted, and filed in the office of the Secretary of State, where it has remained unquestioned. On October 27, 1900, a certificate for 510 shares of full-paid stock was issued to Sternbergh, in pursuance of a resolution of the Duryea Power Company of April 20, 1900. Under these facts is Sternbergh liable for further payments on his stock? On this company becoming bankrupt its trustee acquired no higher rights than the bankrupt possessed (*First Nat. Bank v. Pennsylvania Trust Co.*, 124 Fed. 968, 60 C. C. A. 100; *Davis v. Crompton* [C. C. A.] 158 Fed. 735), and it is clear that company had no right of action

against Sternbergh. Under the Pennsylvania act of April 29, 1874 (P. L. 81, § 17):

"Every corporation created under the provisions of this act, or accepting its provisions, may take such * * * patent rights * * * as is necessary for the purpose of its * * * business, and issue stock to the amount of the value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full-paid stock, and not liable to any further calls or assessments."

Having taken these patents at a valuation to which every person in interest agreed, and having enjoyed them for all these years while they were running, it is clear this company cannot question or repudiate the transaction, and assess or collect on the full-paid stock which it issued for them. This is not the case of an uncollected or unpaid assessment or of a subscription. It is an indirect attempt to invalidate an executed transaction, which has stood unchallenged and ratified by six years' acquiescence and enjoyment of the consideration paid therefor. If now open to attack, the only ground in fact on which it could be done is that the patents were not worth the \$85,000 at which they were taken, but of this there is no evidence. Duryea testified of their value up to \$40,000; that his prior price for them was \$100,000, and the referee sustained an objection to the petitioner's question, which sought to show by Duryea they were worth in excess of \$40,000. Presumably that objection would not have been made by his counsel, unless his answer would have disclosed that fact. Nor was the return made to the state department that "the capital stock of said company has been increased from \$1,000 to \$100,000, said additional stock being issued for cash and property," either untrue or misleading. Patents are personal property (*Shaw Valve Co. v. City of New Bedford* [C. C.] 19 Fed. 753), and were aptly returned and described as property. A large number of returns printed in petitioner's brief shows the return in this case is substantially in the form followed by the Pennsylvania bar. And in view of the absence of bad faith and fraud and of the acceptance, without objection, of this return by the department, we see nothing to warrant our challenging its sufficiency. Holding these views, we are of opinion Sternbergh was not indebted to the bankrupt company on his stock, and the referee should have allowed him to prove his claim.

The order of the court approving the action of the referee will be reversed, and the case remanded, with instructions to allow the petitioner to do so. In view of the fact, however, that no allegation is made against the trustee, we see no reason why, at this late day, the selection of it should be disturbed.

VACCAREZZO v. 567,000 GALLONS OF MOLASSES (MUNSON S. S. LINE, Claimant).

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 231.

SHIPPING—SUIT FOR CHARTER HIRE—DEFENSE OF REFUSAL TO LOAD FULL CARGOES.

Evidence considered, and *held* not to sustain the defense of a charterer to a suit for charter hire, admittedly due under a time charter, based on the claim that the master refused to load full cargoes.

[Ed. Note.—Deductions and offsets from charter hire of vessel, see note to Tweedie Trading Co. v. George D. Emery Co., 84 C. C. A. 254.]

Appeal from the District Court of the United States for the Eastern District of New York.

For opinion of court below, see 149 Fed. 792.

Wheeler, Cortis & Haight, Clarence Bishop Smith, and C. S. Haight, for appellants.

Ullo, Ruebsamen & Yuzzolino and Lorenzo Ullo, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The libel was brought to recover a balance due of charter hire of the steamship *Margaretha*. The amount was not disputed, but claimant counterclaimed for damages because of an alleged refusal of the master to load full cargoes during the voyages made between January 1 and August 12, 1905. The District Judge made some allowance for the last two voyages, but as to the earlier ones reached the conclusion that claimant was concluded in each instance by an account stated. The libellant did not appeal, so the propriety of an allowance for the last two voyages is not presented for review here.

We have reached the conclusion that the decree should be affirmed, not upon the points of law which have been presented and argued, as to which we express no opinion, but because we are of the opinion that the claimant has not established his defense. The vessel was originally chartered in January, 1903, under a charter party which contained the following clause:

"(6) That the whole reach, burthen, and passenger accommodation of the ship (not being more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers and crew, tackle, apparel, furniture, provisions, stores, and fuel."

A renewal charter was entered into on July 4, 1903, which was subsequently further renewed. Under these successive charters 42 voyages were made. When originally chartered the steamship, an English-built vessel, was operating under the German flag. She was sold to her present owner toward the end of 1904, subject to claimant's charter; and upon sale her register was changed and she took the Italian flag. Under her new control the later voyages, No. 32 to No. 42, inclusive, were made. It is of these voyages that complaint is made. The contention is that while in charge of her two successive German captains she carried full cargoes and gave entire satisfaction, but as soon as the Italian captain took command he insisted on so loading the vessel as

not to submerge her "plimsoll mark," although, being merely an English mark, it was in no way binding on the vessel when under the Italian flag; that the new captain was over-cautious, so timid that he refused to load enough molasses to make up a full cargo; and that in consequence there was a breach of the charter, with resulting damage.

It may be premised that the mere circumstance that one captain habitually carries more cargo in a ship than a subsequent captain of the same ship does is not determinative of the question. Possibly the second captain may be over-cautious. Possibly, also, the first captain may have been over-rash. The matter of safe navigation of a vessel is so peculiarly one within the knowledge of her captain that very clear and convincing evidence is required to warrant a court in holding that his judgment is at fault. As to the "plimsoll mark" itself there is a conflict of evidence. The captain says it was 19 feet and 11 inches from the keel of the ship, and a witness for the claimant that those figures on the plan of the ship indicate the depth of the hold. A witness for claimant testified that the captain insisted on refusing cargo when the water had reached the "plimsoll mark." The captain testified that the Italian government had nothing to do with that mark, that there was no mark upon which he was required to load by the government, and that the ship when loaded draws about 20 feet 10 inches, or 2 or 3 inches, more or less, depending on the season, summer or winter.

The claimant put in testimony showing the quantity of molasses carried on each voyage. As she was a tank steamer, loaded out of a shore tank, these figures may be accepted as accurate. In the calculations that are presented and relied upon, however, the gallons are turned into tons, and the tons are manifestly an estimate. The witness testified that the weight of a gallon of molasses varies with density and temperature. "If a gallon of molasses weighs 11.60 pounds, it might at another time weigh 11.65 or 11.70; sometimes the same difference on the other side." The rule he employed for turning gallons into tons was to "divide by 200"; but, whether the ton be long or short, some other divisor than 200 would seem to be required if a gallon weighs from 11.50 to 11.70 pounds. The tons of fuel and stores at inception of each voyage were also "estimated." The resulting tabulations are indicated below.

First Ten Voyages—German Flag.

Voyage.	Draft.	Tons Molasses.	Coal & Stores.	Total.
1	20', 8½"	2,790	185	2,975
2	20', 3½"	2,835	230	3,065
3	20', 11½"	2,868	185	3,053
4	20', 7"	2,890	166	3,056
5	20', 10½"	2,861	176	3,037
6	20', 10½"	2,883	144	3,027
7	20', 9"	2,845	161	3,006
8	21'	2,974	161	3,135
9	21'	2,930	171	3,131
10	21', 3¼"	2,915	194	3,109

Examination of this table indicates how unreliable these estimates are. For example, on the tenth voyage, when the vessel was loaded to a draft of 21 feet 3¼ inches she carried 27 tons less than she did on the eighth voyage, when loaded to a draft of 21 feet.

Voyages Under Italian Flag.

Voyage.	Draft.	Tons Molasses.	Coal & Stores.	Total.
32	21'	2,747	190	2,937
33	20', 6"	2,665	260	2,925
34	20', 7½"	2,705	231	2,936
35	20', 8½"	2,724	182	2,906
36	20', 9"	2,765	200	2,965
37	20', 7½"	2,742	196	2,936
38	20', 8"	2,673	181	2,854
39	20', 11½"	2,717	156	2,873
40	21'	2,735	153	2,888
41	20', 7"	2,865	136	3,001
42	21'	2,893	196	3,089

Comparison of the drafts shown in this table with those on the first 10 voyages, in which the vessel was commanded by the German captain, whose conduct meets with no criticism from the charterer, shows how unpersuasive is the testimony that the Italian captain was over-cautious, and that through his timidity she was not loaded as deeply as she had been before. Upon the record we are not satisfied that the defense was sufficiently made out to defeat the libellant's admitted claim.

The decree is affirmed, with interest and costs.

O'CONNELL et al. v. NATIONAL WATER CO.

(Circuit Court of Appeals, Third Circuit. May 13, 1908.)

No. 23.

TRADE-MARKS AND TRADE-NAMES—UNLAWFUL COMPETITION—DECEPTION OF PUBLIC.

In order to entitle complainant to relief in a suit for unlawful competition, it is not necessary that the public should be actually deceived; it being sufficient that the infringement had a tendency to deceive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 86.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 159 Fed. 1001.

John H. Fow, for appellants.

J. J. Kennedy, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree of the Circuit Court for the Eastern District of Pennsylvania, awarding the usual relief to the complainant below (the appellee here) for unfair competition in trade. This decree was so satisfactorily vindicated by the learned judge who made it that we are content to rest our affirmance of it on his opinion. 159 Fed. 1001. Upon a single point, however, we add a few words in deference to the earnestness and

ability with which the learned counsel of the appellant pressed it upon our attention.

It is claimed that there was no evidence to warrant a finding that any one had really been deceived into believing that the water put upon the market by the defendants below was that which was dealt in by the plaintiff; but the sufficient answer to this claim is that "it is not necessary that the public should be actually deceived in order to afford a right of action. All that is required is that the infringement should have a tendency to deceive," and of this, in the present case, there could be no reasonable doubt. *Shaw et al. v. Pilling*, 175 Pa. 78-87, 34 Atl. 446; *Consolidated Ice Co. v. Hygeia Distilled Water Co.*, 151 Fed. 10-12, 80 C. C. A. 506.

The decree of the Circuit Court is affirmed.

MORTON TRUST CO. et al. v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court, D. New Jersey. May 29, 1908.)

1. PATENTS—SUIT TO ENJOIN INFRINGEMENT—NECESSITY OF NOTICE OF PATENT.

Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), requires patented articles to be marked or notice of the patent to be given to a defendant only as a prerequisite to the recovery of damages for its infringement, and such notice is not essential where the only purpose of the suit is to enjoin future infringements.

2. SAME—INFRINGEMENT—HOPPER-BOTTOM CAR.

The Schoen patent, No. 647,907, for a hopper-bottom car, claim 1, was not anticipated and discloses invention; also *held* infringed.

3. SAME—SUIT TO ENJOIN INFRINGEMENT—EQUITY JURISDICTION.

The fact that the device of a patent has never gone into commercial use does not preclude the owner of the patent from maintaining a suit in equity to enjoin its infringement.

In Equity. On final hearing on pleadings and proofs.

William C. Strawbridge, Charles Neave, and Thomas W. Bakewell, for complainants.

Paul Bakewell and Frederick R. Cornwall, for defendant.

LANNING, District Judge. This case is on a bill alleging infringement of patent No. 647,907, granted April 17, 1900, to Pressed Steel Car Company, one of the complainants, as assignee of Charles T. Schoen. The patent is for an improvement in hopper-bottom cars. The defendant insists that the injunction prayed for must be denied, because there is no proof that notice was ever given to the public or to the defendant that the hopper-bottom car described in the patent in suit was ever patented. There is an allegation in the bill of complaint that:

"The Pressed Steel Car Company caused notice to be given to the public in general, and to the said defendant in particular, of the said letters patent, and the infringement herein complained of, and of the rights of your orators in the premises, requesting the said defendant to desist and refrain therefrom, but that, in total disregard of the said notice, the said defendant has refused to desist from said infringement, and is continuing and threatening to continue to infringe the said letters patent, and upon the exclusive rights of your orators in the premises."

Assuming this allegation to be a material one, the complainants were entitled to an answer by the defendant "according to the best and utmost of its knowledge, remembrance, information, and belief." See Story's Eq. Pl. §§ 845, 854. The prayer of the bill is that it should so answer. The defendant answered the allegation as follows:

"Defendant is not advised, except by the allegations of the bill of complaint herein, that Pressed Steel Car Company, or the complainants herein, or either of them, has or have caused notice to be given to the public in general, and to this defendant in particular, of the said letters patent No. 584,709, of the alleged infringement herein complained of, and of the alleged rights of the complainants in the premises, or that the complainants, or either of them, have requested the defendant to desist and refrain from said alleged infringement; and therefore defendant denies all such allegations in the bill of complaint herein, and requires strict proof in regard thereto on behalf of complainants."

It will be observed that the defendant has not denied that it has no knowledge, information, or belief concerning the truth of the allegation. It simply says that it has not been advised concerning the matter. It therefore has failed to aver anything upon which it can intelligently base a denial of the truth of the allegation. If it has no knowledge, information, or belief on the subject, it should have so declared, and the effect of that declaration would have been to put the complainant on proof of the allegation, if it be a material one in the case. The Holladay Case (C. C.) 27 Fed. 830, 841.

But, waiving this point, and waiving, also, the point that the answer refers to patent No. 584,709, while the patent in suit is No. 647,907, on which points nothing was said on the argument, and assuming the answer to be in good form, the weight of authority is to the effect that no notice is necessary, where the object is merely to secure an injunction to restrain the defendant from future infringement. Section 4900 of the Revised Statutes (U. S. Comp. St. 1901, p. 3388) seems to require notice only as a prerequisite to a recovery of damages. *New York Pharmaceutical Association v. Tilden* (C. C.) 14 Fed. 740; *Horn v. Bergner* (C. C.) 68 Fed. 428; *Goodyear v. Allyn*, Fed. Cas. No. 5,555, 6 Blatchf. 33; *Anderson v. Monroe* (C. C.) 55 Fed. 398. Whether, if a decree for injunction be allowed in this case, the complainants may also, in view of the present state of the pleadings and the principles laid down in *Rubber Company v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566, *Dunlap v. Schofield*, 152 U. S. 247, 14 Sup. Ct. 576, 38 L. Ed. 426, and *Lorain Steel Co. v. N. Y. Switch & Crossing Co.* (C. C.) 153 Fed. 205, have included in the decree a provision for an accounting, is a question that has not been argued and should not now be decided.

Claim 1 of the patent in suit; which is the only one that the complainant relies on, reads as follows:

"In a double hopper-bottom car, an underframe constructed without side sills and comprising bolsters, end sills, draft-rigging beams interposed between the bolsters and sills, and center sills arranged between the longitudinal center of the car and its sides and out of alignment with the draft-rigging beams and secured to the bolsters, thereby leaving a clear space in the middle of the car for the projection of the hopper-chutes through the underframe, substantially as described."

The defendant manufactures and sells double hopper-bottom cars whose underframes comprise all the elements mentioned in the above-quoted claim. The defendant contends, however, that its underframes also comprise side sills, and therefore that there is no infringement. The complainants insist that the defendant's underframes have no side sills. This is the only disputed question concerning the alleged infringement. My examination of the model of the defendant's structure and of the evidence on the point satisfies me that the defendant's structure has nothing that can properly be called side sills. The side sills of the underframe of a car are intended to support or help to support the weight of the superstructure. The patent in suit discloses an underframe without side sills and a car so constructed that its weight, whether loaded or empty, is so largely borne by the center sills that there is no need of side sills. The model of the defendant's car shows an angle iron running along the bottom of each side of the car. This angle iron, the defendant says, is a side sill. To it the sides of the car are riveted. The floors of the car slope from the ends downwards to the bolsters and from the sides downwards to the center sills. These floors and the sides of the car are riveted to braces which rest on the center sills. I have no doubt that the center sills of the defendant's structure serve the same purpose as the center sills of the patent in suit. The angle iron running along the bottom of the sides of the defendant's car is so light, especially between the bolsters, where there is great need of strength in the underframe, that it is impossible to believe it fulfills to any appreciable extent the function of a side sill. All it does, I think, is to aid in stiffening the sides of the car by reinforcing its lower edge, just as in the patent in suit the side of the car is stiffened and reinforced by turning in the lower edge of the side and riveting it to portions of the underframe. The stipulation of the parties to this suit, printed in the record, in which the angle irons are referred to as side sills, does not require the court to conclude that they are side sills, for it contains also a provision that, while the defendant contends that the angle irons are side sills, the complainants insist that they are not. To my mind infringement seems clear.

Nor do I think the claim sued on is invalidated by the prior art. Defendant cites the Cook patent, No. 126,029, as one showing a car without side sills. It is true that nothing is said in the patent about side sills, but I agree with the complainants that a side sill is shown in Fig. 1 of the patent. Besides, claim 1 of the patent in suit was at first rejected in the Patent Office; the Cook patent being cited against it. At that time the claim omitted the words "constructed without side sills and," which it now contains. The claim was amended by inserting those words, and the Patent Office then allowed it. This shows that that office did not regard the Cook patent as describing a car having no side sills. The defendant admits that the Hughes patent, No. 425,517, is constructed with side sills. The Hersee patent, No. 267,078, is entirely unlike the complainants' structure. It has no bolsters of any kind, and consequently no "draft-rigging beams interposed between the bolsters and (end) sills." The Meatyard patent, No. 293,265, has no bolsters and no center sills out of alignment with draft-rigging beams. The Fox English patent, No. 11,017 of 1888, has side sills.

The Calthrop English patent, No. 1,066 of 1896, has no "draft-rigging beams interposed between the bolsters and (end) sills," and in its general construction differs widely from the structure described in claim 1 of the patent in suit. The Livesey English patent, No. 15,794 of 1898, has side sills. The article published in the Railroad Gazette in 1897, and the drawings embodied therein, show an underframe with center sills too close together to permit the load to be dumped between them. It describes, also, the side sills shown by the drawings and the manner of their construction. These are all of the references in relation to the prior art discussed either in the brief of the defendant's counsel or in his oral argument. The specification of the patent in suit declares that the invention therein described has for its objects:

"First, the adaptation of the underframe to double-hopper bottoms; second, the peculiar inclination of the bottom of the body, so as to divide the load and provide for its ready discharge, and thereby facilitate unloading; and, third, to provide means for simultaneously operating the doors of the double-hopper bottoms and thus expedite the unloading of the car and the subsequent closing of the doors."

The structure described in claim 1 of the patent in suit bears an intimate relation at least to the first and second of these objects. I think the claim discloses invention and that the record does not disclose anticipation.

The last of the defendant's objections is that the complainants have failed to prove that the structure described in claim 1 of their patent was put into commercial use before the filing of their bill of complaint, or why it was not put into such use, and therefore that they are not entitled to equitable relief by way of injunction. This point has been elaborately argued on both sides. It seems never to have been passed on by the Supreme Court. The weight of authority in the inferior courts of the United States is against the position assumed by the defendant. See *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 150 Fed. 741, 80 C. C. A. 407, and the cases cited at the top of page 744.

Infringement will be decreed, and an injunction allowed.

EDISON ELECTRIC LIGHT CO. v. NOVELTY INCANDESCENT LAMP CO.

(Circuit Court, W. D. Pennsylvania. May 7, 1908.)

No. 6.

PATENTS—INVENTION—INCANDESCENT LAMPS.

The Edison reissue patent No. 12,393 (original No. 444,530), for a lead-in wire for incandescent lamps, consisting of two copper wires connected by a short joint of platinum wire extending part way through the glass of the bulb, both joints between the copper and platinum being sealed in the glass, is void for lack of invention. It was previously known that such joints could be made and sealed in the glass; but it was believed that in such case the expansion of the copper would break the glass, and the discovery that such belief was erroneous was of a mechanical truth, and not an inventive act.

In Equity. On final hearing.

Bakewell & Byrnes, Richard N. Dyer, and John Robert Taylor, for complainant.

A. Parker-Smith, for defendant.

BUFFINGTON, Circuit Judge. The complainant, the owner of patent No. 444,530, granted January 13, 1891, to Thomas A. Edison, for a leading-in wire for incandescent electric lamps, and of a reissue thereof, No. 12,393, dated October 10, 1905, charges the respondent with infringing its first three claims. The patent concerns the fine platinum wires through which the electric current reaches the carbon filament inclosed in the vacuum of an ordinary incandescent bulb. The essential to prevent destruction of the filament is a glass seal through which the platinum wires conduct the current. Platinum, though very expensive, is the only substance thus far discovered that can be used for that purpose. This arises from the fact that its coefficient of expansion is so close to that of glass that its expansion neither cracks the enshealing glass nor its contraction separates it therefrom. In addition to its cost, the extension of platinum beyond the seal is open to objection. If its size is restricted to the small cross-section, which is electrically sufficient to lead in the current, the platinum wire that extends beyond the seal to connect with the copper wires at the outer end of the seal, and that as well which leads into the vacuum to support the copper wire by which the filament is supported, are too frail. On the other hand, if the platinum is made of large enough cross-section to obviate these mechanical objections, its size causes certain electrically objectionable results. What the device did is best stated in Mr. Edison's own note of instruction to his solicitor in preparing his specification:

"The object of this invention is to diminish the cost of incandescent lamps. The invention consists in arranging and manipulating the leading-in wires in such a way that many times less platina is required than heretofore and at the same time produces a more perfect seal and mechanical arrangement. A, A', and A, A', X, are copper wires. A short piece of platina is fused to them. The size of the platina is several times smaller than that used heretofore, yet abundantly sufficient to carry the usual current. Previous to my invention the platina wires extended clean through and projected from the glass bulb outside and inside the vacuum, and the size could not be reduced beyond a certain size, owing to mechanical reasons. The platina had to sustain and carry the filament, and the effects of vibration in shipping and jarring in factories, as well as bending and manipulating in the factory. Therefore, previous to my present invention, the size was not limited for electrical, but mechanical, reasons. I have found that copper, iron, nickel, silver, and other metals and their alloys, having a greater expansion than platina, can be sealed into glass, but on cooling contract sufficient to permit air to pass into the vacuum, but are yet held mechanically rigid; hence by using a short length of platina wire as a part of the seal I secure a stable vacuum, and at the same time the copper or other wires provide all the mechanical strength requisite in an incandescent lamp."

That the locating of these two copper-platina joints within the glass seal was novel and the result useful we are free to concede; but a study of the art satisfies us no invention was involved in so doing. It was known before that a copper-platinum joint could be located in a glass seal, and the mechanical effect was known that, while the relative

coefficients of expansion of copper and glass were such that they failed to form a perfect seal for the vacuum, this copper section did form a rigid mechanical support for the filament. But it was also known that, notwithstanding this defect in the copper portion of the seal failing to seal perfectly, the platinum portion beyond the seal remained perfect. But such a joint located to connect platinum with copper leading in to the filament showed the possibility of making such a joint, and obviously there was no reason why such joint could not be made with a copper wire leading outwardly from the other end of the platinum. Such outward-extending copper wire was not exposed to heat induction, as was its fellow at the other end, and there was no real reason why such a joint could not be made. Doubtless it would have been so made, save for the fact that lampmakers labored under the erroneous idea that such a copper wire thus sealed in would crack the glass and thus ruin the seal. In this they were mistaken, as Edison showed; but the recognition of this mistake was a mechanical truth, and not an inventive act.

Indeed, this case is not unlike that of *Daylight Company v. American Company*, 142 Fed. 459, 73 C. C. A. 570, decided in this circuit. There, although the possibility of rolling glass was known, a false notion that thin rolled glass could not be cut and annealed existed. Accordingly there was no attempt to roll prismatic glass. When this mistake in regard to cutting and annealing was exploded, the rolling of prismatic glass was claimed as an inventive act. It was there said:

"This assumption by the glass manufacturers that sheets could not be cut and that it would be impossible to anneal them was quite natural, in view of their experience with molded glass, and they had every ground to reason by analogy from that assumption it was no use to roll large sheets, when they had to make the molded tiles thick and small in order to anneal them, and that they could not be satisfactorily cut. Now the rolling of glass has shown this assumption was wholly wrong; that rolled glass can, when made thin, be successfully moved to the leers and can be annealed in large sheets; and that, in cutting, it acts differently from molded tiles. But these facts do not impart inventive qualities to the making of a machine to roll such glass. That there were mechanical difficulties to be overcome in successfully rolling prism glass goes without saying. * * * But to our minds all these steps, important as they were to the art, were mechanical, and not inventive, in their nature."

So, also, here we are of opinion that the new location of the Edison joint, while ingenious, useful, and practical, was but a mechanical improvement. He did not discover a copper-platinum joint could be made in a seal without destroying its integrity, but by correcting a false notion as to the effect of such a seal at its other end he broadened the sphere of use of such seal. It was one of those mechanical advances which the increased cost of platinum and closer study of manufacturing problems naturally brought about.

We accordingly hold this patent void, and a decree dismissing the bill may be submitted.

ELECTRIC CANDY MACH. CO. v. EMPIRE CREAM SEPARATOR CO.

(Circuit Court, D. New Jersey. May 16, 1908.)

PATENTS—INFRINGEMENT—CANDY MACHINE.

The Morrison and Wharton patent, No. 618,428 for a candy machine, claim 1, contains but two elements, a rotative perforated vessel, and a heating attachment or burner. By referring to the vessel as "the vessel, A, A', A'', C, C'," the part, A' as shown in the drawings, is not made an element of the claim; but the letters are merely used as designating the vessel described as an entirety. As so construed, said claim *held* infringed.

In Equity. On final hearing.

Francis C. Lowthorp, F. W. Ritter, Jr., Melville Church, and G. P. Ritter, for complainant.

William Houston Kenyon and Pennington Halsted, for defendant.

CROSS, District Judge. The complainant is the owner of letters patent No. 618,428, which were issued to William J. Morrison and John C. Wharton January 31, 1899, for a "candy machine." The pleadings are in the usual form. The first claim only of the patent is involved. It is as follows:

"1. The combination, in a candy-machine, of a rotative, perforated vessel, A, A', A'', C, C', and a heating attachment, or burner, m, substantially as shown and for the purpose set forth."

The defendant has rested its case upon the complainant's proofs, and consequently is restricted in its defense to a denial of infringement. Narrowed still farther, the substantial question for decision is whether the scope of claim 1 in the complainant's patent is so narrowed and limited by the use of reference letters therein that it embraces that particular form of construction only which is shown in the diagram to which the letters refer. On the part of the complainant, it is maintained that there are but two elements in the claim, a rotative perforated vessel, and a heating attachment or burner; while the defendant claims that the flange of the rotative vessel which is indicated in the claims, drawings, and specifications by the letter A' is either an additional element, or an essential feature of the first element, with which, regarded in either way, the defendant has dispensed, and consequently has not infringed the patent in suit. This, as I understand the argument of complainant's counsel, is the only material defense; but, whether or not I am right in this assumption, it is in fact, in my judgment, the only substantial difference, if any, between the two machines. In an application for a preliminary injunction, based upon *ex parte* affidavits, I was in doubt whether or not the defendant's insistence was correct, and, consequently, for that and other reasons, denied the complainant's application. It may properly be stated at this point that the validity of the complainant's patent was upheld in *Electric Candy Company v. Morris* (C. C.) 156 Fed. 972, in which case it was also held to be a pioneer invention in the sense in which that expression is defined in *Westinghouse v. Boyden Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, viz.:

"A device of such novelty and importance as to mark a distinct step in the progress of the art as distinguished from mere improvement or perfection of what had gone before."

Tending in the same direction is the testimony of the complainant's expert, who says that he knows of no candy machine which has the elements of claim 1 upon which the patent in suit is an improvement.

I have already said that in my judgment the only substantial difference, if any, between the machine of the complainant and the defendant, is that the former has the flange, A", which the latter has not. There are, however, some immaterial differences of construction which will now be considered, and, first, the bottom of the complainant's revolving vessel is concave in form, while in the defendant's it is flat, but in the latter the upper part is convex, with the result that the interior of the sugar holding vessel is substantially of the same shape in both, and in either case the bulk of the sugar is held in the center of the vessel as remote as may be from the zone of intensest heat over the circle of gas burners beneath. Moreover, in both, the sugar, as held by the receptacle, is comparatively thin over the burners, so that it may be readily and rapidly melted, after which it is thrown by centrifugal force outwardly to and through the small apertures or perforations in the edge of the revolving vessel. The portion thus melted and thrown out is immediately replaced by unmelted sugar from the mass in the center of the vessel, and this process is constantly repeated while the machine is in operation. In both machines the circle of perforations is located at the outer limits of the sugar-containing vessel, into which the sugar is fed at the top, through a passage shaped like an inverted funnel. This form of opening is used to prevent the sugar from being thrown out at the top of the vessel by its rapid revolution. The transposition of the upper and lower parts of the sugar-containing vessel just referred to is, in my opinion, a manifest evasion. Another but unimportant difference in mechanical construction consists in the fact that the upper and lower parts of the containing vessel are held together, in the case of the patented machine, by clamps, and in the defendant's by bolts. These are plainly mechanical equivalents. Again, the means of rotating the vessels is different. It should be noted, however, that claim 1 does not specify the mechanism which might be adopted for that purpose. It is true that in the specifications, foot power is referred to; but it is added that such power might be replaced by any other suitable power. So, also, the perforations in the two machines, although similarly located, differ somewhat in shape. In the drawings of the patent they are shown as small triangular apertures, while in the defendant's machine they are narrow slits as if made by a very fine saw. In either case, however, they perform substantially the same function in the same way. Then, too, the claim in question does not restrict the openings to any particular size or shape. The vessel is said to be "perforated," and perforations may be of manifold sizes and shapes. Furthermore, the patentees in their specifications say:

"We do not confine ourselves to the exact construction of the machine as shown in the drawings, as it is obvious that various forms might be given to the essential parts."

We come then to a consideration of the question whether or not the flange, A", is so described by letters of reference in the claim as to constitute it either an element by itself or an essential part of an element. The function of the flange, if any it has, is evidently insignificant and unimportant. The specifications, after speaking of the melted sugar as being thrown by the centrifugal force of the revolving vessel through the perforations, adds: "Thence along the flanged part, A", to the extreme edge of the rotative vessel." This is the only reference made to the flange, simply as a flange, and it is apparent that no function is ascribed to it. Complainant's expert, testifying upon this point, says:

"It is evident that flange A" has a variety of functions, although none are specified or even mentioned in the specifications of the patent. It is clear, however, that the flange, A", strengthens the curved portion of the rotating vessel and enables it to retain its shape in spite of the centrifugal forces developed during rotation. A second function is to furnish a means for attaching the cylinder, A', to the rotating vessel, and, thirdly, being always hot during the operation of the machine, the temperature being about the melting point of sugar, it would, if the speed of rotation is low, keep the streams of candy issuing from the perforations in the circumference of the vessel sufficiently warm so that they might continue to stretch during the passage across the flange A", whether narrow or wide, to the receptacle beyond. In case of very rapid rotation this third function would so nearly disappear as to be inappreciable."

It is obvious, however, that, of the functions thus indicated, the first two are purely mechanical and constructive, while the third, in view of his other testimony, is quite unimportant, since he admits in one place that the main stretching of the candy is done after the candy leaves the flange, and, in another, that, in case of very rapid rotation, this function would so nearly disappear as to be inappreciable. We have then a bowl, with a flange or projecting edge of no particular width, and without distinctive function that the ingenuity of an expert can discover, outside of mere mechanical construction, except its possible tendency to stretch the candy when the sugar-containing vessel is revolving slowly, but which practically disappears when it is revolved rapidly. There is nothing, however, in the claim which prescribes any particular degree of speed in the revolution of the bowl. The requisite speed would perhaps be determined to a great extent, by the size of the perforations, since with larger apertures the candy would be ejected by the exercise of less centrifugal force than it would with smaller. In my opinion infringement cannot be avoided by omitting the flange any more than it could be by widening, narrowing, or thickening it. So far as appears it is not an essential element or part of an element of the claim under consideration. In the specifications, in different places, it is spoken of, but always when describing the rotative or revolvable vessel, as an entirety. Thus the inventors at one place speak of "the entire rotative or revolvable vessel," A, A', A", C, C', and again, at another place, as "the revolvable vessel," A, A', A", C, C', and, lastly, as "the vessel," A, A', A", C, C'; that is to say, they describe the vessel as a parallelogram might be described, by placing the letters A, B, C, D, at its respective corners, or a triangle by the letters A, B, C, at its angles. As already said, the patent itself nowhere, ei-

ther in the specifications or claim, attaches any definite or controlling significance to the flange, and it remained for an expert to discover and define its function.

As a matter of fact, then, claim 1 describes a combination consisting of but two elements, "the rotative perforated vessel" and "the heating attachment or burner," and the descriptive letters do not restrict these elements to the precise construction pointed out in the drawings, but rather indicate one of the various forms of construction which the specifications say might be adopted. Whether or not reference letters narrow the scope of a claim depends upon the state of the prior art. The rule is thus laid down in Walker on Patents, at section 182a:

"Reference letters or numerals when used in a claim to indicate, or help to indicate, a part or combination covered thereby, do not limit that claim to the specific mechanism shown in the patent, unless the claim must be thus limited by the prior state of the art."

In *Lake Shore R. Co. v. Car-Brake Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. 33, 28 L. Ed. 129, a brake-shoe patent was considered. The only claim involved was as follows: "The combination of shoe, A, sole, B, clevis, D, and bolt, G; the whole being constructed and arranged substantially as specified." The defendant contended that the element of the lateral locking motion of the sole B, should be read into the claim, since it was described as one of the features of the sole in the specification. This contention, however, was disallowed; the court saying, at page 236 of 110 U. S., at page 36 of 4 Sup. Ct. (28 L. Ed. 129):

"There is no suggestion that the combination of the second claim was not new; and, there being nothing shown in the state of the art which requires any such construction of the second claim as that contended for by the defendant, and it being fairly susceptible of the opposite construction, and the latter being one which is commensurate with the real invention embraced in the second claim, and one which prevents the real substance of that invention from being bodily appropriated by an infringer, it is proper to give the claim such a construction."

Again, in *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 45 C. C. A. 544, we find the following statement of the law upon pages 714 and 715 of 106 Fed., pages 565, 566 of 45 C. C. A.:

"There are cases wherein the form of a device is the principle of the invention. There are other cases wherein the state of the prior art and the specific terms of the specifications and drawings leave no doubt of the intention of the applicant to restrict his claim to the specific form of the device or element he points out. In such cases claims of patents are sometimes limited to the specific forms of the devices pointed out by letters or numbers in the claims or specifications. * * * The description in a specification or drawing of details which are not, and are not claimed as, essential elements of a combination, is the mere pointing out of the better method of using the invention. *City of Boston v. Allen*, 91 Fed. 248, 249, 33 C. C. A. 485, 486. A reference in a claim to a letter or figure used in the drawing and in the specification to describe a device or an element of a combination does not limit the claim to the specific form of that element there shown, unless that particular form was essential to, or embodied the principle of, the improvement claimed"—citing numerous authorities.

The same rule was laid down in *Electric Candy Mach. Co. v. Morris*, *supra*, wherein the patent under consideration was upheld. Of the mul-

titude of authorities that might be cited, the above are sufficient to illustrate the point in question.

In the case at bar, the prior art is not before us, and there is nothing of record therefore which demands or requires a limitation of the claim. On the contrary, the patent has been adjudged in another jurisdiction to be a pioneer patent, and the testimony of complainant's expert points in the same direction. There is consequently no apparent reason why any restrictive force should be given to the letters of reference. There is no reason why the letter "A" should be held to constitute an element or an essential part of an element of the claim in suit. Any argument in that direction would make each of the other lettered parts also distinctive and essential elements incapable of the slightest variation. As already indicated, the letters of reference simply point out the "rotative vessel," and do not restrict the claim to the particular form of construction shown in the drawings. The differences between the defendant's machine and the complainant's, such as they are, are merely details of mechanical construction.

I have therefore reached the conclusion that the defendant has infringed the complainant's patent.

A decree in the usual form to that effect will be entered with costs.

AMERICAN LAUNDRY MACHINERY MFG. CO. v. ADAMS LAUNDRY MACHINERY CO.

(Circuit Court, N. D. New York. May 15, 1908.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction denied to restrain infringement of the Barnes patent, No. 684,776, for a clothes drier, on the showing made as to the prior art affecting the construction and perhaps validity of the patent.

[Ed. Note.—Grounds for denial of preliminary injunction in patent infringement suit, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

In Equity. Application for injunction pendente lite restraining the defendant from making and selling what are known as "conveyer dry rooms," and which are alleged to infringe the first six claims of United States letters patent No. 684,776, dated October 22, 1901, to William M. Barnes for "clothes dryer."

Church & Rich (Frederick F. Church, of counsel), for complainant.

Wm. W. Morrill (Walter E. Ward and E. B. Stocking, of counsel), for defendant.

RAY, District Judge. The six claims of United States letters patent to William M. Barnes, No. 684,776, dated October 22, 1901, for clothes dryer, and alleged to be infringed by the defendant, read as follows:

"1. In combination, a drying-room having heating-coils extending upwardly on the side thereof, a conveyer traversing said room, the central portion of said room beneath the conveyer being devoid of heating-coils and an air-circulating device in said room above said conveyer driving said air downward.

"2. In combination, a drying-room having heating-coils extending upwardly on the side thereof, a conveyer traversing said room, the central portion of said room beneath the conveyer being devoid of heating-coils and an air-cir-

culating device in said room, substantially central of and above said conveyer, driving said air downward.

"3. In combination, a drying-room having heating-coils extending upwardly on the sides thereof, a conveyer traversing said room, the central portion of said room beneath the conveyer being devoid of heating-coils and an air-circulating device in said room above said conveyer driving said air downward.

"4. In combination, a drying-room having heating-coils extending upwardly on the sides thereof, a conveyer traversing said room, the central portion of said room beneath the conveyer being devoid of heating-coils and an air-circulating device in said room, substantially central of and above said conveyer, driving said air downward.

"5. The combination, with a drying-room provided with heating-coils on the sides only of the lower portion of said room, of a conveyer traversing said room above said heating-coils and an air-circulating device in said room above said conveyer and substantially central of the drying-room, said circulating device driving the air in said room downward.

"6. The combination, with a drying-room, provided with heating-coils on the sides only of the lower portion of said room, of a conveyer traversing said room above said heating-coils and at substantially the same level throughout, and an air-circulating device in said room above said conveyer and substantially central of the drying-room, said circulating device driving the air in said room downward."

The defendant claims (1) that there is no patentable invention disclosed in view of the prior art; that the patent would not have been granted had the whole prior art been before the Patent Office; (2) that the alleged combination is but a mere aggregation; (3) that, conceding patentable invention, it is of a very narrow character, in view of the claims and file wrapper; and that, narrowly construed, as it must be, the defendant does not infringe. The defendant insists that a negative element—that is, the absence of heating-coils from the central part of the drying-room—is an essential part of the complainant's "clothes drier," and that, as defendant's device has heating-coils so located, it does not infringe. Defendant insists that the file wrapper of the patent in suit shows that the patent was granted when and only when this specific limitation was placed in the claims, and that in this respect only is it materially distinguishable from the prior art. The defendant also insists that the prior adjudication of the validity of this patent by Judge Holland in *Barnes v. Lingo*, 151 Fed. 59 (Eastern District of Pennsylvania), should be disregarded, as it is apparent that Judge Holland did not have the whole prior art before him in considering the validity of the patent.

In reading the claims in suit we find that in claims 1, 2, 3, and 4 we have the words, "the central portion of said room beneath the conveyer being devoid of heating-coils," and that in claims 5 and 6 we have the words "drying-room provided with heating-coils on the sides only of the lower portion of said room." This is a combination patent, and in claim 1 the combination consists of (1) a drying-room having (a) heating-coils extending upwardly on the side thereof, (b) a conveyer traversing said room, (c) the central portion of said room beneath the conveyer being devoid of heating-coils, and (d) an air-circulating device in said room above said conveyer driving said air downward. The distinguishing features of this room, as mentioned in claim 1, are the heating-coils extending upwardly on the side of the room, (2) the absence of heating-coils from the central part of the room beneath the convey-

er, (3) the conveyer for carrying the material to be dried, and (4) an air-circulating device in the room located above the conveyer driving the air downward. Claim 2 locates the air-circulating device in said room "substantially central of" as well as "above said conveyer." Claim 3 is the same as claim 1, except it has "heating-coils extending upwardly on the sides" of the room, instead of side. Claim 4 is the same as 3, except the air-circulating device is central of, as well as above, the conveyer.

In the first four claims the heating-coils extend upwardly on the side or sides of the room, and there is no limitation as to distance. In these claims "the central portion of the room beneath the conveyer" is spoken of; but this does not necessarily mean that this "central portion" is the "central portion" of the room, unless it is understood that "a conveyer traversing said room" traverses the entire room. If the conveyer traverses the entire room, then the central portion of the room beneath the conveyer does not include the entire floor space of the room. I think a fair and sensible construction of the language of the claims is that the conveyer traverses the overhead part of the room substantially in all its parts, except near the coils and walls, not every portion, and that "the central portion of said room beneath the conveyer" includes all of the floor space not adjacent to the four walls of the room. In claims 5 and 6 the heating-coils are on the sides only of the lower portion of said room, and the conveyer traverses the room "above said heating-coils"; but I do not think this means that the conveyer is directly above the heating-coils. It is higher up in the room and traverses it from side to side. I think the combination of these claims is a room containing the heating-coils on the side or sides of the room only; a conveyer traversing the said room at a suitable distance from the floor; an air-circulating device in said room above the conveyer which so operates as to drive the air downward. These claims are so broad as to cover any heating-coils, but they must be located on one side or two or more sides of the room, and the room may have any desired number of sides.

While the patentee in his specifications describes a room, he does not refer to it in any way in these six claims except as a room, or limit his first six claims to such a room. The claims cover any conveyer which traverses the room and any air-circulating device which will drive the air downward. The sides of the room, including top and floor, confine the hot air; the heating-coils heat the air at the side or sides of the room; and the circulating device circulates the hot air by driving it downward mainly in the more central part of the room—that is, in the parts away from the sides of the room. It is not necessary in all the claims that the circulating device be located centrally of the overhead part of the room. As the tendency of the heated air, heated by the coils, is to rise, and as the circulating device drives the air from the top of the room, where it becomes cooler, downward, and it flows thence to the coils, from which the heated or hotter air is rising, it is evident that there is a substantially even heat maintained throughout the room, with a general down draft, except next the sides of the room having heating-coils where there is an upward current. This is

the general course or current of the air; but it is also evident that with angles and clothing on the moving conveyer there will be side currents and eddies of the heated atmosphere. No one of these claims refers to the specifications for any limitation. The claims are not limited to the devices shown and described. It is evident that the purpose is to maintain an equal temperature in all parts of this room, to keep the air in constant circulation, and to keep the articles to be dried and carried on the conveyer in constant motion and exposed equally and uniformly to the heated and, generally speaking, downwardly moving current of air.

Is this a new conception, and do we have new means, or a new combination of old elements furnishing improved means for drying clothing? If we have a new combination of old elements, do we have a new mode of operation, with new or with improved results? If so, we may have invention. This depends on the nature and extent of the changes and improved results. We have nothing to do, in considering these six claims, with the particular form or construction of the room, or of the conveyer, or of the air-circulating device, except that it must be so constructed or operated as to drive the air downward. The other claims relate to those details of construction. The patentee in his specifications says:

"My invention, speaking generally, belongs to that class of driers in which the articles to be dried are carried by an endless carrier, and, further, in carrying the goods secured to the endless carrier through a heated room; the goods being dried in their passage through this room. My invention has for its object to accomplish the drying in a more thorough and certain manner. To that end, speaking generally, my invention consists in a carrier which traverses the drying-room on edge and passes around guiding-wheels on vertical axes. By this construction any number of traverses or turns in the drying-room may be made without the guiding wheels interfering with the articles carried by the carrier, and thus may all be at the same level in the room, whereby the articles are constantly subjected to the most efficient temperature in the room. * * * Further, my invention comprises certain improvements in the drying-room itself, and the relation of the heating medium, carriers, etc., to each other whereby the best result is obtained, etc. * * * By the construction described it will be seen that the heating-coils are at the sides of the room and the fan above the conveyer. The air rises from the bottom along the sides, being heated by the heating-coils, and the fan forces it downward through the center to the bottom, from which it again rises, as before described, thus producing a perfect circulation. * * * Further, the arrangement of the heating-coils is at the sides of the room and the fan above the conveyer carries a perfect circulation of the heat and a complete and rapid drying. * * * I also desire it to be understood that the arrangement of drying-room with the heating-coils at the sides of the room and the fan above the conveyer has advantages, whether the conveyer be used on edge or flat."

While not described or mentioned in the patent, it is said that this arrangement of heating-coils on the sides alone with fan (air-circulating device) at the top of the room above the conveyer driving the current of air downward, has advantages, such as keeping the clothing hung on the carrier or conveyer in a perpendicular position, not liable to be blown off, as the current when the conveyer moves is downward; the air in the room of an even temperature throughout, as the coldest air at the sides is first heated. The absence of heating-coils in the central part of the room prevents interference with the down cur-

rent from the fan in the central part, as no heat is rising there, and also prevents clothing falling from the carrier or conveyer from coming in contact with heated coils and becoming soiled or burnt, and also allows easy entrance into the room and unobstructed movement therein when necessary. All these advantages are perfectly obvious. Radiators and steam and hot water pipes have been placed on the outer edges of the room generally to insure the better and more uniform heating of the room, as well as to be out of the way. All this was old and common knowledge in 1900 when this patent was applied for. So it was common knowledge that air when in circulation, whether cold or hot, would dry clothing more quickly and better than when still. So that a down current of air would better maintain the perpendicular position of hanging clothing than a side or horizontal current. It was nothing new that air in a room, like water in a barrel, into which heat is being injected at one or two points, or even more, will have a more uniform and even temperature in all parts of such receptacle if constantly in motion, or stirred up.

Turning to the prior art for the elements of the first six claims of this patent and their combinations, we find patent to J. H. Therien, No. 646,327, dated March 27, 1900, for "drying-room," which has the four-walled room, with top and bottom; the air-circulating device, "a peculiarly-constructed fan used in the upper part of the drying-room, * * * which I place at the upper part of the drying-room for the purpose of driving down the hot air that naturally rises from the steam coil, * * * and causes the blades to work at such angles that more of the hot air is displaced and forced down at any one time than can be accomplished with any other fan heretofore known"; the heating-coil of steam pipes, which are located on or near the floor of the room and heat the room; and also "conveyers" for carrying the articles of clothing to be dried in and out of the room and holding them while in the room. This Therien drying-room in its apparatus differs from Barnes in two respects, viz., the location of its steam heating-coils and the form and operation of its conveyer or conveyers.

In the patent in suit, Barnes, the conveyer not only enters the room, but traverses said room above the heating-coils at substantially the same level; that is, it carries the clothing to be dried about from the one point of the room to another so that each article is exposed to the heat of all parts of the room on that level and also to the same up and down or horizontal currents of air; that is, each article gets precisely the same treatment in the drying-room. In Therien we have shown four carriers or conveyers, each used to carry the clothing in, hold it suspended thereon while in the room in the same place or location, and then carry it out. These are shoved or pushed in and pulled out, being suspended on rods with rollers, and held at the bottom from wobbling. The articles of clothing have no motion while in the room, unless imparted by a current of air. If, perchance, there is a difference of temperature in different parts of the room, then some articles are dried more than others. There may not be uniformity. If any clothing falls from the carriers, it drops upon the heating-coils below, and unless there is a grating they may become soiled, or if there be a grating then those which fall are so near the hot coils that they may become scorch-

ed or discolored. Again, as the heating-coils are on the floor, the air heated thereby rises and mixes with the down current coming from the fan, and eddies or currents are created, and the clothing swayed or blown from side to side, and may become detached from the carriers. The circulation is not as perfect, for the reason that the direct up current from the coils is met and opposed by the down current from the fan. Hence we have in Barnes two improvements over Therien—(1) the carrier traversing the room, and (2) the location of the heating-coils.

Turning now to Proctor, No. 525,921, of September 11, 1894, "drying machine," he says:

"The principal objects of my invention are, first, to provide a comparatively simple, durable, and efficient drying apparatus; second, to provide a compact drying apparatus in which a continuous circulation of the air is insured for drying as well as quickly absorbing moisture from suspended materials in a wet or other condition therein; and, third, to provide a drying apparatus adapted for the reception of a movable truck or similar appliance, which is adapted to support the fibrous or other materials in a wet or other condition in such manner as to be subject to the direct influence of a continuous and vigorous circulation of heated air or other medium to expeditiously dry out the same, and the apparatus so arranged as that it may be operated continuously—that is, materials subjected to the influence of the circulating drying medium therein and under such arrangement as that the materials may be readily removed therefrom and other materials quickly introduced, so as to be subject to the influence of such medium for a like purpose, without stopping or interfering with the perfect working of the appliance."

He has the same room, as a mere room; the fan in the upper part thereof to circulate the air; the movable trucks, on which are hung the articles to be exposed and dried; and the heating-pipes or coils, located on the sides of the room. Aside from mere detail of construction, we have Barnes, except the "conveyer traversing said room." The trucks or carriers of Proctor are pushed in when loaded with hanging clothing and pulled out through a door or doors when the drying is completed. They are stationary while in the room. These substantially are the trucks of Therien.

Turning to Hatfield patent, No. 217,102, dated July 1, 1879, for "improvement in clothes-drying machine," he says:

"The object of this invention is to furnish an improved machine for drying clothes and other similar articles, which shall be so constructed that the clothes will pass through the machine in one direction and the hot air in the other, which will allow the clothes to be attached outside of the drying-room, which will cool the clothes as they pass out, and will drop them automatically as they pass out, which will so direct the current of air as to effect the best results, which will allow the escape of the air to be controlled, which will economize the heat, and which will be simple in construction and convenient in use. The invention consists in means, substantially as hereinafter described, by which the clothes are secured, carried through a drying-chamber so as to automatically open weight-held doors and discharge without manual intervention; a counter-current of heated air blowing upon them as they proceed."

He plainly shows and describes an endless carrier or conveyer traversing the drying-room upon which the clothing is suspended and moved from point to point while undergoing the drying process. The clothing is attached thereto outside the chamber and carried in and about the

same and then out and automatically dropped. Hatfield has no fan. His steam pipes are thus described:

"The air is heated to dry the clothes by a system of steam pipes, V, which receive steam from any suitable steam-boiler or steam-generator, and which rest upon low walls or beams, W, which rest upon the bottom of the drying-chamber, L, and extend entirely across the said drying-chamber."

No point seems to be made as to the location of the pipes at or near the sides of the room. Here we have the idea and the element of the endless conveyer traversing the drying-room or chamber.

Without describing or mentioning other patents in this precise art, we will consider British patent to Norton, No. 2,685, dated October 29, 1864. This is a complex and a compound device or drying-room with machinery and apparatus for both drying and stretching the fabrics. It may also be used for either purpose separately. As a mere drying-room we have the endless carrier traversing the room, and, as the fabrics to be dried are attached to this part outside and before it enters the room, such fabrics are carried into and about the room, exposed to the heat, and then out. The fabrics are hung on the traveling conveyer. Steam-heating pipes or coils are shown on the sides of the room, and there may be a fan for circulating the air. I do not see that we have the fan, air-circulating device, if used, located at any particular point, or that stress is laid on the location of the heating-coils or pipes. In substance and effect we have the Barnes drying-room and apparatus shown; but we do not have his limitations as to the location of certain elements, such as the air-circulating device and steam heating-coils.

Barnes has written into each of his claims a negative element, the absence of heating-coils in the central part of the room. The defendant insists that this is what differentiates Barnes from the prior art, and that this insertion in his claims is what secured the allowance of his claims; that hence it may use the combination of the prior art, the drying-room of Barnes, so far as to construct, sell, and use a drying-room having the carrier traversing the room; the air-circulating device or fan located above the carrier and so arranged as to drive the air downward; and steam heating-pipes or coils located both on the side or sides and in the central part of the room. Defendant claims this is a mere return to the prior art, from which Barnes departed when he inserted the negative element, absence of heating pipes in the central part of the room, in his combination.

Says Walker on Patents (4th Ed.) p. 306, § 347:

"But if a patented combination differs from some older combination only in the omission of one of the parts of the latter, and in a resulting difference of mode of operation, the restoration of the older structure by adding the part which the patented combination omitted would not constitute an infringement of the latter."

He cites *Shoemaker v. Merrow*, 61 Fed. 948, 10 C. C. A. 181. The case cited is instructive, but not exactly in point here. What the court said was:

"But suppose it was not shown that Munsing anticipated him, and his patent was consequently held to be valid. The result would be the same. His claims in such case would necessarily be so construed as to exclude the

'finger' and its equivalents. After withdrawing a specific claim for this element in favor of Munsing, he would be precluded from setting it up. His patent, if valid, is for the combination minus the 'finger'—a device whose novelty consists in dispensing with this element. The respondents, as before suggested, do not infringe such a device; for they use the 'finger' and their machine will not work without it."

Here the drying-rooms will work, do effective work, with the heating-coils on the floor alone, or with heating-coils on the sides alone, or with heating-coils in both places. The general rule is:

"Addition to a patented machine or manufacture does not enable him who makes, uses, or sells the patented thing with the addition to avoid a charge of infringement. This is true, even where the added device facilitates the working of one of the parts of the patented combination, and thus makes the latter perform its function with more excellence and greater speed, or where the added part hinders the patented combination from having some of its minor merits." Walker on Patents (4th Ed.) § 347.

I am inclined to the opinion that Barnes has an improved combination of old elements and an improved result. I do not agree with the contention that he has revolutionized the clothes-drying art in laundries. The test of invention is mental conception, not larger sales, or improved results, or benefits conferred on mankind. All these are evidence of invention, but not invention as the Supreme Court of the United States has repeatedly decided. To hold that a combination of old and well-known elements in the old way with some modifications to which the skill of the ordinary mechanic skilled in the art is adequate, unless to meet a new and novel exigency, is patentable for the reason the benefit to mankind is valuable and extensive, is to reward every mechanic for exercising his skill, not his mental conceptions, by a monopoly, and is a misconception and works a perversion of the patent laws.

I am asked to grant this preliminary injunction on the authority of *Barnes v. Lingo* (C. C.) 151 Fed. 59. In that case all the claims of the patent here in suit and claims 1 to 17 and 21 to 24, inclusive, of a patent to Barnes, No. 684,778, for a clothes-drying machine were in issue and held valid. It is evident from the language of the opinion that the learned judge did not have the prior art before him, for he says:

"A great number of patents have been cited against these at bar to show that everything used by Barnes in his combination had been known for a long time in this art. I shall not attempt to refer to these patents separately, but shall only state that, after an examination of the evidence by the experts on both sides in reference to these patents, I conclude that all of them are patents in an art entirely different from the art involved in the Barnes patent."

The prior art is before me, and at least eight different prior patents in the precise art of this Barnes patent, viz., "clothes-drier." He says:

"I * * * have invented a new and useful improvement in clothes-driers. * * * My invention, speaking generally, belongs to that class of driers in which the articles to be dried are carried by an endless carrier, and, further, in carrying the goods secured to the endless carrier through a heated room, the goods being dried in their passage through the room. My invention has for its object to accomplish the drying in a more thorough and certain manner."

I think this device belongs to the art of drying clothing and similar articles by means of artificial heat and circulation of air in a suitable structure. The Norton patent speaks of cloth, yarn, such materials as require to be suspended when under the process of drying wool, velvets, and other fabrics, or other fibrous materials; Hatfield is for drying clothes and other similar articles; Proctor is for drying fibrous and other somewhat similar materials; Dixon is for drying collars and cuffs; Therien is for drying clothing, and shows shirts suspended in the drying-room; Proctor for drying any goods which can be hung or suspended on poles, etc.; McGlone is for drying clothes; Lumppp is for drying cloth or other textile, etc.

I am not much impressed with defendant's suggestion that this is a mere aggregation, and not a true combination. The object is to dry clothing as stated. This is the result. Hot air must be generated, radiated into the room, and circulated, and the clothing exposed to its efficient action. The various elements seem to be essential and to co-act in producing the result.

I have gone through the affidavits presented, the file wrapper, the opinion in *Barnes v. Lingo*, and the prior art to see if this is a proper case for a preliminary injunction. Is there a reasonable doubt of the validity of these six claims in issue, or is it free from doubt, having in mind that the presumption is that the combination discloses patentable invention? In view of the opposing affidavits, the state of the prior art, and the decisions of the Circuit Court of Appeals in this circuit, I am of opinion that a preliminary injunction should not issue at this stage of the case at least. No evidence has been taken, and affidavits, when there is a square clash of expert evidence, with no opportunity of cross-examination, are not to be implicitly relied upon. I think great injustice might be done, should I grant this motion. If denied, there can be a speedy taking of testimony and a speedy final hearing. If such hearing is not consented to, there can be a renewal of the motion when the evidence is closed.

Motion denied.

**BONSALL v. T. B. PEDDIE & CO. SAME v. AMERICAN SPECIALTY CO.
SAME v. STRAUSS et al.**

(Circuit Court, S. D. New York. May 29, 1908.)

1. PATENTS—VALIDITY AND INFRINGEMENT—WARDROBE TRUNK.

The Bonsall patent, No. 604,346, claim 3, for a trunk adapted for hanging therein ladies' dress skirts and other garments so they may be carried without crushing, discloses novelty and patentable invention, and is of a pioneer character. Claims 4 and 5, for hanger frames for garments, are void for lack of patentable invention, in view of the prior art. Claim 3, also, *held* infringed.

2. SAME—RECEPTACLE FOR CLOTHING.

The Bonsall patent, No. 642,075, for improvements in receptacles for garments consisting of frames and hangers, claims 3 and 4, are void for lack of invention. Claim 5, which covers a device by which the suspended garments are made to incline inwardly and press together, in view of the novelty and utility of such device and its commercial success, must be conceded patentable invention and given a liberal construction as a pioneer. As so construed, *held* infringed.

In Equity. Suits to restrain alleged infringement of certain United States letters patent and for an accounting.

H. S. Mackaye, for complainant.

Dickerson, Brown & Ragener, for defendants.

RAY, District Judge. As defendant T. B. Peddie & Co. makes and sells the alleged infringing devices, and the defendants in the other cases merely sell such devices so made by T. B. Peddie & Co., and as all defend by same counsel, it was courteously agreed that evidence should be taken in one case only, read and used in all three, and that there shall be but one bill of costs.

Complainant charges infringement of claims 3, 4, and 5 of United States letters patent No. 604,346, dated May 17, 1898, to Seymour W. Bonsall for "dress skirt and wardrobe trunk," and claims 3, 4, and 5 of United States letters patent No. 642,075, dated January 30, 1900, to Seymour W. Bonsall for "receptacle for clothing." The claims in issue of the first patent mentioned read as follows:

"3. In a trunk, a slide adapted to move forward when the trunk is on one end, a prop at the forward end of said slide, and a cover-flap hinged to said trunk at one end and adapted when open to afford a bearing for the lower extremity of said prop.

"4. A hanger-frame adapted to slide back and forth, said hanger-frame comprising bearing sides and intermediate supporting-bars, in combination with hangers adapted to slide on said supporting-bars.

"5. A hanger-frame adapted to slide back and forth, said hanger-frame comprising bearing sides and intermediate supporting-bars, in combination with hangers adapted to slide on said supporting-bars and a prop for said frame attached to its outer end."

It will be noticed that claim 3 of this patent is for a combination of elements in a trunk, while the combination of elements in claims 4 and 5 have no reference to a trunk whatever. As to claims 4 and 5 it says:

"One portion of my device, namely, hanger, is useful as well in a fixed closet or wardrobe as in a trunk, and I have claimed same aside from a trunk in the claims hereof."

As to his invention he says that it relates to an improved device in which ladies' dress skirts and other garments can safely be carried without crushing or disturbing the folds in which it is desired they should remain; that his device is especially adapted to the needs of traveling salesmen, importing dressmakers, and ladies who wish to visit health or pleasure resorts with an extensive wardrobe, and those persons who desire economy of room and easy access to their suspended clothing. As shown, the lid of the trunk is made in two parts, and when the trunk is set on end and opened one part of the lid lies flat upon the floor, and the other portion of the lid is thrown back upon the upper end of the trunk. Close to one end of the trunk, and upon each of two opposite sides, are placed or attached two guides running from the bottom or back of the trunk to the top or front thereof. On these guides is suspended a frame or sliding rack, so that this rack may run easily back and forth when the trunk stands on end and is open. The outer or upper end of this sliding rack has two

cross-pieces, extending from front to rear when standing on end, which cross-pieces support the hangers. These hangers are for supporting the clothing and may be of any desired form and material. This sliding rack has a cross-bar, which supports the two cross-pieces mentioned, and against this cross-bar the flap or top of the trunk, when closed, rests so as to hold the sliding rack firmly in position. To this cross-bar are attached two props or legs, connected near their lower ends by a brace which holds them parallel to each other, and these props or legs rest upon that part of the top or lid of the trunk lying upon the floor, so that when the trunk is placed on end and opened, and the sliding rack or frame, with the suspended clothing, is drawn out, such clothing is protected thereby from coming in contact with the floor. The trunk may be turned, also, on the carpet or floor, and the clothing is always protected as the trunk lids, sliding frames, props or legs, and suspended clothing all move in unison.

The operation of this trunk is substantially as follows: The trunk is set on end and opened. The sliding rack is then drawn out, with its hangers suspended or resting upon the cross-pieces. The clothing is then attached to suitable hangers and hitched upon the hangers extending from cross-piece to cross-piece. As the garment is suspended in this way, it may be pressed or slid back toward the bottom of the trunk. Garment after garment is suspended in the same way, and enough may be suspended to entirely fill the trunk. Of course, a lesser number may be suspended. This operation of filling the trunk with suspended garments being complete, the sliding frame is pushed back into the trunk, carrying the clothing with it. The lids or flaps are now closed and the trunk locked. If it is desired to make sure that the suspended clothing will not shake or flop about, a strap or cord may be tied around the entire body of clothing. When the trunk is wholly or partially filled in this way, it may be turned down on its bottom, or turned bottom side upwards, and the clothing will keep in position during transportation. On arriving at her destination the owner sets the trunk on end in his or her room, unlocks or opens the same, pulls out the sliding frame or rack, loosens the cords, if used, and finds the clothing properly suspended on the hangers as in a closet or room. By sliding the different hangers the different garments are supported a little distance apart, and any one may be taken out for use without disturbing the others, and the rack or frame may then be shoved back into the trunk, or the rack may be left pulled out. So one of the garments may be replaced without disturbing the others. I do not see why this trunk, containing this device, may not be used by a gentleman for his clothing, as well as by a lady for hers.

I have carefully examined the prior art, but find nothing that anticipates this. We have a trunk containing a bed and drawers or apartments to contain clothing, and this bed in two parts may be drawn out; the end of the framework resting on legs or supports. However, this is not a device for suspending clothing. So we have a trunk with drawers for containing clothing, but this is not the device in question. We have clothes driers with sliding racks, upon which clothing may be suspended. We also find in patent to Barnes, No. 546,647, of September 24, 1895, "apparatus for holding drawings,"

a sliding framework with supports, with cross-bars and hangers for suspending and holding drawings. This apparatus is somewhat suggestive of the device in question, but quite different. I regard this combination of the complainant in a trunk as a new and useful and novel and patentable invention. He seems to have been a pioneer, and is deserving of credit and protection as an inventor. I think that claim 3 of this patent is valid, and infringed by the defendants and each of them.

As to claims 4 and 5 I do not think they disclose patentable invention. These claims are very broad, and would include every combination hanger frame having the following elements: (1) Bearing sides and (2) intermediate supporting bars, with (3) hangers adapted to slide on the supporting bars, and (4) a prop for the frame attached to the outer end. Claim 4 omits the prop; that is, claim 4 includes a hanger frame such as is shown in patent to Shannon, No. 380,949, of April 10, 1888. That hanger frame has bearing sides, is adapted to slide back and forth, and has supporting bars; and it has hangers, but of a different description. But the sliding hangers of Bonsall are not so connected as to form an integral part of the frame. Any hanger that will slide on a bar or rod will do. In Barnes, No. 546,647, of September 24, 1895, we have very clearly a hanger, with bearing sides, adapted to slide back and forth, and intermediate supporting bars. He also shows hangers or holding devices. Hangers to which we attach the clothing are of various forms, and may be hung on a nail, a hook, or a bar, and will slide thereon. Barnes shows a prop or props. Singer, No. 235,032, of November, 1880, shows a sliding frame, in a trunk, having bearing sides. A mattress is supported thereon, and this frame has props. Such or similar sliding frames, with or without props or legs, and having bearing sides, and adapted to slide back and forth, are so numerous and common that I cannot discover patentable invention in the combinations of claims 4 and 5.

Defendant says he does not infringe claim 3, because Peddie's prop or leg is not at the forward end of the slide and is not fastened permanently to the outer extremity of the rack. I think Bonsall a pioneer to such an extent that infringement cannot be avoided by changing the location of the leg or prop, or the mode of connecting it with the sliding frame, or by removing it altogether. Infringement is not avoided by changing the location of an element of the combination, unless you change the mode of operation or secure far better results.

Coming to patent No. 642,075, it is evidently an improvement on the patent already considered. In a receptacle for garments, trunk, closet, or the like, in claim 3 we have (1) a pair of substantially horizontal rods; (2) a frame depending therefrom; and (3) two sockets attached to the sides of said frame, said sockets being adapted to slide on said rods and to grip the latter when the bottom portion of said frame is pressed forward. In claim 4 we have (1) a sliding rack having side rods and (2) a confining frame sliding on said rods and adapted to serve as a support for said rack when the latter is drawn out. In claim 5 there is (1) a sliding rack having side rods; (2) a

confining frame; and (3) sockets on said frame adapted to slide on said rods—said frame being hung so as to incline inward when unconfined, and said sockets acting to grip said rods when the lower part of said frame is pressed outward.

In claim 3 of this patent I see no possible patentable combination. Two horizontal rods; a frame depending therefrom; two sockets attached to the sides of the frame. Rods, frames, and sockets are old, and a frame depending from one, two, or more rods is no novelty. But the sockets slide on the rods. I take it that such sockets so adapted and used are no novelty. But the sockets are so constructed or adapted that they grip the rods when the bottom part of the frame to which they are attached is pressed forward. What is new or novel in this? A socket is "an opening or cavity into which anything is fitted; any hollow thing or place which receives and holds something else." See Century Dictionary. Put two sockets on a frame, one on each side, run a rod smaller than the socket through each, and the adaptation is perfect, and the sockets will slide on the rods. But they are to grip the rod when the bottom of the frame is pressed forward. Take the frame with sockets attached to the rods in the manner just mentioned, and, if the sockets are only sufficiently large to allow them to slide easily on the rods, press the bottom of the frame forward and see what will happen. In every instance the sockets will grip or bind on the rods and prevent sliding. To prevent the gripping or binding you must carry the frame substantially perpendicularly to the rods. This is common knowledge. Bonsall does not confine himself to some particular form of socket. He says:

"It is to be understood that my invention covers every form of socket which will permit the retaining member [the frame] to slide along its rod, whether made of wire or otherwise."

Claim 3 is invalid. Claim 4 is so broad that it covers every sliding rack having side rods; that is, rods on its sides, and a confining frame sliding on such rods of such length that it will act as a support to the rack when drawn out. Sliding racks are old. To add side rods is not invention. See Bovey, No. 190,409, of May, 1877. Sockets binding on rods is not an old idea. It is fully described in patent to Wood, No. 341,394, of May, 1886. As to sliding racks arranged with hangers on rods so that one suspended garment may be taken out without disturbing the others, see Holzhalt, "clothes rack for wardrobes," No. 356,125, of January 18, 1887. I find no patentable invention in claim 4 of this patent, having in view the prior art. It is too broad in any event.

Claim 5 is invalid, unless there is patentable novelty or mental conception amounting to invention in so hanging the frame that it will "incline inward when unconfined; the sockets being adapted to grip the rods when the lower part of the frame is pressed outward." To hang the frame so it will incline inward when unconfined the patentee has two sockets on his frame if only one suspended bar is used as a confining frame, and four sockets, two at each rod, if the frame has two suspended bars united by a cross-piece. See Figs. 3 and 4. In order to have the suspended frame, whether of the one construction

or the other, incline inwardly—that is, towards and so as to press against the suspended clothing and act as a confining frame—the suspended frame has two sockets on each rod attached to the perpendicular bar or leg, one in its front and the other in its rear. One of these sockets at each rod is prolonged above the other, so that in fact it has a larger opening on the perpendicular line. The result is that the shorter, or, so to speak, smaller, socket takes the weight and pull of the suspended frame soonest, and as the frame is then suspended from one side the other side drops down, and the lower part of the frame tilts or inclines backward in obedience to the law of gravity. However, this backward swing of the frame is arrested by the other socket so soon as it comes in contact with the rod. In Fig. 4 Bonsall shows this inner and shortest socket made of wire, evidently, bent once and a half about the rod which passes through it. Made in this way this socket grips the rod. You would get the same result should you attach two ears to the suspended frame, one each side of the leg, with a hole in each ear above the leg, with one hole made longer up and down than the other. Such a structure, such sockets, would be within and covered by this patent, or this claim of the patent. On this subject the specifications of this patent No. 642,075 say:

"I prefer to use two rods, 4, and a retaining member carried by both, as shown; and I prefer, as shown, further, to utilize the outer support for the rack shown in my patent aforesaid as the retaining means. The retaining member itself preferably consists of two legs or side bars, 6, joined by appropriate cross-pieces, 7; but a retaining member, consisting of but a single bar, 6, and sliding upon a single rod, would be within my invention. At the top of each side bar or leg, 6, I provide a form of mounting whereby the legs are hung upon the parallel rods, 4, in a manner to permit of the legs sliding back and forth upon said rods 4. This mounting preferably takes the form shown in Fig. 4, wherein a wire socket is attached to the top of the leg, 6; said socket comprising two parts, 8 and 9, looped over the rod, 4. These parts may be made in one piece, or in two pieces, as desired. As shown in the drawings, two different shapes of bent wire are shown as employed for the socket, 8, 9; but it will be readily understood that many shapes may be given to these wires without departing from the spirit of my present invention. In my preferred form of socket the forward part, 9, is sufficiently prolonged above the other part, so that, as the legs, 6, hang naturally, the center of gravity may come under the bearing-point of the part, 8, without the loop of the part, 9, coming in contact with the top of the rod, 4. The part, 8, is placed nearest the rear of the trunk or wardrobe in which it is used, and the consequence is that the natural tendency of the legs, 6, as they hang free is to incline toward the rear of the trunk or wardrobe. I prefer to make any socket which I use in this connection, so that this natural inclination toward the rear is secured, although it is to be understood that this feature of my invention is not a vital one. It is to be understood that my invention covers every form of socket which will permit the retaining member to slide along its rod, whether made of wire or otherwise. In the form of socket shown the part, 9, serves merely to prevent the legs, 6, from being inclined too far back when used."

To my mind this mode of suspending a frame having two legs and a cross-bar, or only one leg, so that the lower part especially will tilt back, is neither new nor novel. I think it has been common knowledge, of which any intelligent court should take judicial notice, that a piece of timber, say two inches thick and one or two or more feet in length, when suspended on a rod by a socket attached to one side

only, will incline; that if suspended on such a rod by two sockets, one on each side of the timber, it will not incline, if both sockets are of the same size and in the same horizontal plane with reference to the timber, but will incline, if the one socket is higher up than the other from the end of the timber, or has the perpendicular opening larger than the other. The theory is that the clothing hung in the receptacle therefor and suspended on the hangers attached to the rods or resting thereon is held at the upper part near the rods by the hangers, but that the lower portion of such clothing, being unconfined, will hang loosely and have a tendency to press outwardly, but will not overcome the inclination or tilt of the suspended frame and the grip of the sockets, and that therefore this suspended retaining rack will keep the clothing pressed together until the pressure is released by human interference. I think the device will and does work well for the purpose intended.

If the trunk is only half filled with garments, and this frame is pushed along the rods against them, they will be securely held in position, accidents barred, until released by human agency. The device is new and useful as a receptacle for clothing. It is a device to aid in pressing and holding suspended garments together; its main function being to hold them together after being pressed together. As it has utility, and is a new combination, and has proven successful, I am not disposed to hold claim 5 of the second patent invalid. The Circuit Court of Appeals in this circuit has recently decided that the real test of invention is the extent of the benefit conferred on mankind. The Supreme Court of the United States has repeatedly held that there must be something more than utility, commercial success, large sales, etc.; that there must be the mental conception. However, commercial success, large sales, benefits conferred on the public, etc., are evidence of invention and in close or doubtful cases usually turn the scale. In *O'Rourke Eng. Const. Co. v. McMullen*, 160 Fed. 933, decided April 14, 1908, the Circuit Court of Appeals said:

"The keynote of all the decisions is the extent of the benefit conferred on mankind. Where the court has determined that this benefit is valuable and extensive, it will, we think, be difficult to find a well-considered case where the patent has been overthrown on the ground of nonpatentability."

Where economy of space is desired, it is valuable, and this is especially true in receptacles for clothing and garments. As I look at this combination of Bonsall found in claim 5 of patent No. 642,075, it is valuable, generally useful, and has been a commercial success. In putting up this combination in a receptacle for garments, so far as I can find, Bonsall was in a sense a pioneer. On the question of infringement he is to be treated accordingly. His was not what we may term a bold and brilliant conception; but in this line, this particular art, he has done what had not been done before. He was an improver on his own trunks and devices connected therewith, and, this claim having been recognized by the Patent Office, I do not think the patentee should be held to such a strict and limited construction as to confine him to the precise construction shown. In this view I think defendants infringe this claim.

There will be a decree for the complainant accordingly.

WILLIAMS v. SYRACUSE & S. R. CO.

(Circuit Court, N. D. New York. May 11, 1908.)

No. 7,139.

PATENTS—DESIGNS—INSULATING PLUG FOR ELECTRIC-LINE SUPPORTS.

The Williams design patent, No. 31,838, for a design for an insulating plug for electric-line supports, is void, because the article shown is not a proper subject for a design patent, not being intended for display or ornament, and when in use being covered, so that the design cannot be seen, also for anticipation and lack of invention, in view of the prior art, it being shown that the alleged infringing article was made, advertised, and sold several years before the patent was applied for.

In Equity. This is a suit to restrain alleged infringement of a design patent for insulating plug for electric-line supports, and for an accounting. Among the defenses are want of patentable novelty in view of the prior art, that this is not the proper subject of a design patent, and prior use and anticipation.

Dennis W. Hunt (H. T. Fenton, of counsel), for complainant.

Brown, Darby & Hopkins (Frank T. Brown and Francis A. Hopkins, of counsel), for defendant.

RAY, District Judge. The patent in suit, No. 31,838, to Luzerne A. Williams, for "design for an insulating plug for electric-line supports," was applied for October 17, 1899, and issued November 14, 1899, and I find no claim or evidence that the alleged invention antedates the application. Drawings accompany the specifications. On the final hearing complainant's counsel stated that no plug of this design has ever been made by plaintiff, or by any one for him; and hence we are confined to the drawings and specifications for a description and an understanding of the exact design claimed. The Ohio Brass Company, which makes and sells the alleged infringing device, is defending this action. It is conceded that the plugs made by it are substantially like those of the patent in suit. The patentee says, and this quotation embraces the sole claim of the patent in suit:

"The leading feature of my design consists of an insulating-plug for electric-line supports, which, when viewed in front elevation, presents substantially the appearance of a T, having the lower end of its upright branch reduced in diameter, and when viewed in plan presents the appearance of substantially circular concentric surfaces and angularly-arranged surfaces inclosed between two of said concentric surfaces. A and B are respectively the transverse and upright branches of an insulating-plug embodying my design. The transverse branch, A, is of substantially the same size from top to bottom, its outline presenting a substantially oblong parallelogrammatic appearance in elevation, and a substantially circular appearance in plan view. The upright branch, B, is substantially cylindrical, and is also of the same size from top to bottom, with the exception of its lower end, which is formed with upper and lower reduced portions, b, b¹, the upper portion b, being provided with angularly-arranged surfaces, b², having their adjacent ends separated and merged in the substantially circular outline of the main body of said branch, when viewed in inverted plan, and the portion, b¹, being substantially cylindrical and provided with a spiral raised surface, b³. An insulating-plug for electric-line supports embodying my design presents a pleasing and characteristic appearance. What I claim is: The design for an insulating-plug for electric-line supports, substantially as shown and described."

The base or foundation of this plug is formed of metal, and covered by insulating material, except at the lower end, where it is to be screwed into the support, trolley ear, or clamp on the line, but the insulating material is so applied as to make the completed plug of the design described. In point of fact this plug is of the same general shape and contour of the ordinary round bolt, with a round or circular head, having screw threads at the lower end, which is the "spiral raised surface, b," and also, what is not common to cylindrical bolts, a nut portion near the lower end, integral with the stem or body part of the plug, and which is not added for beauty or ornamentation, but for utility; that is, as a means for applying the wrench, when it is desired to screw the plug into or out of the support, trolley ear, or clamp on the line. Assuming that the head of this bolt or plug is necessary for mechanical purposes when put in actual use, and that the nut portion is also necessary for mechanical purposes, and that it is desirable to have the whole of a pleasing appearance when on the line and in use, so as not to disfigure the landscape, we find nothing new or novel in the cylindrical head of the plug, or in the cylindrical stem or body thereof, or in the nut portion near the lower end, unless it be its shape, and certainly there is nothing new or novel in the threaded end, "spiral raised surface," which screws into the support, trolley ear, or clamp. Whether this "spiral raised surface" is raised, made broader than the main part of the body, or not, is entirely immaterial so far as appearance is concerned; for it disappears from sight when in actual use, being secured into the support on the line. And it may as well be stated here that the entire insulating-plug, except the nut portion, disappears from view, is entirely covered by the hanger on the wires into which it fits, when in actual use. There is no evidence or pretense that this plug is more attractive to customers or users, or more salable, of greater market value, or more in demand, on account of its design or shape. When in actual use on the line, and covered by the hanger, as necessarily it is, only the nut part can be seen, and the hanger does not necessarily conform, in any respect, to the shape of the plug, but presents more the appearance of a spool, with flanges near the center, which support or carry the wire. In no event, whether in the market or in use, does it present any attractive feature or ornamental appearance. These insulating-plugs are not made for ornamental purposes in any situation. They do not change or modify the general appearance of the electric line or electric-line supports. That general appearance is determined by the shape of the hanger and trolley ear or clamp.

The complainant has put in evidence a photograph of the insulating-plug (so far as it can be seen when in use) and support in use by the defendant, complainant's exhibit of July 16, 1907, taken July 5, 1907, and the witness, Charles K. King, vice president of the Ohio Brass Company, says:

"The Syracuse & Suburban Railroad Company are using our type, D, insulated bolts, and are therefore using an insulated bolt, which is almost identically the same in design as the design shown in the Williams patent."

Infringement may therefore be conceded if this Williams patent in suit is valid.

The law as to design patents provides (Rev. St. U. S. § 4929 [U. S. Comp. St. 1901, p. 3398]):

"Sec. 4929. Any person who, by his own industry, genius, efforts and expense, has invented and produced any new and original design for a manufacture, * * * the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the fee prescribed, and other due proceedings had the same as in cases of inventions or discoveries, obtain a patent therefor."

In view of the decisions of the Circuit Court of Appeals of the Second Circuit, by which this court is bound, and of the absence of evidence that this insulating-plug is a thing of beauty, intended for ornamentation or display, or that, because of its design, it possesses added commercial value, or is more in demand, and in view of the fact that it is intended for use in an obscure place, where it cannot be seen or admired, and is so used, I do not see how I can hold this patent valid.

In *Rowe v. Blodgett*, 112 Fed. 61, 50 C. C. A. 120, that court had under consideration a patent for an ornamental design for a horse-shoe calk, a thing that is seen much more and much oftener and by more people than is the insulating plug of a trolley line, and held it not the proper subject of a design patent. Every horseman and every owner of a horse, of which there are tens of thousands in the United States, sees the shod foot of the horse, and realizes that the shape of the shoe has much to do with the appearance of the horse, but the Circuit Court of Appeals said:

"* * * Patents for designs are intended to apply to matters of ornamentation, in which the utility depends upon the pleasing effect imparted to the eye, and not upon any new function. Design patents refer to appearance, not utility. Their object is to encourage works of art and decoration which appeal to the eye, and the esthetic emotions, and the beautiful. A horseshoe calk is a mere bit of iron or steel, not intended for display, but for an obscure use."

In *Bradley v. Eccles*, 126 Fed. 945, 949, 61 C. C. A. 669, the design patent was for a washer for thill couplings. This court had held it valid ([C. C.] 122 Fed. 875) on the ground the patentee had—

"'a new, useful, and original shape or configuration' of an article of manufacture; that the article of manufacture itself is not designed or intended for an ornament, or for ornamental purposes, but for use as an essential and useful part of vehicles drawn by animals, but that the complainant's design makes such article of manufacture, when displayed or offered for sale in the market, or used as an ornament in carriage factories and carriage houses, ornamental and attractive, and pleasing to the eye and senses of all who see it—both sellers, purchasers, owners, users, and observers—and consequently more valuable, both as an article of merchandise and as an article of use."

The Circuit Court of Appeals (126 Fed. 945, 61 C. C. A. 673), reversed, and said:

"The first patent included in the second suit, No. 28,571, May 10, 1898, is for 'design for a washer for thill couplers.' The specification states that: 'This design relates to the configuration of a washer for thill couplings. The essential feature of my design consists in an approximately spherical body,

which is truncated at both ends, and divided longitudinally at one side.' The subject of the patent is the identical, integral, spherical, truncated washer we have just been considering, which is placed in the recess of the draft-eye as packing for the knuckle of the thill-iron. When so placed, it is as much out of sight as was the horseshoe calk in *Rowe v. Blodgett*, 112 Fed. 61, 50 C. C. A. 120, with which cause the one at bar seems to be on all fours. It is another instance of the 'liberal,' if not lax, practice in issuing design patents, which was therein referred to. The washer, like the horseshoe calk, is not intended for display, but for an obscure use. There is no evidence that its form appeals in any way to the eye, or serves to commend it to purchasers and users as a thing of beauty. There is not a scintilla of evidence that the sale of a single washer was ever induced by reason of any attractiveness in its appearance. Functional utility entitled the patentee to the mechanical patent already discussed, but mere functional utility did not entitle him to a design patent for the same article."

In *Eaton v. Lewis* (C. C.) 115 Fed. 635, Judge Wheeler followed the Circuit Court of Appeals, holding the advantage of the design for fastening plates for uniting the ends of machinery belts was mechanical, and not esthetic, and that their appearance, when in use, would be wholly immaterial. In *Wagner Typewriter Co. v. Webster Co.* (C. C.) 144 Fed. 405, a design patent for a metal spool for use in a typewriter, also an article of manufacture and commerce, was held invalid, and the court said:

"This metal spool is not designed for display, but for an obscure use. It cannot be seen by the user of the machine, except as he or she bends forward, and the bystander must bend over the machine or it is hid from view."

It is evident, I think, in view of the use to which this device is put, and must be put, especially in the absence of proof that the design does not enhance its marketability, or market value, or utility, that it is not the proper subject of a design patent. It is used overhead, out of reach, and out of sight to the naked eye so far as its design is concerned, and, as stated, when in use, it is covered up. Whether its head and body are cylindrical or octagonal is immaterial; whether the nut part is hexagonal or polygonal or of some other shape is immaterial, unless it be from the point of utility. Several of these insulating-plugs, such as are used by the defendant, are in evidence, attached to and covered by the support, so that there is complete evidence as to their obscure position, etc., when in actual use. There is nothing new or novel in the appearance of a round bolt having a cylindrical head, and having the lower end of its upright branch reduced in diameter with the lower end screw-threaded. To add the nut projection just above the screw thread adds nothing to its beauty, although it may add to its utility for certain purposes. In no event is it added for the sake of ornamentation. The outside appearance of it is of little consequence. The "upper reduced portion" of the lower end is reduced by, so to speak, taking a slice off from each of the four sides of the cylinder, not cutting so deep but that the corners between these "angularly arranged surfaces" are left rounded; that is, not cut away. To conceive the idea of making a nut from a round piece of metal, already boxed and threaded, by squaring the four sides, and leaving the corners rounded, is not, to my mind, a patentable conception, even in a design patent. As I have before me, while

writing, a glass inkstand, which I have used for at least 30 years, of this precise design, it is perhaps difficult for me to see novelty and special ornamentation, deserving of a patent in 1899, in so forming the lower end of an insulating bolt or plug. While this inkstand is not in evidence, and, under the decisions of the Circuit Court of Appeals, I am precluded from considering it, we have a portion at least of the prior art in evidence; and, so far as I can see or judge, we have very nearly this exact design, for insulating plugs for electric-line supports, disclosed therein. The nut portion may be cut octagonal, polygonal, sextagonal, or in any desired shape, of course. The only limitation is that it must be so cut that a wrench may be applied to turn it.

Turning to the prior art, not design patents, we have United States letters patent to Cicott, Belcher, and Billings, assignors to Billings & Spencer Company, for insulated support for trolley lines, dated August 27, 1895, and which patented device includes the insulating-plug, which is fully shown and quite fully described therein, and shows a plug almost the exact counterpart of that of the patent in suit. It is of metal, and covered with insulating material, which conforms in shape to the metal base or foundation. The insulating material extends down to the nut portion. The insulated plug (support in this Cicott patent) is thus described:

"The improved insulated support comprises a central stud, 10, provided at its upper end with a head, 11, and at its lower end with a screw-thread, 12, adapted to be screwed into the carrier, 13, employed to grasp or directly hold the trolley line wire as shown in Fig. 2. Said stud is also provided, near its lower end, with a head, 14, having a polygonal portion, 15, onto which a wrench may be applied to screw the stud in the trolley line carrier, 13. The upper head and cylindrical portion of this stud is covered and surrounded by any suitable insulating material, 16, such as hard rubber, and in practice this material is preferably made about one-fourth of an inch in thickness throughout the extent thereof, so that, as shown in Fig. 2 of the drawings, the insulated material will form a thimble comprising a cylindrical portion and a head, said head having a circular flange, 17, adapted to rest upon the upper edge of the sleeve, 19, of the protector hereinafter described, said insulating material thereby forming, together with the stud, an improved insulator-stud (designed generally as 60), which the bell-shaped protector, hereinafter described, is adapted to incircle."

The central stud with its head are the same as the "transverse and upright branches" of Williams, and the shape is the same, cylindrical "head," transverse branch, of the same size from top to bottom, and presents a substantially oblong parallelogrammatic appearance in elevation, and a substantially circular appearance in plan view, with central stud, "upright branch," cylindrical, of substantially the same size from top to bottom, with the exception of its lower end, which has upper and lower reduced portions, the upper reduced or nut portion being the "head, 14, having a polygonal portion, 15, onto which a wrench may be applied to screw the stud in the trolley line carrier, 13," this polygonal portion being the same as the upper portion of Williams, with angularly arranged surfaces, and the lower reduced portion being the screw-threaded part, "substantially cylindrical," and provided with a "spiral raised surface" the same as Williams. The only differences between the plug of Williams and the plug or "insulated support" of Cicott is that the nut portion of Williams has or

shows, as his "angularly-arranged surfaces b²" (nut portion), four flat sides and four rounded corners, while Cicott has, in the same nut portion, four flat sides and four flat corners, and in Williams the insulating material extends down to cover the rounded corners of the nut portion, while in Cicott it does not cover the corresponding corners. In the Billings and Spencer exhibit "Insulating-Stud" the nut portion has six flat surfaces, with six rounded corners, thus reducing the size of the upper portion, with the screw-threaded part, still smaller below. Both Williams and Cicott, when viewed in front elevation, present substantially the appearance of a T, as does any similar bolt or nail, and, when viewed in plan, present the appearance of substantially circular concentric surfaces, and angularly arranged surfaces inclosed between two of said concentric surfaces. All this is not only shown in the drawings, but is perfectly apparent on inspection of the photograph and various devices in evidence.

If Williams had the prior art before him, or was familiar with it, he must have known he was making a substantial copy of Cicott, and obtaining a patent on that design. They are not precisely alike, but the changes are slight and immaterial. There is nothing in Williams' variations that amounts to patentable invention, even if this plug is the proper subject of a design patent. In design and in mechanical and process patents there must be "invention."

Turning to the Ball patent, No. 518,213, of April 17, 1894, the Lee patents of October 25, 1892, and February 2, 1892, Nos. 485,105, 467,942, respectively, and the Luscomb patent of August 14, 1894, No. 524,467, we have the same general form and design, with some variation in the lower ends of the several plugs, but it is evident that, having in view the prior art, Williams does not disclose invention.

The complainant has not put in evidence one of the plugs used by the defendant. Neither has the defendant nor the Ohio Brass Company. The photograph is in evidence, but from this it is impossible to say that the defendant's plug is of the same precise design as Williams. The complainant relies upon the evidence of Luzerne A. Williams and of Charles E. Hubbell to show infringement. Neither testifies that the design of defendant's plugs is the same as that shown in the Williams patent. Williams says:

"Well, upon comparing of these plugs, they all have an almost identical appearance."

"Q. 28. And to the best of your knowledge and belief how many of those plugs of that design, or covered by your letters patent, were in use? A. I should say twelve to fifteen hundred, eighteen hundred, perhaps."

"Q. 69. I will now ask you if the plugs that you have observed in use by this defendant are identically the same as described in your letters patent, covering the design of which you claim to be the patentee? A. They have every appearance of it."

Hubbell, who is familiar with the plugs used by defendant, and who had the patent in suit before him, said, in answer to question 23, "Well, there is something similar to that we have in use; yes," and, in answer to question 28, "I just said they were similar to the ones in use," and "I don't see any difference." This is sufficient to show that the plugs used by defendant are the same in general appearance to

the plugs shown in Williams' drawings, but Hubbell was not an expert, and his cross-examination discloses that his evidence is not persuasive that the defendants are using the exact design of the Williams patent. What the evidence in the whole does disclose is that the defendant is using insulating plugs for electric-line supports, made by the Ohio Brass Company, of the same general design and of nearly the exact design shown in the Williams patent and drawings, and that it was making and selling them, and that they were in common use a long time prior to the filing of the Williams application. The Billings and Spencer Company were also making and selling plugs of substantially the same design in 1895. The evidence on this part of the case is very clear and conclusive. It does not rest upon mere memory, but is shown by long-used plugs, by books and written entries and documents, clearly old and genuine, and by printed illustrated catalogues and price lists, which antedate complainant's application. In defendant's exhibit, Ohio Brass Catalogue, No. 3, of 1895, we have type D of this company's trolley wire hangers in section showing the entire design and construction, including hanger, and showing the bolt or plug and its inclosure of insulating material, the head, the nut portion, and the screw-threaded portion, also type D of the bolt or plug by itself, and also the "insulated bolt, west end type." In the Billings and Spencer Illustrated Catalogue of 1895 we have its straight line hanger, showing bolt with head, insulation, nut, and screw-threaded portion, in section, and also the "colophite or vulcanized rubber insulated stud," and also the steel stud by itself. All these were made and in use prior to the complainant's application for his design patent. This design patent is merely descriptive of the design of the plugs of the prior art, with one or two very slight changes—changes which in no way add to the general attractiveness or appearance of the plug. Complainant's design is not new. It is an old design, slightly modified, and then patented. If the design, as patented by Williams, is valid, the proof fails to show infringement thereof by the defendant. It is using plugs made by the Ohio Brass Company, which vary as much in design from that of the Williams patent as does the Williams patent from the prior art of design patents. In short the defendant is using the design of the prior art, and not the Williams design at all, except in so far as Williams copies the prior art. This the defendant has the right to do. If Williams has something new in his design which defendant does not have, he cannot, by copying the prior art as to the balance of his design, preclude others from using the old design, even if they add something or make changes, provided they do not copy Williams' addition. If Williams has an improved design, defendant is not shown to use it.

If inquiry is made, "Does the defendant's plug present the same general appearance to the ordinary observer as does the Williams' plug, judging from his drawings and specifications?" The answer is "yes." It cannot be otherwise. But defendant is using a plug that has been made and on the market since 1895 at least, and described and shown in printed publications descriptive of the art. It is, of course, true that in design patents the test of sameness and of infringement is, "Do the two things present to the eyes of the ordinary

observer and purchaser and user the same general appearance?" See *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606; *Ripley v. Elson-Glass Co. (C. C.)* 49 Fed. 927, 930; *Redway v. Ohio Stove Co. (C. C.)* 38 Fed. 582; *Monroe v. Anderson*, 58 Fed. 398, 400, 7 C. C. A. 272; *Root v. Ball*, 4 McLean, 177, Fed. Cas. No. 12,035; *Kraus v. Fitzpatrick (C. C.)* 34 Fed. 39; *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20 L. Ed. 731. This must be the test as to invention, and as to the newness and originality of the patented design, and, also, as to anticipation. That which infringes, if subsequent, anticipates, if prior.

In *Smith v. Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, the Supreme Court of the United States said:

"The shape produced must be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. *Foster v. Crossin (C. C.)* 44 Fed. 62. The exercise of the inventive or originaive faculty is required, and a person cannot be permitted to select an existing form, and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty, and the result is, in effect, a new creation, the design may be patentable."

In the same case the Supreme Court quoted and approved Judge Brown, later Mr. Justice Brown, in *Northrup v. Adams*, 12 O. G. 430, Fed. Cas. No. 10,328:

"To entitle a party to the benefit of the act, in either case, there must be originality and the exercise of the inventive faculty. In the one there must be novelty and utility; in the other originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention."

Without going into quotations of the evidence given by defendant's witness as to prior use of this design, and anticipation which is clear and satisfactory and convincing beyond a reasonable doubt, I am satisfied that, in view of the use to which these plugs are intended to be put, and are put, they are not the proper subject of a design patent; (2) that, conceding the validity of complainant's patent, infringement by defendant is not sufficiently proved; (3) that the defense of anticipation is clearly made out beyond a reasonable doubt; (4) no invention is shown in view of the art.

It follows that the bill of complaint must be dismissed, with costs.

LICHTENSTEIN v. PHIPPS.

(Circuit Court, S. D. New York. May 26, 1908.)

1. PATENTS—INFRINGEMENT—DESIGN PATENTS.

A manufacturer who applies a patented design to an article of manufacture for the purpose of sale without license from the owner of the patent is not relieved from the statutory liability of \$250 for infringement provided by Act Feb. 4, 1887, c. 105, § 1, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3398), by the fact that he had no actual knowledge of the patent, where the articles sold by the patentee were duly marked.

2. SAME—MARKING PATENTED ARTICLES.

Notice of a design patent for a hatband was sufficiently given under Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), by placing the words, "Pat. Jan. 15th, 1907," on the lining of the hats on which the bands were used.

3. SAME—INFRINGEMENT—DESIGN FOR HATBAND.

The Lichtenstein design patent, No. 38,412, for a design for a hatband, *held* infringed.

In Equity. Suit in equity to restrain alleged infringement of United States design patent No. 38,412, dated January 15, 1907, for "hatband," and for an accounting, or \$250 statutory liability.

Joseph L. Levy, for complainant.

John C. Pennie, for defendant.

RAY, District Judge. The validity of the patent to Isaac Lichtenstein, No. 38,412, dated January 15, 1907, for design for hatband, is presumed, and not questioned. Defendant does not deny that he infringed this patent by making sailor hats to which he attached hatbands bearing the design of the patent in question and selling same. He denies that he knew the design was patented. It appears from the evidence that the patentee was engaged in making and selling hats with bands of this design; that after the patent was applied for, and before it was granted, he placed a tag between the band and crown of the hat bearing the words "Patent applied for"; and that after the patent was granted he put inside the hat in plain sight printed in and on a part of the lining a label reading, "Pat. Jan. 15th, 1907." There was nothing to show whether the hat itself, the design of the hat, or the design of the band was patented. However, the notice was sufficient to show that something about the hat was patented. Prior to or about May 27, 1907, the firm of R. H. Macy & Co. obtained one of these hats, tore out the tip or lining bearing the words "Pat. Jan. 15th, 1907," and sent it to defendant, with an order or request that he would make them a dozen like it. He at first demurred, but finally, as Macy & Co. were large customers, consented, and manufactured the hats and delivered them to R. H. Macy & Co., which firm put them on sale. In making these hats defendant had the bands bearing the design made by another party. I do not see that this fact is of any importance. Defendant made and sold the hats to which were attached the bands bearing the design of the patent in suit.

Section 4900, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3388), provides:

"It shall be the duty of all patentees and their assigns and legal representatives, and of all persons making or vending any patented article for or under them to give sufficient notice to the public that the same is patented; either by affixing thereon the word 'patented' together with the day and year the patent was granted; or when from the character of the article this cannot be done, by affixing to it, or to the package wherein one or more of them is inclosed, a label containing a like notice; and in any suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement and continued to make, use or vend the article so patented."

By section 4933, Rev. St. U. S., this section is made applicable to design patents. *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426.

Act Feb. 4, 1887, c. 105, § 1, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3398), provides, among other things:

"That hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of said letters patent, without the license of such owner, to apply the design secured by such letters patent or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner have been applied, knowing that the same has been so applied. Any person violating the provisions, or either of them, of this section shall be liable to the amount of \$250; * * * and the full amount of such liability may be recovered by the owner of the letters patent for his own use, in any Circuit Court of the United States having jurisdiction of the parties, either by an action at law or upon a bill in equity, or an injunction to restrain such infringement."

By section 2 of the same act there may be an accounting for damages and profits in the usual manner, and section 1 would seem to give the complainant the right to waive the accounting, and take judgment for the \$250 as liquidated damages. To be entitled to an accounting for the time prior to suit, the complainant must have alleged and proved notice, etc. *Westinghouse Electric Mfg. Co. v. Condit Electrical Mfg. Co.* (C. C.) 159 Fed. 154. Here the complainant, patentee, duly complied with section 4900. I do not think the patentee is required to follow the patented articles, and see to it that the words—or notice—is kept intact. Once attached, due notice is given. By the provisions of section 1 of the act of February 4, 1887, it was unlawful for the defendant to apply the design of this patent to the hats in question. They were articles of manufacture, and the bands were attached or applied thereto for the purpose of sale as a part of and with the hats. He had one of the hats to which the notice required by law had been attached in his possession. The tip or lining was gone. This was sufficient to put him on inquiry. In any event, the patentee had given the required notice. It was statutory notice to the public and to the defendant. By the provisions of said act, it was also unlawful for defendant to sell to *R. H. Macy & Co.* the hats in question, for the reason that he knew that the bands bearing the design they did bear had been applied thereto, and that they had been applied thereto for the purpose of sale. The defendant cannot escape liability by showing that *R. H. Macy & Co.*, by tearing out the tip, or lining, bearing the notice, and inducing him to make the hats carrying the patented design, deprived him of the benefit of the actual statutory notice. Defendant was the manufacturer. He procured the infringing bands to be made and applied to the hats, and then he sold them for profit.

The following from *Gimbel v. Hogg*, 97 Fed. 791, 794, 38 C. C. A. 419, 422, is pertinent:

"By the plain terms of the statute, the penalty is incurred by the seller of an article to which a patented design has been applied without license only where he sells 'knowing that the same has been so applied.' The statutory punishment is for infringing knowingly. Clearly it was not intended to subject to a penalty a vendor acting in good faith, and selling in entire ignorance

of any infringement perpetrated by the manufacturer. For the infliction of the penalty, the statute contemplates and requires knowledge by the seller of the unauthorized use of the design by the manufacturer. Such knowledge is not to be imputed to the seller from the 'notice to the public' by the marking required of the patentee by section 4900, Rev. St. U. S. It may be reasonable enough to hold such constructive notice sufficient as against the manufacturer who applied the design; for, if he did so without license, he must have known the fact. *Pirkl v. Smith* (C. C.) 42 Fed. 410, 411. But the public notice by marking under section 4900, gives no information whatever to a seller of an infringement committed by the manufacturer, and that section has no such purpose. Certain cases to which our attention has been called, namely, *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 570, 38 L. Ed. 426; *Smith v. Stewart* (C. C.) 55 Fed. 481, and *Stewart v. Smith*, 7 C. C. A. 380, 58 Fed. 580, 17 U. S. App. 217, were suits against manufacturers. We find nothing decided or declared in those cases to justify a decree for a penalty, under the act of February 4, 1887, against the defendants in this bill, upon the undisputed facts."

See, also, *Pirkl v. Smith* (C. C.) 42 Fed. 410, 411, appeal dismissed 154 U. S. 517, 14 Sup. Ct. 1153, 38 L. Ed. 1082, where it was held:

"They knew that the design had been applied to the guards which they so sold, for they applied it; and they knew it was so applied without license, for they had no license, and must have known that. That they did not know of the patent is urged against liability on account of the sale, but the statute does not include knowledge of the patent among the things necessary to create this liability. It only requires that the design shall have been applied without license and a sale, 'knowing that it has been so applied.' The defendants, unwittingly perhaps, appear to have brought themselves clearly within this branch of the statute."

It is urged that the statutory notice was attached to the hat, and not to the hatband. This was permissible and proper by the terms of the act. The evidence shows that ladies would not wear a hat with such a notice on the band in plain sight.

There will be a decree for the complainant for an injunction and \$250 statutory liability, with costs.

HOUGHTON v. WHITIN MACH. WORKS.

(Circuit Court, D. Massachusetts. May 6, 1908.)

No. 340.

PATENTS—SUIT FOR INFRINGEMENT—SUPPLEMENTARY PROCEEDINGS.

Where the validity of a patent has been adjudged by the Circuit Court of Appeals, and pursuant to its mandate an interlocutory decree has been entered for an injunction and accounting, the complainant may properly be permitted by supplemental bill or petition in the same case to present the question of infringement by another device made by defendant, and, if infringement is found, to have it included in the decree and accounting.

In Equity.

Louis W. Southgate, for complainant.

William A. Jenner, for defendant.

LOWELL, Circuit Judge. After the decision of the Circuit Court rendered April 23, 1908 (not for publication), which directed the master to exclude from the scope of the accounting a device of the de-

fendant known as "Whitin C," the complainant filed a petition asking for a construction of the interlocutory order of injunction now on file, in order to determine whether Whitin C is an infringement of the patent in suit. To this end, the complainant, "prays that he may be allowed to take proofs to present this infringement to the court for its ruling thereon, and that said Whitin Exhibit C may be included in the said interlocutory decree, and may therefore be adjudged to be within the injunction heretofore ordered by this court, and that the master be ordered to include said exhibit in the accounting." To this course the defendant objects, and suggests that the complainant's remedy is by an original bill.

The court heretofore refused to admit Whitin C into the accounting, for this reason, among others, that the proof of infringement by Whitin C was not sufficiently clear. To permit an inquiry concerning the profits arising from Whitin C before it was adjudged to infringe, appeared to this court to be unfair. The complainant now seeks to have the question of infringement determined in a manner substantially like that of an ordinary equity suit, and asks that Whitin C be brought into the accounting only if the issue of infringement be determined in his favor. The proceedings for reaching Whitin C proposed by the complainant and the defendant, respectively, seem at first sight to differ only in name.

But since the decree rendered by this court in favor of the complainant and in pursuance of the mandate of the Circuit Court of Appeals is only interlocutory, and not final, the validity of the patent has not become *res judicata*, and so the defendant may set up the invalidity of the patent in defense to another original bill, and may introduce evidence bearing upon that issue. This is admitted to be the real reason of the complainant's preference for a proceeding in the suit now pending, and is believed to be the reason for the defendant's preference for a new original bill. Considering that the validity of the patent has been established by a judgment of the Circuit Court of Appeals, I think the complainant is entitled to the advantage which he seeks, and that he should not be compelled, in a proceeding against the same defendant, to establish a second time the validity of his patent.

The course of proceeding sought by the complainant, therefore, appears to me inherently reasonable. It seems to have been approved by implication, at least, in *Westinghouse Air Brake Co. v. Christensen Engineering Co.* (C. C.) 126 Fed. 764; *Higby v. Columbia Rubber Co.* (C. C.) 18 Fed. 601; *Gold & Stock Tel. Co. v. Pearce* (C. C.) 19 Fed. 419; *Lord v. Staples*, 148 Fed. 16, 78 C. C. A. 167. In *Murray v. Orr & Lockett Hardware Co.*, 153 Fed. 369, 82 C. C. A. 445, and perhaps in *Westinghouse Co. v. Christensen Co.* (C. C.) 121 Fed. 558, a proceeding by way of supplementary bill was suggested. But that procedure is not more acceptable to the defendant than is the procedure by petition here proposed by the complainant, and the latter may be taken to be the equivalent of the former. The defendant will have 20 days to answer the complainant's petition, and, after issue properly joined, the parties will proceed to take evidence in the usual manner before an examiner.

In re UNITED STATES GRAPHITE CO.

(District Court, E. D. Pennsylvania. May 14, 1908.)

No. 2,865.

1. BANKRUPTCY—FOREIGN ATTACHMENT—LIEN.

Where a foreign attachment was levied on the property of a bankrupt more than four months prior to the commencement of the bankruptcy proceedings, the lien of a fi. fa. on a judgment subsequently obtained related back to the date of the attachment and was not divested by the bankruptcy act.

2. SAME—SALE OF PROPERTY—LIENS.

That property of a bankrupt was subject to a valid lien of an attaching creditor, not divested by the bankruptcy act, did not prevent the bankruptcy court from directing the sale of the property free from liens; the lien of the attaching creditor being thereby transferred to the proceeds of the trustee's sale according to its priority.

3. SAME.

Where a portion of a bankrupt's property was subject to a valid foreign attachment lien, and the sale of the attached property by the sheriff would dismember the property and result in destroying its value, while a sale of the whole property by the bankrupt's trustee would enable the creditors to obtain a better price, the bankruptcy court under its general equity powers or referee had power to direct the sale of the whole property free from liens, remitting the liens to the proceeds of the sale.

In Bankruptcy. On petition of attaching lien creditor.

John S. Freeman, for petitioner.

Henry N. Wessel, for trustee.

HOLLAND, District Judge. A. D. Granger Company issued a foreign attachment against certain personal property belonging to the bankrupt on December 14, 1906, more than four months prior to the commencement of bankruptcy proceedings. The case was proceeded with, and trial before a jury in Chester county resulted in a judgment in favor of the attaching creditor for \$1,474.45, upon which judgment was entered and a fi. fa. issued. This court restrained the attaching creditor from selling upon a levy on this fi. fa., and subsequently the trustee in bankruptcy advertised the property attached for sale, together with the whole plant. The attaching creditor then presented a petition to restrain the trustee from selling, upon the ground that, the foreign attachment having been issued more than four months prior to the commencement of the bankruptcy proceedings, the lien thereof was not divested by the bankruptcy act, and that this lien entitled the attaching creditor to sell the property upon his fi. fa., and that the bankrupt court has no jurisdiction to stay the attaching creditor's sale on his fi. fa. and order a sale of the property by the trustee free from all liens, remitting the lien of the attaching creditor to the proceeds of sale.

The cases cited by the petitioner are all to the effect that, the foreign attachment having been served on December 14, 1906, more than four months prior to the commencement of the bankruptcy proceedings, the lien thereof relates back to that date, and is not divested by the bankrupt act. *Metcalf Bros. v. Barker*, 187 U. S. 165, 23 Sup.

Ct. 67, 47 L. Ed. 122. But there is nothing in this or analogous cases to indicate that the court cannot direct a sale of the property free from all liens, in which event the lien of the attaching creditor is transferred to the proceeds of the trustee's sale according to its priority. Where it clearly appears, as in this case, that a sale by the sheriff would dismember the property and result in destroying its value, and that, on the other hand, a sale of the property as a whole by the trustee would enable the creditors to obtain a better price, under such a circumstance the cases are quite uniform in declaring that a bankruptcy court, under its general equitable powers, or a referee, may direct a sale of the bankrupt's property free and clear from all liens, remitting the same to the proceeds of sale. Collier on Bankruptcy (6th Ed.) p. 609; Loveland on Bankruptcy (2d Ed.) p. 706; In re Charles Pittelkow, 1 Am. Bankr. Rep. 472, 92 Fed. 901; In re Worland, 1 Am. Bankr. Rep. 450, 92 Fed. 893; In re Keet, 11 Am. Bankr. Rep. 117, 128 Fed. 651; In re Wilka, 12 Am. Bankr. Rep. 727, 131 Fed. 1004.

Petition to restrain trustee from selling is refused.

In re TUCKER.

(District Court, E. D. North Carolina. April 30, 1908.)

BANKRUPTCY—CHATTEL MORTGAGE—VALIDITY.

A chattel mortgage upon a stock of goods, given and accepted with the understanding that the mortgagor should remain in possession and sell as usual, with no provision for an accounting, is fraudulent and void as against the creditors in bankruptcy of the mortgagor.

In Bankruptcy.

G. W. Taylor, for bankrupt.

Jacob Battle, for creditors.

T. T. Thorne, for E. Hardie.

PURNELL, District Judge. In this cause a controversy has arisen between the Pocomoke Guano Company, a creditor whose claim has been proved, a party in interest, and E. Hardie, father of the bankrupt, who files a claim under a mortgage executed for \$2,000 to secure a loan of \$500. The note and mortgage were executed about a month before the adjudication on a stock of merchandise, which was all the property the bankrupt owned. George M. Tucker, husband of the bankrupt, negotiated the loan of \$500 and carried the money to Tarboro, where his wife executed the mortgage. The purpose of the parties was to hinder and delay creditors. The bankrupt testified:

"I expected to use the money to compromise with my creditors. We expected to hold the creditors off till we could get a compromise."

The mortgage contains no provision for an accounting for the proceeds of sale of the merchandise. Mrs. Tucker says:

"It was understood I was to remain in possession of the goods and continue to sell them as usual."

This court has at some length collated the authorities in *Mitchell v. Mitchell*, 147 Fed 280, which has since been affirmed per curiam by the Circuit Court of Appeals, Fourth Circuit, to the same effect, and held that a mortgage of a stock of merchandise containing a provision that the mortgagors shall remain in possession and sell as usual is fraudulent on its face. When the understanding is the mortgagor is to remain in possession, "selling as usual," it is no less fraudulent in fact or "upon understanding." It is not necessary to requote the authorities cited in *Mitchell v. Mitchell*, supra. On these authorities the referee should have held the mortgage fraudulent in law; hence invalid. *Mitchell v. Mitchell* was from the same division of the district as the present case. This court is still of the opinion the law in that case was properly decided; hence the referee is reversed, and the mortgage to Hardie held to be fraudulent and invalid.

It must therefore be expunged from the records and disallowed in the distribution of the funds of the estate.

THE CHARLES C. LISTER.

(District Court, S. D. New York. February 21, 1908.)

COLLISION—SUIT IN REM—SEIZURE OF FREIGHT MONEY.

Under admiralty rule 15, freight money due the vessel's owner cannot be seized, nor the cargo held therefor, in an action in rem to recover damages in a collision case.

In Admiralty.

James J. Macklin and La Roy S. Gove, for libellant.
Hyland & Zabriskie, for claimant.

ADAMS, District Judge. This action was brought to recover the damages, said to be \$10,000, incident to a collision occurring on the 25th of January, 1908, between the schooner *Charles C. Lister*, loaded with lumber, and the hawser between the third and the last barge in a tandem tow, the breaking of which set the barges adrift and ultimately caused the loss of one of them, with her cargo of coal. Process was duly issued and thereunder the schooner and the cargo remaining on board when she reached this port were seized. The present question is whether the libellant was justified in causing a seizure of the cargo for the purpose of establishing a lien on the freight due at the time of the collision.

The libellant urges that the freight could be properly seized in the action as if it were a part of the tackle &c. of the vessel, while the claimant contends that under the rule governing such matters the vessel alone can be held. The claim of the latter is that the recovery of freight is not allowed in collision cases, where the action to recover is brought in rem, because it is otherwise regulated by a rule of the Supreme Court.

The rule relied upon is as follows:

"15. In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone or against the master or the owner alone in personam."

The rules of the Supreme Court have the force of law and may not be disregarded. Unless, therefore, the seizure of the cargo can be sustained upon the theory of the libellant, it must fail in this matter. I think it is clear that freight is not any part of the vessel as her tackle is. It is an earning of the vessel and ordinarily doubtless belongs to the owner, subject to any expenses necessary to its being earned, but it does not follow therefrom that a party who suffers from improper navigation on the vessel's part can maintain a lien upon the net freight. The language of the rule seems to preclude the recovery of collision damages by a resort to the freight in an *in rem* action. Of course this view does not prevent recourse to the proper action in such a case but it is merely intended to follow the language of the rule. Where it is designed that the freight may be proceeded against, the rules so provide. For example, in suits by material men for supplies, repairs or other necessities, the rule (12) contains a provision that the libellant may proceed against the ship and freight *in rem*; also in mariners' wages cases (13) he may proceed against the ship and freight, but such provision is absent from the rule now under consideration and it seems to have been the intention that an action *in rem* in connection with the vessel should not lie.

The respondent's motion that the seizure of the cargo so far as it affects the freight moneys due thereon be vacated and set aside is granted.

UNITED STATES v. WIMSATT.

(District Court, S. D. New York. February 27, 1908.)

1. CRIMINAL LAW—VENUE—REMOVAL—FEDERAL PRACTICE.

In proceedings for the removal of accused to another federal district for trial, if the indictment produced as evidence of probable cause is framed in the language of the statute, with ordinary averments of time and place, and sets out the substance of the offense in language sufficient to apprise accused of the nature of the charge against him, it is sufficient to justify the removal, though it may be open to a motion to quash or in arrest of judgment in the court in which it was originally filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 510.]

2. SAME.

Removal of accused to another federal district for trial cannot be defeated because the proceedings for removal show acts which might have been prosecuted in the district where the proceedings are had, where it is also apparent that the place of indictment is a proper one in which he could be proceeded against.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 510.]

3. SAME—DISTRICT OF COLUMBIA.

Removal of accused from a federal district to the District of Columbia for trial cannot be defeated because the acts charged in the indictment are common-law offenses; the District of Columbia being a part of the United States and the commission of a crime therein being an indictable offense against the United States.

Henry L. Stimson and Felix Frankfurter, for the United States.
Hugh Gordon Miller, for defendant.

ADAMS, District Judge. This removal to the District of Columbia is sought by the United States and opposed by the accused. It was before a commissioner who reported as follows:

"The accused Richard Wimsatt named in the annexed warrant and who says his right name is Richard H. Wimsatt having been heretofore arrested and brought before me on said warrant and the charges in the warrant and complaint having been duly explained to said accused, and he having been duly cautioned and informed of his rights in the matter, admits his identity, and demands an examination, and an examination having been had, and it appearing to me from the testimony offered that there is probable cause to believe that the said Richard H. Wimsatt is guilty of the charge in the annexed warrant and complaint obtained, he is hereby committed to trial at the District of Columbia, being the District in which the offense charged is alleged to have been committed, and the said Richard H. Wimsatt is hereby committed to the custody of the U. S. Marshal for the Southern District of New York until a warrant for his removal shall issue by the U. S. District Judge or he shall be otherwise dealt with according to law."

Thereafter the accused claimed a right to introduce testimony showing the nature of the offence, and that it was not committed in the District of Columbia but in this jurisdiction. The matter was then sent back to the commissioner for the purpose of taking and reporting such evidence as the accused might desire to introduce and in conformity therewith, further proceedings were had before the commissioner and the testimony of the treasurer of the Hamilton Bank Note Company taken. He said that the tickets in question were stolen from the premises of his company in New York on or about the 1st of November, 1907. These tickets were printed by the said company for the Washington Railway & Electric Company of Washington, D. C., but the New York Company did not continue to be the owner of the tickets until they were paid for. It has not been made clear to whom they belonged but doubtless the Bank Note Company had a lien on them if it chose to assert it.

On the whole case, especially in connection with this further testimony, the defendant objects to the removal.

It is settled in proceedings for removal if the indictment produced as evidence of probable cause is framed in the language of the statute, with ordinary averments of time and place, and sets out the substance of the offence in language sufficient to apprise the accused of the nature of the charge against him, it is sufficient to justify removal, even though it may be open to a motion to quash or in arrest of judgment in the court in which it was originally filed. *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919. The indictment in question meets these requirements but in order to give the accused a full opportunity to present his side of the case, the matter was remitted to the commissioner. What has since taken place before him really makes no difference in the accused's position. Even though the proceedings show acts which might have been prosecuted here, it is also apparent that the place of indictment is a proper one in which he could be proceeded against.

It is also urged by the accused that as only a common law offence is charged in the indictment, this, and not the District of Columbia, is the proper jurisdiction, but the fact of the acts specified being common

law offences does not change the situation. The District of Columbia is a part of the United States and the commission of a crime therein is an indictable offence against the United States. *Benson v. Henkel*, 198 U. S. 12-14, 25 Sup. Ct. 569, 49 L. Ed. 919.

The commissioner's findings will not be disturbed and they warrant the removal which will be made.

In re BRAMLETT.

(District Court, N. D. Georgia. April 13, 1908.)

No. 2,039.

BANKRUPTCY—DISCHARGE—APPLICATION—DEFAULT—SUBSEQUENT PROCEEDINGS.

Where an involuntary bankrupt failed to apply for a discharge within the 12 months prescribed by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, (U. S. Comp. St. 1901, p. 3418), his default was equivalent to an order denying such discharge, which was *res judicata* in a subsequent voluntary proceeding, precluding him from obtaining therein a discharge from the debts previously scheduled.

In Bankruptcy.

E. V. Carter, for bankrupt.

Slaton & Phillips, for objecting creditor.

NEWMAN, District Judge. The bankrupt in this case was adjudged an involuntary bankrupt on February 13, 1905, his estate was administered, and the proceeds distributed among the creditors. He failed to apply for a discharge within the 12 months provided by the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418). He now brings a voluntary petition in bankruptcy, in which he schedules the same debts as were scheduled in the involuntary case, and asks for a discharge, and the discharge is objected to.

This question seems to be conclusively determined by the decisions of two Circuit Courts of Appeals. In *Kuntz v. Young*, 131 Fed. 719, 65 C. C. A. 477, decided by the Circuit Court of Appeals for the Eighth Circuit, in the opinion by Circuit Judge Sanborn, this is said on the subject:

"The failure of the bankrupt to apply for a discharge from his debts in the involuntary proceeding within 12 months after the adjudication foreclosed his right to such a discharge. It is only within that time that he may, under the bankruptcy law, make a lawful application to be relieved from his debts. The record of his failure to make the application in that proceeding was, in effect, a judgment by default in favor of his creditors to the effect that he was not entitled to a discharge from their claims. A judgment by default renders the issue as conclusively *res adjudicata* as a judgment upon a trial. The result is that the question whether or not the bankrupt was entitled to be discharged from the claims of the creditors scheduled and provable in the involuntary proceeding was conclusively determined in an action between them and the bankrupt by the record of his failure to apply for a discharge in that proceeding. But the parties to the voluntary were the same as to the involuntary proceeding, for Kuntz scheduled the same claims and creditors, and the trustee who objected to his discharge was the legal representative of the latter. The bankrupt's application for a discharge in the vol-

untary proceeding presented the same issue which had been conclusively determined against him in the involuntary proceeding, and there was no error in the refusal of the court below to reverse the former judgment and grant the application. The denial of an application for a discharge from debts provable in proceedings under one petition in bankruptcy under the act of 1898 renders the issue of a right to a discharge from those debts in a proceeding under a subsequent petition *res adjudicata*. A failure to apply for a discharge within 12 months after the adjudication in the earlier proceeding has the same effect"—citing *Gilbert v. Hebard*, 8 Metc. (Mass.) 129; *In re Drisko*, Fed. Cas. No. 4,090; *In re Herrman* (D. C.) 102 Fed. 753, 754; *Id.*, 46 C. C. A. 77, 106 Fed. 987, 988.

This case was referred to in the subsequent case of *In re Kuffler*, decided by the Circuit Court of Appeals for the Second Circuit, 151 Fed. 12, 80 C. C. A. 508. In the opinion *per curiam*, this is said:

"Under the act of 1898 the denial of an application for a discharge from debts provable in one proceeding in bankruptcy renders the issue of the right to a discharge *res adjudicata* as to such debts in a subsequent proceeding; and a failure of the bankrupt to apply for a discharge within 12 months after the adjudication in the earlier proceeding has the same effect"—citing *Kuntz v. Young*, *supra*.

These two decisions by Circuit Courts of Appeals ought to be practically conclusive of this question. There can be no doubt that where there is objection to a discharge, and the matter determined against the right to such discharge, that this would be *res adjudicata* in another proceeding, and these decisions hold that failure to apply for a discharge within the time limited in the bankruptcy act has the same effect. This rule may work a hardship in many cases, and it probably does in this case, as contended by counsel for the bankrupt, but this cannot change the law.

The application for discharge will be denied.

IN RE DELMOUR.

(District Court, S. D. New York. April 14, 1908.)

BANKRUPTCY—CONCEALMENT OF ASSETS—DISCHARGE DENIED.

On specifications of objection to bankrupt's petition for discharge, it is not necessary to establish concealment of assets beyond a reasonable doubt. A fair preponderance of credible testimony is sufficient.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 6, *Bankruptcy*, § 722.]
(Syllabus by the Court.)

In Bankruptcy. Motion to confirm report of special master denying bankrupt's discharge.

Mark G. Holstein, for objecting creditors.
Myers & Goldsmith, for bankrupt.

HOUGH, District Judge. With the cases holding, or seeming to hold, that anything more than a fair preponderance of creditable testimony is necessary to require the court to deny a discharge, I do not agree. In my judgment the law is properly stated in *Re Leslie*, 9 Am. Bankr. Rep. 561, 119 Fed. 406, viz., that it is not necessary to

establish concealment of assets beyond a reasonable doubt, but by a fair preponderance of creditable testimony only. Viewed in this light, the referee's report is entirely satisfactory. The testimony against the bankrupt was clear and direct. It may be admitted that it came from interested witnesses; but there are no more interested witnesses than the bankrupt and his wife. Their testimony in opposition is both shuffling and evasive, and that of the bankrupt can even from the printed page be seen to have been contemptuous.

The report is confirmed, and discharge denied.

In re EVANS.

RUDOLPH et al. v. EVANS et al.

(District Court, N. D. Georgia, N. D. April 16, 1908.)

No. 237, in Bankruptcy.

No. 12, in Equity.

BANKRUPTCY—PARTNERSHIP—PROCEEDINGS AFTER DEATH OF PARTNER.

A partnership is not subject to proceedings in bankruptcy after it has been dissolved by the death of one of its members, nor can representations by his heirs at law that they retain his interest in the firm continue it in existence for such purpose; and voluntary proceedings instituted by the surviving partner involve only his individual estate.

In Bankruptcy.

P. F. Akin and F. K. McCutchen, for trustee.

J. M. Rudolph, for creditors.

R. J. & J. McCamy, for bankrupt.

W. C. Martin and W. E. Mann, for bankrupt's wife.

NEWMAN, District Judge. C. R. Evans, doing business under the name of Evans & Co., filed his voluntary petition in bankruptcy, and there was in ordinary course an adjudication. A petition is now brought, which, as amended, and for the purpose of present consideration, is in favor of certain creditors. The petition is against Evans, and also against Mrs. Mamie Evans, Miss Francis V. Scogin, and Mrs. Mattie Belle Parisi, sisters of Mrs. Evans; all of whom—Mrs. Evans, Miss Scogin, and Mrs. Parisi—being daughters of W. R. Scogin. The allegations of the petition are that Evans & Co. was a firm composed of C. R. Evans and W. R. Scogin until December 8, 1903, when Scogin died. The further allegation is that thereafter the three ladies represented to creditors and to persons dealing with Evans & Co. and to the Dun and Bradstreet Mercantile Agencies that they continued to be members of the firm of Evans & Co.; the general effect of the allegation, as I understand it, being that the representations were that the estate of Scogin, or his heirs at law, remained members of the firm and liable for the firm's debts. W. R. Scogin died possessed of certain individual property. The theory of the petition, and, indeed, the allegation of the petition, is that the adjudication of C. R. Evans in bankruptcy as the sole owner and proprietor, and

trading as Evans & Co., is a fraud upon the creditors of Evans & Co., and should be opened, vacated, and set aside, in so far as the same is an adjudication in favor of the allegation that Evans is the sole owner and proprietor of Evans & Co. The prayer is that the adjudication be opened, vacated, and set aside in so far as it may be considered as an adjudication that C. R. Evans is the sole owner and proprietor of Evans & Co. The result sought to be accomplished by this proceeding of creditors is to change the present voluntary bankruptcy proceeding into an involuntary case, at least so far as the three ladies are concerned, making it one case against Evans & Co., a firm composed of C. R. Evans, Mrs. Evans, Miss Scogin, and Mrs. Parisi.

The death of W. R. Scogin in December, 1903, dissolved the firm of Evans & Co., composed of Evans and Scogin. The firm was extinguished. It was civilly dead—rendered so by the death of Scogin. The firm was a distinct entity in law. With Scogin's death it ceased to exist. Consequently no bankruptcy proceeding could thereafter be instituted against this partnership entity. As the firm no longer existed, all that Evans could do was to go into bankruptcy individually. Therefore his voluntary petition in bankruptcy was only, under the law, the bankruptcy petition of C. R. Evans. Indeed, it was nothing more than this upon the face of it. It was C. R. Evans doing business under the firm name of Evans & Co. The purpose of the petition filed by creditors now is to bring the ladies named into the bankruptcy proceeding as partners in the firm of Evans & Co., upon the ground that they made certain statements to creditors and to mercantile agencies, after the death of their father, to the effect that they were still connected with the firm and liable for its debts. Statements of this sort could not re-establish the firm of Evans & Co. which had been dissolved by operation of law. The statements might render the ladies liable for credits given to Evans & Co. on the faith of such statements, but could not make them members of the firm. The old firm was dead, and I do not see how the statements of these ladies could make a new firm composed of themselves and Evans. While, as I have stated, they might be estopped by their statements from denying liability for credit given on the faith of their representations, they would not in this way establish a new partnership firm. I do not now see how this proceeding can be anything more than a proceeding of Evans individually, and any discharge that might be granted a discharge of Evans individually. If there be any charge on the property of Scogin's estate for debts created before Scogin's death, such charge could not be affected by this proceeding, nor by any discharge granted in this proceeding, and the same is true as to any liability on the part of the daughters of Scogin for statements made by them after Scogin's death, which induced credit to Evans & Co.

Such being my views, I am compelled to hold that this petition is not well founded in law, and must be dismissed, without prejudice to the right of creditors to recommence any proceeding against the estate of Scogin, or against his heirs, as they may be advised. An order may be taken to this effect.

Ex parte LEE KOW.

(Circuit Court, N. D. New York. May 7, 1908.)

1. ALIENS—EXCLUSION—CHINESE—JURISDICTION.

A proceeding for the exclusion of a Chinese alien in the first instance is within the jurisdiction of the Chinese Inspector, from whom an appeal may be taken to the Department of Commerce and Labor, after which resort made be had to the courts if the decision is adverse to the person seeking admission.

2. HABEAS CORPUS—GROUNDS FOR RELIEF.

An adverse determination of a proceeding for the exclusion of a Chinese alien by the immigration officer or the Department of Commerce and Labor, when a fair hearing was had, will not be set aside by the courts on habeas corpus unless the evidence is such as to require a finding that the decision was arbitrary, unwarranted and an abuse of discretion.

3. JUDGMENT—COLLATERAL ATTACK—JUDGMENTS SUBJECT TO ATTACK—JUDICIAL OFFICERS.

When a question of fact is presented for decision by an immigration officer or Chinese inspection officer, and is honestly passed on after full hearing, the decision based on legal evidence is conclusive on the courts.

Habeas Corpus. This petition is made by R. M. Moore, an attorney at law of the city of New York, in behalf of said Lee Kow, a Chinese person.

R. M. Moore, for petitioner.

Geo. B. Curtiss, U. S. Atty., and H. B. Owen, Asst. U. S. Atty.

RAY, District Judge. The writ was allowed by Judge Coxe, and made returnable at the April term held by me. I have carefully examined the record to ascertain if the rights of the petitioner have been in any way infringed.

This is one of the cases coming within the jurisdiction of the Chinese inspector in the first instance, and from whose decision an appeal may be taken to the Department of Commerce and Labor. Then resort may be had to the courts, in case the decision is adverse to the Chinese person seeking admission. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Ex parte Jong Jim Hong* (C. C.) 157 Fed. 447, 450. The petitioner here shows neither unlawful action nor an abuse of discretion or power by the immigration officers or by the Department of Commerce and Labor. The decision made was neither arbitrary nor unwarranted, and the evidence was not so conclusive as to warrant a court in saying that there has been an abuse of power or discretion. Unless the court must say this or is forced to this conclusion by the record, it is its duty to dismiss the writ. See cases cited. In this case the record discloses that a full and a fair hearing and rehearing, with additional testimony taken, were had before the inspector, and that on appeal there was, in substance, a hearing and a rehearing with more testimony in behalf of the petitioner. The record further discloses that unusual care was taken, and that unusual consideration was given to this case by the department. I find no prejudicial error; no evidence of prejudice; no abuse of discretion or power. All the hearings were full and fair, and on the evidence adduced there was a fair question of fact pre-

sented. This court cannot grant a writ and in effect reverse and set aside the decisions of the inspector and department on the ground it may think there was sufficient evidence to warrant a decision the other way, or that there was a preponderance of evidence in favor of the petitioner. See cases cited. When a question of fact is presented for the decision of these quasi judicial officers, and that question is honestly passed upon, it is final and conclusive on the courts, if a full opportunity to be heard was given. The hearing was full and fair, and the decision was based on legal evidence. Here the evidence was fully considered and weighed, and with the conclusion reached this court fully agrees.

The writ must be dismissed.

JOHNSON & JOHNSON v. HEROLD et al., Revenue Collectors.

(Circuit Court, D. New Jersey. July 31, 1907.)

1. JUDGMENT—RES JUDICATA—SPLITTING CAUSE OF ACTION—INTERNAL REVENUE—ACTIONS TO RECOVER TAXES PAID.

A manufacturer of surgical supplies, which purchased internal revenue stamps from time to time under protest for use on articles made and sold by it, may maintain different actions against successive collectors to recover the amounts paid to each, and different actions against the same collector, when required to prevent the bar of limitations, or when they relate to different classes of articles, and the questions involved may be different, and a recovery in one such suit is not a bar to the prosecution of the others pending, where no motion has been made to consolidate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1107-1114.]

2. INTERNAL REVENUE—STAMP TAXES—RECOVERY—INVOLUNTARY PAYMENT—SUFFICIENCY OF PROTEST.

Where plaintiff was a large purchaser and user of internal revenue stamps, and there was a constant dispute between it and the department whether certain articles manufactured by it were subject to tax, it was not essential that it enter a formal protest every time it purchased stamps in order to preserve its right to recover the amount paid for stamps used on such articles.

3. JUDGMENT—CONCLUSIVENESS—DISMISSAL OF WRIT OF ERROR.

The fact that a writ of error was sued out to review a judgment which was dismissed by the appellate court because not taken in time does not affect the conclusiveness of such judgment between the parties as to the questions actually put in issue and decided therein.

4. SAME—RES JUDICATA.

Where different actions are brought by the same plaintiff to recover internal revenue taxes paid under the same law on the same class of articles, a judgment in one case is conclusive in the others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1244-1247.]

5. INTERNAL REVENUE—WAR REVENUE TAXES—STAMP TAXES ON MEDICINAL PREPARATIONS.

Medicinal plasters, made after a standard formula, which are not sold under a trade-mark nor any claim of exclusive right nor of special merit, are not advertised to cure any disease, and are without directions for use, are not taxable under Schedule B and section 20 of the War Revenue Act

of June 13, 1898 (30 Stat. 456, 462, c. 448 [U. S. Comp. St. 1901, pp. 2297, 2306]). Plasters described as "dental" merely, because cut in very small pieces suitable for dentists' use, are not within the statute, nor are finger hats nor corn or bunion plasters, the action of which, when applied, is purely mechanical, and not medicinal; but plasters described as "Johnson's" or as "rheumatic" may be regarded severally as proprietary and as recommended as a remedy for rheumatism, and are taxable.

6. SAME—ARTICLES "COMPOUNDED."

The provisions of War Revenue Act June 13, 1898, c. 448, § 20, 30 Stat. 456 (U. S. Comp. St. 1901, p. 2297), that the stamp taxes provided for in Schedule B "shall apply to all medicinal articles compounded by any formula, published or unpublished," but that they shall not apply to any uncompounded medicinal drug or chemical, contemplate a compound made after some formula and a natural product, such as papain, which is prepared from the juice of the pawpaw and cannot be made artificially, although it may be a chemical compound, is not "compounded" within the meaning of the statute, and is not taxable, whether used as the basis of a plaster, or prepared in the form of tablets or pills by being mixed with an excipient which has no medicinal effect.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1372.]

At Law. On contract.

Willard P. Voorhees and Archibald Cox, for plaintiffs.

John B. Vreeland, U. S. Dist. Atty., and Theodore Booraem and H. P. Lindabury, Asst. U. S. Dist. Attys., for defendants.

CROSS, District Judge. These actions have been brought to recover sums of money paid by the plaintiffs to the defendants, as successive collectors of internal revenue for the district of New Jersey, for stamps affixed by the plaintiffs to certain articles manufactured by them, which articles were claimed by the United States to be subject to stamp taxes provided for by section 20 and Schedule B of the act of Congress of June 13, 1898 (30 Stat. 456, 462, c. 448 [U. S. Comp. St. 1901, pp. 2297, 2306]), entitled, "An act to provide ways and means to meet war expenditures and for other purposes."

There are in all 16 different suits, of which five are brought against Rutan, late collector, and are designated on the record as C, D, E, G, and H; five against Herold, collector, designated as C, D, E, G, and H; and six others against Herold, collector, designated as B², C², D², E², G², and H². Each designated class, as for instance class C, C, and C², comprises the same group of articles, and the three actions embrace different periods of time during which stamps were imposed upon the articles comprised in such group. The other suits, designated B and B, were originally instituted by the plaintiffs in this court, one against Rutan, collector, and the other against Herold, collector, upon which final judgments have been entered. The remaining sixteen cases designated as above have been tried together before the court pursuant to stipulation without a jury, upon the same evidence so far as applicable. I find the facts from the evidence to be as follows:

(1) That the plaintiff, Johnson & Johnson, Incorporated, is a manufacturer of surgical supplies at New Brunswick, N. J., and has been for a number of years past, and between July 1, 1898, when the war

revenue act went into effect, and July 1, 1901, they manufactured and sold the different articles enumerated in the declarations.

(2) Between July 1, 1898, and March 1, 1899, the defendant William D. Rutan was collector of internal revenue for the Fifth district of New Jersey, and from the 1st day of March, 1899, until the 1st day of July, 1901, the defendant Herman C. H. Herold was collector in said district.

(3) That between the 1st day of July, 1898, and the 1st day of July, 1901, the plaintiff purchased large quantities of internal revenue stamps from the said defendants; purchases made between July 1, 1898, and March 1, 1899, being made from the defendant William D. Rutan, and during the balance of said period from the defendant Herman C. H. Herold. A part of the stamps purchased during the whole period were affixed on the articles mentioned in said declarations and canceled, such stamps being so affixed and canceled under rulings of the said defendants and the Commissioner of Internal Revenue of the United States that such articles were subject to a tax under the provisions of the act referred to, and the sums so paid for said internal revenue stamps by the plaintiff to the defendants were paid under protest and on threat of distress and confiscation in case of refusal, and not voluntarily. For the sums thus paid claims were duly presented by the plaintiff and disallowed.

(4) On June 29, 1900, the plaintiff began twelve suits on claims heretofore presented and disallowed; six suits, designated B, C, D, E, G, and H, against the defendant Rutan for the amount of internal revenue stamps so affixed and canceled during the period from July 1, 1898, to March 1, 1899, and six suits designated B¹, C¹, D¹, E¹, G¹, and H¹, against the defendant Herman C. H. Herold, to recover the amount paid for internal revenue stamps so affixed and canceled during the period from March 1, 1899, to January 1, 1900. Suits B against the defendant Rutan and B¹ against the defendant Herold have been heard and determined by this court; final judgment having been entered therein on the 12th day of June, 1903.

(5) That on the 27th day of December, 1901, plaintiff began six suits against the defendant Herman C. H. Herold, on claims presented and disallowed between July and December, 1901, designated suits B², C², D², E², G², and H², to recover the amount of internal revenue stamps so affixed and canceled during the period from January 1, 1900, to July 1, 1901.

(6) There are three suits in each class, for example, C Rutan, C¹ Herold, and C² Herold, concerning the same class of articles stamped during different periods during which the said act was in force. The remaining sixteen suits, designated as above, have been tried together before the court, pursuant to a stipulation in writing, without a jury.

(7) In the actions above mentioned heretofore litigated and determined between the parties hereto, this court entered final judgment that the plaintiff was entitled to recover the amount paid by the plaintiff to the defendants under the identical circumstances under which payment was made herein and as part of the same transaction for stamps affixed and canceled upon certain plasters which, in every

respect, were identical with the plasters involved in the action now before the court, designated Class B, which actions determined the following questions:

(a) That the payments were not voluntary.

(b) That the plaintiff has not and does not claim to have any exclusive right or title to the making or preparing the plasters. That the plasters are not prepared, uttered, vended, or exposed for sale under any letters patent or trade-mark, or held out or recommended to the public by the plaintiff as proprietary medicines or medicinal proprietary articles or preparations or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body, or put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general, or advertised on the package or otherwise as remedies or specifics for any ailment or as having any special claim to merit or to any peculiar advantage in mode of preparation, quality, use, or effect.

(c) That the use of plaintiff's trade-mark as it is used on said plasters did not render them liable to taxation.

(d) That the amount paid as taxes on said articles should be returned to the plaintiff.

(8) That the following articles, to wit, all the articles in class C, and all the articles in class D, and the capsicum, strengthening, porous, belladonna, and belladonna and capsicum plasters in class E, and the belladonna plaster in class H, not designated "Johnson's" each and all present no question not actually litigated and determined in the aforesaid actions between the parties hereto.

(9) That the plaintiff has withdrawn the claims for the taxes paid on the following articles in class E: Dr. Scott's electric plasters; Phoenix plasters; Dr. McLean's plasters; hop plasters; Collin's voltaic plasters; cuticura plasters; kidney plasters (under buyer's name); zonas corn leaf; camphenol; zonweiss; baby powder; Wood's penetrating plaster; Red Cross toothache plaster; Red Cross kidney plaster; canthos plaster; Red Cross cough plasters; first aid to wheelmen.

(10) The following articles are each and all purely mechanical in their purpose and operation and are not medicinal articles or preparations: Finger hats; Dr. Don's corn plasters; Dr. Don's bunion plasters.

(11) The plasters in class E to which the word "dental" is applied are identical with the other plasters of the same name, except that they are cut in small pieces and in convenient form for the use of dentists. The word "dental" does not describe or indicate any disease or affection.

(12) That "Papoid Powder" and "Papoid Tablets" in class G are the simple drug papain, the purified juice of the carica papaya (alone and with an excipient, which is purely mechanical and not medicinal, respectively), and are uncompounded drugs.

(13) That the claims on the articles in class G named "Papoid and Nux Vomica" and "Papoid and Boracic Acid" have been withdrawn by the plaintiff.

(14) That with the exception of the articles mentioned in findings 5 and 9 as withdrawn, in finding 6 as mechanical and not medicinal, and the "Rheumatic Plaster" in class E, and that "Belladonna Plaster" in class H, which bears the word "Johnson's," and the papain preparations in class G, all the articles involved in these actions are in fact:

(a) Not plasters wherein the person making or preparing the same has or claims to have any private formula, secret or occult art for the making or preparing the same, or has or claims to have an exclusive right or title to the making or preparing the same. On the contrary, they are manufactured and prepared according to formulas taken from the United States or National Dispensatory or the British Pharmacopia, all well-known publications of accepted authority, and are standard medical preparations recognized and constantly prescribed by the medical profession, the merits of which are discussed in medical text-books and journals and are the same plasters made according to the same formulas as prepared and sold under the same names by other manufacturers in competition with the plaintiff.

(b) They are not prepared, uttered, vended, or exposed for sale under any letters patent or trade-mark, or held out or recommended to the public by the plaintiff as proprietary medicines or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body, or put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general, or advertised as remedies or specifics for any ailment or as having any special claim to merit or to any peculiar advantage in mode of preparation, quality, use, or effect. On the contrary, they are sold under the standard Pharmacopia names, which are the equivalents of formulas and the names used by the text-books and medical profession and other manufacturers to describe the same plasters by whomsoever produced, and they are represented to be nothing except the standard remedies they in fact are.

The Law.

The defendants have raised a question which, as it is in a sense preliminary, will at once be disposed of. They contend that whatever rights of action the plaintiffs had against each defendant in reality constituted but one, and that consequently they should all have been embodied in a single suit against each defendant; or, in other words, that, having but one cause of action, the plaintiffs had no right to split it, but, having done so, and recovered in two of the suits, they must be deemed to have waived the remainder of their demand and to be estopped from any recovery on account thereof. The defendants admittedly did not raise this question upon the trial of the earlier actions, or indeed upon the trial of these, until the briefs of counsel were filed. The position is untenable. It is obvious from the record that, if suit had not been brought until all of the causes of action had matured, many of the earlier items would have been barred by the statute of limitations. Moreover, the causes of action in the later suits had not arisen when the first suits were instituted.

The suits were begun at different times against successive collectors, and embraced different periods during which the war revenue act was in force, and the stamps were purchased for which recovery is sought. As to all such suits as were pending at any given time, the defendants might, under the practice act of this state, have moved before issue joined, had they so desired, to have them consolidated, and courts will do this whenever necessary to prevent vexation and oppression. The defendants apparently have been in no wise injured or embarrassed in making their defense by the maintenance of several suits instead of one. Not infrequently the question of a multiplicity of suits is largely one of costs; but, as in these cases there can be no costs against the defendants, that reason may be eliminated. The division of the articles which were taxed into six groups, and the maintenance of suits thereon for taxes paid during different periods of time to the different collectors, was, whatever else may be said of it, certainly not the splitting of an individual cause of action, and such procedure undoubtedly aided at the trial not only in giving direction to, but in the comprehension of, the evidence. The rule invoked by the defendants is only applicable where there is an indivisible demand. *Baird v. United States*, 96 U. S. 430, 432, 24 L. Ed. 703. The point is further considered in *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276, where, at page 485 (24 L. Ed. 276), Mr. Justice Field, in delivering the opinion of the court says:

"It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. But this principle does not require distinct causes of action—that is to say, distinct matters—each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together."

Furthermore, the rule is for the benefit of the defendant and may be waived. *Claffin & Kimball v. Mather Electric Co.*, 98 Fed. 699, 39 C. C. A. 241.

As already said, it cannot be that the plaintiffs were required to permit the bar of the statute of limitations to intervene, as to any part or parts of their demand, in order that but one suit should be brought against each collector. My conclusion therefore is that the plaintiffs' demand was divisible, and that recovery in the present actions is not barred for the reason stated.

The further point is raised by the defendants that the moneys paid by the plaintiffs for stamps, which they are seeking to recover, were paid without protest and voluntarily, and that therefore the suits must fail. The plaintiffs contend, however, that this question is, as between the parties hereto, *res judicata*, by reason of the judgments entered in the former suits; but assuming, for the purpose of argument, that it is not, I think the evidence shows that the payments were made under protest, and were not voluntary. It is quite impossible to read the evidence upon this point without reaching that

conclusion. Even before the act became operative, a representative of the plaintiffs went to Washington with samples of all the articles and preparations manufactured by them, and the question of their liability to the stamp tax was gone over with the Internal Revenue Commissioner, or his deputy. The department decided that the articles here involved were taxable, and wrote a letter to that effect, which came to the plaintiffs through one of the defendants, and from that time on until the act was repealed the liability to taxation of these various articles and preparations was one of active and constant argument and dispute between the plaintiffs and the Revenue Department, and defendants. Protests were repeatedly made by the plaintiffs, both verbally and in writing, to the Revenue Department and to the collectors, and the plaintiffs were informed by the department that, if the articles which were declared by the department to be subject to taxes were sold or exposed for sale without the requisite stamps, such action would be at their peril, and that all such unstamped articles would be seized and confiscated, and as a matter of fact there is evidence that some were so seized. Under the circumstances, it was wholly unnecessary for the plaintiffs to enter a protest with the collectors each time they purchased a stamp or stamps. Indeed, such action would have been well nigh impossible, since they were constantly using stamps in large quantities, not only upon the disputed articles, but also upon very many other articles about which there either never had been any dispute, or, if there had, it had been adjusted. There was never at any time any doubt between the plaintiffs and the department and defendants as to which of their preparations the plaintiffs claimed were not, and which the department claimed were, subject to stamp duty, and it was to these disputed articles that the protests, verbal and written, were directed, and were understood by the defendants to be directed.

Two cases are specially relied upon by the defendants to support their position, viz., *Chesebrough v. United States*, 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432, and *United States v. New York & Cuba Mail Steamship Co.*, 200 U. S. 488, 26 Sup. Ct. 327, 50 L. Ed. 569, but they do not seem to me to control the question under consideration, or indeed to have much bearing upon it.

In the first case mentioned, *Chesebrough* purchased stamps from a collector of internal revenue without intimating the purpose for which they were purchased, and without any protest made, or notice given at the time, that the purchaser claimed that the purchase was made under duress, and that the law requiring their use was unconstitutional. Under such circumstances, it was accordingly held that the purchase was purely voluntary, while in the other case substantially all that was decided that can be claimed to be pertinent appears in the second syllabus, in the following language:

"Affixing stamps required by the war revenue act of 1898 to the manifest of a vessel in order to obtain the clearance required by section 4197, Rev. St. (U. S. Comp. St. 1901, p. 2840), without presenting any claim or protest to the collector of internal revenue from whom the stamps are purchased, or to the collector of the port from whom the clearance is obtained, is not a payment under duress, but a voluntary payment, and the amount paid for the stamps cannot be recovered either on the ground of the unconstitution-

ality of the provisions of the war revenue act, requiring the stamps to be affixed, or under Act May 12, 1900, c. 393, 31 Stat. 177 (U. S. Comp. St. 1901, p. 2276), providing for the redemption of stamps used by mistake."

In the cases above referred to the plaintiffs interpreted the law to suit themselves, and then as an afterthought attempted to recover the taxes paid. In all such cases the authorities are unanimous in holding the payments voluntary.

In the case of *Swift & Co. v. United States*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341, it appears that the plaintiff did not even protest against the payment of stamp duties on matches, but settled periodically with the Treasury Department pursuant to an established course of business. Referring to this practice, the court said:

"From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value instead of in money; that it regulated all its forms, modes of business, receipts, accounts, and returns upon that interpretation of the law; that it refused on application, prior to 1866, and subsequently, to modify its decision; that all who had dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition, without which they would not be permitted to purchase stamps at all. This was, in effect, to say to the appellant that, unless it complied with the exaction, it should not continue its business, for it could not continue business without stamps, and it could not purchase stamps except upon the terms prescribed by the Commissioner of Internal Revenue. The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim: '*Volenti non fit injuria*.' * * * If a person illegally claims a fee *colore officii*, the payment is not voluntary so as to preclude the party from recovering it back. *Morgan v. Palmer*, 2 B. & C. 729. In *Steele v. Williams*, 8 Exch. 625, *Martin, B.*, said: 'If a statute prescribes certain fees for certain services, and a party assuming to act under it insists upon having more, the payment cannot be said to be voluntary.' 'The common principle,' says Mr. Pollock (*Principles of Contract*, 523), 'is that if a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice.' Addison on Contracts, 1043; *Alton v. Durant*, 2 Strobb. 257."

Moreover, the character of the protest is not of vital importance. In *Wright v. Blakeslee*, 101 U. S. 174, 179, 25 L. Ed. 1048, the court, speaking by Mr. Justice Bradley, says:

"No such written notice or protest is required of a party paying illegal taxes under the internal revenue laws. He must pay under protest in some form, it is true, or his payment will be deemed voluntary (citing cases); but whilst a written protest would in all cases be most convenient there is no statutory requirements that the protest shall be in writing. In the present case the court merely finds that the payment of the tax and penalty was made under protest which may have been either written or verbal. We think that this finding is sufficient to show that the payment was not voluntary."

In *Philadelphia v. Collector*, 5 Wall. 720, 18 L. Ed. 614, the court, at page 731 of 5 Wall. (18 L. Ed. 614), says:

"Where the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."

The same doctrine is enunciated in *Erskine v. Van Arsdale*, 15 Wall. 75, 77, 21 L. Ed. 63, where the court says:

"Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them."

It is clear, in the cases at bar, that there was no misunderstanding between the parties upon this point. Neither the collector nor the Internal Revenue Department could have been under the impression, for a single moment, that the taxes were being paid by the plaintiffs voluntarily and without protest. There were a number of very decided protests and disagreements between them, which continued, with varying degrees of intensity, throughout the whole period during which the stamps were purchased. Furthermore, it was unnecessary, as I have already intimated, for the plaintiffs to continually protest. They protested sufficiently often to show that there was no acquiescence in the demands of the government officials, anything beyond that was not required. It would, moreover, be somewhat difficult to indicate what else the plaintiffs could have done to show that they were stamping certain articles involuntarily and under protest and duress.

Coming now to the merits of the case, I would say, at the outset, that in so far as applicable I shall accept the reasoning and conclusions reached by Judge Archbald, in his opinion in the earlier cases, decided in this district, and reported in 122 Fed. 993 and 123 Fed. 409. Many of the questions presented and argued in these cases will thereby be disposed of, and there will remain to be dealt with such articles and preparations only as seem substantially differentiated from those adjudged by him to be nontaxable. But before entering upon such discussion, it may be well to consider the matters which the plaintiffs claim are absolutely *res judicata*. In the cases decided by Judge Archbald, to which reference has been made, writs of error were sued out upon the judgments, which, however, upon hearing were dismissed by the Circuit Court of Appeals, for this circuit, upon the ground that the writs were not taken out within six months after the entry of the judgments, and consequently the court had no jurisdiction. 130 Fed. 109, 64 C. C. A. 443. Such dismissal, however, in no wise prevents those judgments from being *res judicata*, as to all such matters here in controversy as were actually decided therein, and upon which such judgments or findings were based. *Hubbell v. United States*, 171 U. S. 203, 210, 18 Sup. Ct. 828, 43 L. Ed. 136. The writs of error, having been sued out too late, were absolutely inoperative upon the judgments below. Jurisdiction was never conferred upon the court of review. The operation and effect

of the judgments were never for a moment interrupted or suspended by the void writs. Hence whether these cases were rightly or wrongly decided below makes no difference in their power to estop herein the parties and their privies as to all such matters as were actually and necessarily litigated and decided therein and thereby (*Wilson's Ex'r v. Deen*, 121 U. S. 525, 534, 7 Sup. Ct. 1004, 30 L. Ed. 980; *Adams v. Crittenden*, 133 U. S. 296, 298, 10 Sup. Ct. 304, 33 L. Ed. 623; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 398, 17 Sup. Ct. 905, 42 L. Ed. 202), and the existence or nonexistence of a right in either party to have the judgment in the prior suit re-examined upon appeal or writ of error cannot in any case control the scope of the estoppel (*Johnson Company v. Wharton*, 152 U. S. 252, 261, 14 Sup. Ct. 608, 38 L. Ed. 429).

Under the circumstances therefore there are at least two points raised in these suits which I think must be considered *res judicata*, viz.: That the trade-mark, used as the plaintiffs used it, did not render the articles taxable under the act; and that the payments for stamps were made involuntarily and under duress. Notwithstanding this conclusion, the latter point has already been discussed upon the evidence, and it has been determined that the taxes were paid under protest and involuntarily. As to the former question, that the use of the trade-mark and the initials J. & J. upon the packages are *res judicata*, I see no reason whatever to doubt. These matters were directly in controversy in the earlier suits, and were considered and passed upon by the court necessarily and under the conditions and circumstances now presented. The stamps were all imposed under the same act, upon like classes of articles between the same parties and during successive periods of time. In *New Orleans v. Citizens' Bank*, *supra*, the court said, at page 396 of 167 U. S., at page 913 of 17 Sup. Ct. (42 L. Ed. 202):

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the things adjudged in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text-books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear."

In *Baldwin v. Maryland*, 179 U. S. 220, 21 Sup. Ct. 105, 45 L. Ed. 160, the same principle is enunciated, and is clearly indicated in the earlier case of *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205, where, upon page 622 of 7 Wall. (19 L. Ed. 205), the following language is used:

"The court had full jurisdiction over the parties and the subject. Under such circumstances a judgment is conclusive, not only as to the res of that case but as to all further litigation between the same parties touching the same subject-matter, though the res itself may be different."

As to matters which may not be strictly *res judicata*, I shall follow, as already stated, the opinion of Judge Archbald. There re-

mains therefore comparatively little for me to add. In so far as the articles stamped are identical, and that is true of those included in the suit B², the doctrine of *res judicata* must prevail, while as to the suits in class C it is enough to say that they comprise the same articles as class B, except that in class B the plaster was packed in a roll, whereas in classes C the rolls of plaster were cut for use into small parallelograms and were packed in cases in that form, a dozen or more in a case. There is no apparent distinction between the taxability of these two classes under the statute. In character, directions for use and general mode of putting them up, they are alike. If one is taxable, both are, and, if one is not, neither is, and the same may be said of the suits in class B. Class E comprises a miscellaneous collection of articles. Some of the articles comprised in this class omit the plaintiffs' name and trade-mark, and in lieu thereof give the name of some druggist for whom they were manufactured. The articles are made after a standard, and not a secret formula, and there is no exclusive right to make them. The packages manifest no trade-mark or semblance of trade-mark, no advertisement of any disease which it is alleged they will cure, no claim to special merit, no directions for use, and no name other than a pharmaceutical one. They seem to me to be entirely outside of the statute. It is true they are put up in packages, and so too are "proprietary trade-mark and patent medicines"; but this alone cannot settle the question of taxability, since the evidence shows that patent or quack medicines are put up in every conceivable form. The taxability of other articles in class E must be determined by the question whether they are mechanical or medicinal. These articles are referred to in the testimony as finger hats, corn plasters, and bunion plasters, and it establishes conclusively that they are purely mechanical. They serve to protect a finger, a corn or bunion, as the case may be, from injury or outside pressure. An ordinary finger stall used to protect a cut finger illustrates the use of them all. There is not a word of testimony to show that they are medicinal. Other articles in classes E are described as "dental" capsicum plasters and "rheumatic" plasters. Referring to the testimony, we find that "dental" capsicum plasters are identical with the other capsicum plasters, except that they are cut in very small pieces and in convenient form for the use of dentists. The mere fact that the word "dental" may indicate their use for the teeth is of no weight, since it does not describe or indicate any disease of the teeth, or other disease, for which they may be used. I think, however, that "rheumatic" plasters were properly taxable. It is true the word "rheumatic" is not the name of a disease, but it is so directly and inseparably connected with the name of a disease that it may be fairly held that the plasters so styled are advertised as remedies for rheumatism, which is a disease. To call a plaster a rheumatic plaster is equivalent to calling it a plaster for rheumatism. There were other articles specified in classes E which were required to be stamped, but they were voluntarily withdrawn by the plaintiffs at the trial.

Classes G and H require more extended consideration. As to the articles included in the class G, it is claimed, on behalf of the plain-

tiffs, that they are within the proviso of section 20 of the act, which reads, "provided that no stamp tax shall be imposed upon any uncompounded medicinal drug or chemical," and that the fact that they are thus included is emphasized affirmatively by a subsequent portion of the same section, which says, "the stamp taxes provided for in Schedule B of this act, shall apply to all medicinal articles compounded by any formula published or unpublished," etc. It would appear, therefore, that the compounding contemplated by the act is a compound made after or pursuant to a formula, whether published or unpublished, and the weight of the evidence establishes that "compound" implies intelligent action after, or according to, a formula. The word is used in a pharmaceutical sense. *United States v. Studds* (D. C.) 91 Fed. 610, and so understood the evidence shows that compounding would be usually, if not invariably, after a written formula. The classes G under consideration have to do with the drug papain, and the evidence establishes that there is no formula by which papain can be made. It is prepared from the juice of the pawpaw plant. It is a natural product, and the evidence shows that nothing but nature can produce it. Papoid is a name for the simple drug papain, and it is not compounded. It may be a chemical compound, but it is not compounded by chemists or pharmacists, after a formula or otherwise; nor can it be. If its constituent elements were resolved by chemical analysis, they could not be reunited to form papain.

In the case of *Rose v. State of Ohio*, 11 Ohio Cir. Ct. R. 87, the court found as a matter of fact that "Baker's Cocoa" contained nothing which was not a part of the cocoa bean, but resulted from converting that bean by removing the hulls and drying and baking into what is known as "cocoa-nibs," and then extracting therefrom a considerable part of the fat or oily matter, and then grinding the remainder into a powdered substance, and the question presented for decision was whether the article was a "mixture" or "compound," and, after referring to the dictionary definitions of "mixture" and "compound," the court said:

"A fair interpretation of these definitions would not seem to include within any one of them any natural product, though, considered chemically, that natural product may have various ingredients. If we are to say that every article is a mixture or compound which has, chemically considered, more than one ingredient, then we would make every fruit of the earth a compound. Certainly we should make the cocoa bean a mixture or compound. But clearly, a fair interpretation of the meaning of the words 'mixture' and 'compound' in the statute is something resulting from the putting together of parts or ingredients other than as nature has put them together in the fruits of the earth. And if this interpretation is correct, then to say that the article sold by Rose is a mixture or compound, we should be driven to say that the taking of an ingredient from that which is not a mixture or compound leaves a mixture or a compound remaining. It would seem a very strange thing if that from which we take something is not a mixture or compound, that when we take something from that article what remains is a mixture or compound."

The evidence conclusively establishes, to my mind, that papoid is the simple drug papain, the purified juice of the pawpaw plant, and that it is uncompounded. Classes G, however, embrace also papoid tablets and papoid pills. These tablets and pills are composed of the

simple drug papain in the powder form, mingled with an excipient to hold the powder together in the particular form desired. Sugar of milk is used for that purpose. Its effect, according to the evidence, is purely mechanical. It performs the same function as the base of a plaster. In the selection of an excipient the desire is to select one without medicinal quality, and the testimony shows that sugar of milk is of this character, and that it has no medicinal quality except possibly what is inherent in every food. It is a food, and not a medicine. The defendant's expert witness admitted that the vehicle in which drugs are put for the purpose of administration is mechanical, and not medicinal, and that the whole object in view in selecting an excipient is to procure one having as little medicinal effect as possible, so as not to alter the effect of the drug. Papain therefore, whether sold as a powder or in tablets or pills, was a simple drug, and not subject to taxation. In each and every of the forms mentioned it was un compounded, within the meaning of the act.

Coming now to the articles comprised in the classes designated H, we find included therein belladonna plasters which are identical with the plasters of the same name included in class B, and, being so, are subject to the same adjudication. All of the questions pertaining to them are res judicata. There are, however, included in suits H, other plasters known as "Johnson's Belladonna Plasters," which in certain respects differ from the others. Schedule B, appended to the war revenue act, taxes medicinal proprietary articles and preparations under certain specified conditions. Included in the list of articles liable to taxation, if any one of those conditions is met, are "plasters." It is necessary therefore to determine whether the plasters under consideration fall within any one or more of the prescribed conditions which render them taxable. Among those conditions are the following: When the articles are held out, or recommended to the public, by the makers, vendors, or proprietors thereof, as proprietary medicines, or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body. It seems to me the plasters were taxable for the reason that they meet the conditions of the statute just stated. They were held out to the public by the makers as medicinal proprietary articles. They were made and sold as "Johnson's Belladonna Plasters." This in effect made them proprietary. "Proprietary" means belonging to, or pertaining to, a proprietor. The word necessarily implies absolute or qualified ownership. Johnson's plasters are Johnson's, and nobody's else, and they cannot be anybody's else. It is not equivalent to saying "belladonna plasters made by Johnson." "Smith's house" and a "house made by Smith" have a widely different meaning. If one speaks of "Smith's house," he recognizes that house, as in some sense, Smith's; but, if he speaks of a "house made by Smith," there is absolutely no implication of ownership in Smith. Furthermore, each plaster is inclosed in a wrapper, and the purchaser's attention is directed to certain testimonials in the following language: "Note these important indorsements." Immediately thereunder one person says that he is "greatly pleased" with them, and

that they have a quicker and better effect "than any other he has used," and another person, after stating that he has tested them for "skin diseases," finds "increased action and more immediate effect." By printing these testimonials on the wrapper of each plaster, the proprietors adopted them as their own, and in effect recommended them for skin diseases. They were also spoken of as "touching the spot," as "excellent," "uniform," etc., and this was puffing them as the evidence shows patent or quack medicines are uniformly puffed. These plasters meet face to face some of the conditions of Schedule B of the war revenue act. The cases of *Ferguson v. Arthur*, 117 U. S. 482, 6 Sup. Ct. 861, 29 L. Ed. 979, and *United States v. Eisner & Mendelsohn Co.*, 59 Fed. 352, 8 C. C. A. 148, lend color to the views I have expressed.

Summarizing my conclusions, then, I find that the plaintiffs are entitled to recover for stamps illegally exacted upon the articles described in the remaining action in class B (that is the action styled B²), also in the actions in classes C, D, E, and G (excepting rheumatic plasters in class E), and finally upon the articles in class H, except those described as "Johnson's Belladonna Plasters." What I have just said, however, does not, of course, apply to such articles in the various suits as have been voluntarily withdrawn from consideration by the plaintiffs. No proof was produced to show what amounts the plaintiffs would be entitled to recover in the several actions, if entitled to recover at all, for the reason that it was stipulated and agreed between the counsel of the parties that the causes should be referred to a referee or commissioner to compute the amount to be recovered in each suit, after the merits of the cases had been determined by the court.

Pursuant to such stipulation, an order of reference will be made upon proper application.

UNITED STATES v. WELLS-FARGO EXPRESS CO.

(Circuit Court, N. D. Illinois, E. D. April 22, 1908.)

Nos. 28,726-28,730.

1. CARRIERS—INTERSTATE COMMERCE LAW—EXPRESS COMPANIES.

By the provision of Hepburn Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), amendatory of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), that "the term 'common carrier' as used in this act shall include express companies," such companies are made subject to all provisions of said interstate commerce act and its amendments, so far as the same may be applicable, to the same extent as though they had been named in the original act, including the provisions of sections 2 and 3 (24 Stat. 379, 380 [U. S. Comp. St. 1901, p. 3155]) against unjust and unreasonable discriminations, of section 6 (24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]) as amended by the Hepburn act (34 Stat. 586 [U. S. Comp. St. Supp. 1907, p. 897]), prohibiting the taking of any greater or less sum for transportation of property than that named in the tariffs filed, and section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), as so amended, making it unlawful to offer or accept any rebate from the published rate, or other discrimination in respect of the transportation of any property whereby any advantage is given.

2. SAME—CONSTRUCTION—"DISCRIMINATION."

The use of the word "discrimination" in section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), as amended by Hepburn Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1907, p. 897), without the qualifying words "unjust," etc., used in the original Act Feb. 4, 1887, c. 104, §§ 2, 3, 24 Stat. 379, 380 (U. S. Comp. St. 1901, p. 3155), was not intended to broaden the provisions of the earlier act in that respect; the word "discrimination" itself, as so applied, implying an unjust or unfair distinction.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2099.]

3. SAME.

The provisions of Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 2, 3, 24 Stat. 379, 380 (U. S. Comp. St. 1901, p. 3155), prohibiting unjust discriminations and undue and unreasonable preferences, have reference to the service rendered, and not to the person of the sender or consignee.

4. SAME—VIOLATION OF ACT—FRANKS ISSUED BY EXPRESS COMPANIES.

The issuing of franks by an express company to officers, agents, attorneys, or employes of itself or other express companies or railroad companies, or to the families of such persons, upon which property is transported from one state to another free of charge, relates to interstate commerce, which it is within the constitutional power of Congress to regulate, and is within the prohibitions of the interstate commerce act and its amendments against discrimination, undue preference, and departure from the published schedule of rates, and is unlawful. Such gratuitous carriage is not within the exceptions made in Interstate Commerce Act Feb. 4, 1887, c. 104, § 22, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3170), which by their terms are restricted to certain classes of passengers carried by railroads and property carried for certain classes of shippers and for stated purposes.

In Equity. Petition to restrain violation of the interstate commerce law by the United States against the Wells-Fargo Express Company. On final hearing. Like petitions against the United States Express Company, the National Express Company, the American Express Company, and the Adams Express Company were also argued and submitted.

Edwin W. Sims, U. S. Atty., and James H. Wilkerson, Sp. Asst. U. S. Atty.

W. W. Gurley (Frank H. Platt, of counsel), for United States Express Company.

Lewis Cass Ledyard and Winston, Payne, Strawn & Shaw (Lawrence Maxwell, of counsel), for National Express Company and American Express Company.

W. W. Green and Holt, Wheeler & Sidley, for Wells-Fargo Express Company.

Cravath, Henderson & De Gerschof and Winston, Payne, Strawn & Shaw (Lawrence Maxwell, of counsel), for Adams Express Company.

KOHLSAAT, Circuit Judge. The government files its petition herein under the provisions of section 3 of "An act to further regulate commerce with foreign nations and among the states," approved February 19, 1903 (32 Stat. 848, c. 708 [U. S. Comp. St. Supp. 1907, p. 882]), to restrain defendant from issuing franks to any of-

ficer, agent, attorney, or employé of itself or other express companies and of any railroad company, and to the respective families of said several persons, and from transporting, without demanding full rate of payment therefor as published, any property of any of said persons from a point in one state to a point in another state. Defendant has answered, and the facts have been stipulated, admitting the granting of free transportation of property substantially as charged.

The issue is squarely made upon the law, and the cause is now before the court on final hearing. Those portions of the statutes of the United States involved in this proceeding are:

(1) That part of section 1 of the interstate commerce act of February 4, 1887 (24 Stat. 379, c. 104 [U. S. Comp. St. 1901, p. 3154]), as amended June 29, 1906 (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1907, p. 892]), which reads as follows:

"No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion. * * * Provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in the case of general epidemic, pestilence, or other calamitous visitation."

(2) That portion of section 2 of said act of February 4, 1887, which reads as follows:

"That if any common carrier subject to the provisions of this act shall * * * collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

(3) That part of section 3 of the same act which reads as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

(4) That part of section 6 of said act, as amended by the act of June 29, 1906, which reads as follows:

"Nor shall any carrier charge or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as specified in such tariff."

(5) Section 22:

"That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments. * * * Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes."

(6) That part of section 1 of the act of February 19, 1903, known as the "Elkins Act," as amended June 29, 1906, which reads as follows:

"The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs of rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof, the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense. And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is gained or discrimination is practiced. * * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate, as against such carriers, its officers or agents, or any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate shall be deemed to be an offense under this section of this act."

(7) By the act of June 29, 1906, it was provided:

"The term 'common carrier' as used in this act shall include express companies and sleeping car companies."

It is contended by complainant that said acts of defendant in transporting property for the above persons without charge (1) constitute unjust discrimination under sections 2 and 3 of the act of 1887; (2) constitute a charge of less than schedule rates under section 6 of the act of 1887, as amended June 29, 1906; (3) violate the Elkins law of 1903, as amended June 29, 1906, in the matter of discrimination and variance from schedules. (The language of this clause of the Elkins act last referred to is substantially unchanged by the amendment.) For defendant it is claimed: (1) That such acts were concededly lawful prior to the amendment of June 29, 1906; (2) that such acts do not fall within the prohibition of the act as it now stands; (3) that said acts do not come within the meaning of "commerce" as used in the act; (4) that express companies come within the exceptions of the act as amended June 29, 1906.

Prior to the amendment of June 29, 1906, express companies were not specifically subject to the terms of the interstate commerce act and the several amendments thereto as common carriers. Since that date hitherto, they stand with reference to the act and the several amendments thereto as though they had been named in the original

act of 1887. They are in no respect in an attitude different from that of a railroad, save in so far as the language of the act necessarily excludes them. It may be conceded for the purposes of this hearing that the acts complained of were lawful prior to the passage of the said amendment of June 29, 1906. Since that amendment, said transactions, so far as they contravene the provisions of said act, are unlawful. These may be stated briefly as follows: (1) The provisions of sections 2 and 3 against unjust and unreasonable discrimination in the transportation of persons or property; (2) said amended section 6, prohibiting the taking of any greater or less sum for transportation of passengers or property than that named in the tariffs filed; and (3) said section 1 of the Elkins act as amended, making it unlawful to offer or accept any rebate from the published rate, or other discrimination in respect of the transportation of any property whereby any advantage is given.

Amended section 1 of the so-called Elkins act differs from sections 2 and 3 of the original act, among other matters, in this: That the word "discrimination" is used in the former without any qualifying adjective, as "unjust," etc. It is contended by the government that this omission discloses the intention on the part of Congress "to require common carriers in interstate commerce to publish and file schedules of rates, to adhere absolutely to such rates, and to grant no preferences or discriminations unless expressly authorized by the statute." It may be doubted whether Congress intended by this language to broaden the prohibitions of the act in that respect. It is difficult to conceive of the terms "discrimination," "prejudice," or "disadvantage" as not associated with what is unjust, unreasonable, and undue. It is true the adjectives are dwelt upon in the former decisions of the court with considerable emphasis. It hardly seems, however, as though their absence would have modified the opinion rendered in these cases. Webster defines the word "discrimination," with reference to railroads, as "the arbitrary imposition of unequal tariff for substantially the same service," investing it with the sense of unjustness and unfairness. So far as appears, the Supreme Court has not had its attention called to the change, and has given it no construction. In *Platt v. Le Cocq* (C. C.) 150 Fed. 391, the words "prejudice and disadvantage" of the South Dakota statute were construed to mean unreasonable prejudice or disadvantage. In view of these considerations, and bearing in mind the general trend of the statute and amendments thereof, there seems to be no sufficient basis for the construction of the Elkins act asked for by the government in that respect. It is, however, evident that the passage of the acts of 1903 and 1906 contemplated a more effectual enforcement of the statute. The requirements are made more specific and the prohibitions more emphatic, and, as if to make an end of the violations theretofore winked at, it was declared in 1906 that free transportation of persons except in certain specifically named instances should not be granted after January 1, 1907.

As above said, the government insists that under these statutes as amended it is the duty of common carriers to file and publish their

tariffs (except as to those instances specifically named in section 22), and, having so done, to charge the rate to every one, including those named in the pleadings; that the "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions," of section 2, "relates to the carriage of goods, and not to the person of the sender or consignee"—citing *Great Western R. R. Co. v. Sutton*, L. R. 4 H. L. 226, and *Denaby Main Collier Co. v. Manchester Railway Co.*, 11 App. Cas. 97. In the latter case Lord Chief Justice Blackburn said:

"I think it finally settled * * * that for passing over the same portion of the railway the obligation to charge in respect of goods of the same description equally is imposed if they are 'under the same circumstances,' and that the circumstances are those relating to the carriage of goods, and not to the person of the sender."

The portion of sections 2 and 3 which refer to unjust discrimination and undue and unreasonable preference are modeled from the English tariff act, and the construction placed thereon by the English courts is deemed, to say the least, very persuasive. *Interstate Commerce Commission v. B. & O. R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; *Interstate Commerce Commission v. Alabama Midland R. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The Interstate Commerce Commission (5 Interst. Com. R. 69, 77, 91) has construed section 2 as follows:

"Without further citation of authority, the construction we give to section 2 of the act to regulate commerce is that, where the service by the carrier subject to the act is 'like and contemporaneous' for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in section 22, and that, where the traffic is 'under substantially similar circumstances and conditions' in other respects it is not rendered dissimilar within the meaning of the statute by the fact that such passengers hold unlike—or, as sometimes termed, unequal—official, social, or business positions, or belong to different classes, as they ordinarily exist in a community, or are arbitrarily created by the carrier."

Therefore it seems clear that the court should on the facts of the case consider the language above quoted from section 2 as referring to the carriage of goods, and not as applying to the person or capacity of the sender or receiver.

It is further contended for complainant that the free carriage of property not excepted in section 22, by defendant, for the classes of persons described in the pleadings, while at the same time the filed and published rate for that same service is charged against the general public, constitutes per se discrimination within the meaning of the statute. As above stated, the term "discrimination" includes unjust discrimination, and that is not within the statute which is not unjust or unfair. "The spirit as well as the letter of a statute," says the Supreme Court in *Durousseau v. United States*, 6 Cranch, 307, 3 L. Ed. 232, "must be respected, and, where the whole context of the law demonstrates a particular intent in the Legislature to effect a cer-

tain object, some degree of implication may be called in to aid that intent." To the same effect are *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320, and *Glover v. United States*, 164 U. S. 287, 17 Sup. Ct. 95, 41 L. Ed. 440. Mr. Justice Brown, speaking for the Supreme Court in *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, affirming the ruling of the lower court (43 Fed. 37), says:

"The object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state, or municipal governments," etc.

The section stands, with regard to the transportation of property as originally passed, except as it may be deemed to have been modified by the language of amended section 1 of the Elkins (1903) act, and the more stringent requirements of amended section 6, with regard to the filing, publishing of, and adherence to the schedule of rates. In the group of cases known as the "Express Cases" (117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791), it was held that railroads were not, as to express companies, common carriers. This was later approved in *Railway Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560. In *United States v. C. & N. W. Ry. Co.*, 127 Fed. 783, 62 C. C. A. 465, decided in 1904, the Circuit Court of Appeals for the Seventh Circuit held that the granting of a party rate to theatrical, musical, and other enterprises, and withholding it from the government for the transportation of soldiers, did not come within the prohibition of the act. In *Northern Pacific Railway Company v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, and in numerous other cases, the courts have held that, in transporting an employé of another railroad upon a pass, the company did not stand in the attitude of a common carrier for hire to such person. The jurisdiction of Congress to legislate upon the subjects of car equipment and employer's liability was sustained by the Supreme Court in *Johnson v. R. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, and *Howard v. Illinois Central R. R.* (decided January 6, 1908) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. —, upon the ground that the subject-matter had reference to commerce. "Manifestly," says the court in *Adair v. U. S.* (decided January 27, 1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. —, "any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated."

Relying upon the doctrine of these decisions, defendant takes the position that gratuitous transportation is not commerce, because it lacks the essential idea of traffic. The statute is not a police regula-

tion, it says, nor one dealing with questions of public policy, and defendant's acts here involved must be held to transgress the statute only in so far as they are inimical to or influencing commerce. "In respect, however, to the classes not connected with trade or commerce in any manner," say its solicitors, "with whom the carrier has no dealings in its common and accepted relation to the public, we contend that gratuitous service is not commerce in any sense of the term, and not forbidden either by the letter or the spirit of the interstate commerce act. The circumstances and conditions surrounding such service are so entirely removed from and unlike the conditions upon which the carrier serves the public that no comparison can be made between the two to support a charge of unjust discrimination or undue preference." (Defendant's Brief, p. 12.) It may be, as stated, that as to persons and matters in no way connected with trade or commerce the granting of gratuitous carriage would not constitute discrimination or undue preference. If, however, the transaction is within the domain of interstate commerce, it cannot be said to be in no way connected with commerce. Speaking for the Supreme Court in the Employer's Liability Cases, so called (207 U. S. 495, 497, 28 Sup. Ct. 145, 52 L. Ed. —), it is said by Mr. Justice White:

"From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states,' etc.; that is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do; that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce."

In *New York, New Haven & Hartford R. R. v. Interstate Commerce Commission*, 200 U. S. 391, 26 Sup. Ct. 277, 50 L. Ed. 515, the court says:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism; these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination."

Mr. Justice Day, speaking for the court in *Armour Packing Co. v. United States* (decided March 16, 1908) 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. —, says:

"But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the published and filed rate, equally known by and available to every shipper. * * * In this act we find punishment by imprisonment abolished, and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect to the transportation of property in interstate or foreign commerce whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. * * * This act is not only to be read in the light of the previous legislation; but the purpose which Congress evidently had in mind in the passage of the law is also to be considered. * * * The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which, or the motive for which, this purpose was accomplished; but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

In *Hanley v. Kansas City So. Ry. Co.*, 187 U. S. 619, 23 Sup. Ct. 215, 47 L. Ed. 333, it is said:

"The transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered."

Mr. Justice Harlan, voicing the opinion of the court in *Adair v. U. S.*, decided January 27, 1908, defines "commerce" as follows, viz.:

"This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph; indeed, every species of commercial intercourse among the several states, but not to that commerce completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Of course as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and authorities there cited."

"If," says Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1-196, 6 L. Ed. 23, "as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

It thus appears that, while Congress takes jurisdiction of the matter of interstate commerce under the provision of the Constitution pertaining thereto, it in so doing draws to itself full power to deal with all questions arising in that field, and, among others, the right

to declare what shall be and what shall not be permitted therein, subject only to other constitutional provisions, and so to determine what matters are comprehended within the spirit of the act. It may, therefore, not be said, as an abstract proposition, that in respect to the classes claimed by defendant not to be connected with trade or commerce in any manner, with whom the carrier has no dealings in its common and accepted relation to the public, to use counsel's phrase, that gratuitous service is not commerce in any sense of the term, and not forbidden, either by the letter or the spirit of the interstate commerce act. The statute applies to all acts which directly or indirectly affect interstate commerce. Surely it cannot rest in the volition of the carrier, by departing from the published schedules in arbitrary cases, to create a privileged class to which it may with impunity extend discriminating rates. Defendant's contention in this regard is not tenable. There can be no doubt but that it is clearly within the power of Congress to legislate upon the subject-matter here involved and to include the free carriage of goods by an express company for employes of itself, other express companies, and railroad companies, among those acts which are prohibited by the interstate commerce act. The claim on the part of defendant that the granting of the free carriage set out in the pleadings contributes materially toward making its service attractive to employes, resulting in better transportation facilities to the public, and therefore, not within the act, even if true, is beside the question before the court.

While the constitutionality of the act is not here attacked, yet the defendant seems to imply that to construe the statute as asked for in the bill would leave it open to that objection. For the reasons and upon the authorities above set out, and others not cited, this is not the law. Whether or not a construction of a statute would work inconvenience or affect the efficiency of the thing legislated upon is of no moment, provided Congress has the power to legislate upon the subject-matter. A court might well charge itself with judicial cognizance of the fact that, carried to its logical result, the use of free carriage as a means for bettering the public service would revive the very evils which the statute was designed to remove. The court is of the opinion that the transactions set out in the pleadings are within the prohibitions of the statute, and that, unless included within the exceptions thereof, they must be held to violate the same.

It is contended for defendant that the term "passes," as used in said amended section 1 of the act of 1887, includes the franks in question, one form of which reads as follows, viz.:

"1907.

"This frank does not cover charges on foreign S. S. lines or to the U. S. island possessions.

"Wells Fargo & Company will transport free of charge during the current year over its express line the personal packages of ———, subject to conditions endorsed hereon."

The conditions indorsed on the back are as follows:

"The free transportation hereby granted is complimentary and not transferable, and is applicable only to personal packages of the holder, not the

shipments of extra heavy weight or quantity, money, bonds, jewelry, live stock or business consignments.

"By accepting and using this frank, the respondent thereby assumes all risk of loss or damage from whatever cause to property carried under same.

"When charges are collected upon packages entitled to free transportation, the company's agent will if requested refund same upon presentation of the frank.

"The holder of this frank is requested to present it with shipments, when made, or if not practicable to do so, to personally mark on the baggage 'free frank. No. ———,' adding his signature. If used at any other place than the residence of the holder, the frank must be presented with the shipment."

While on the merits there may be no just reason why express companies should not have the same liberty in respect to the issuance of free transportation of property that railroads have as to persons, it is evident that this section applies in terms solely to the transportation of particular classes of persons, and there can be no doubt that Congress acted within its powers in so doing. As said in *Gibbons v. Ogden*, supra, with reference to interstate commerce:

"As has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects."

Its acts with regard to subject-matters over which it has plenary power, unless done in contravention of the Constitution, become the supreme law of the land; nor does there seem to be any limitation upon its power to deal as it may elect with the questions involved in the statute under consideration, even though such action, if taken by a state, would be prohibited as class legislation under the fourteenth amendment to the Constitution. In *Howard v. Illinois Central Railroad*, supra, it was urged that the statute discriminated in favor of the employé and against the employer, "placing all employers who are common carriers in a disfavored, and all their employés in a favored, class." "But," says the court, "without, even for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act, and not the power of Congress to enact it. We say this, since, in testing the constitutionality of the act, we must confine ourselves to the power to pass it, and may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary."

There is no reason for assuming that Congress intended to give other meaning to the terms "pass" and "frank" than those in common acceptance—the one referring only to persons, and the other to property, telegrams, and the like. The language of the statute with reference to the filing of and adherence to rates is comprehensive and unequivocal, and, in the absence of the exception of sections 1 and 22, would include the excluded items thereof. By the proviso certain persons are relieved from the general effect of the act. This is deemed to be the fair meaning thereof, and the rule of construction laid down by Mr. Justice Story in *United States v. Dickson*, 15 Pet. 141-163, 10 L. Ed. 689, is held to apply, viz.:

"In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words, as well as within the reasons, thereof."

And by Mr. Justice Strong in *Savings Bank v. U. S.*, 19 Wall. 227, 235, 22 L. Ed. 80:

"[It [the proviso] takes out of the operation of the body of the enactment that which otherwise would be within it. It restrains the generality of the provision."

It will be seen, from the terms of the frank above set out, that it opens a wide field for the evasion of the spirit of the act. It is not even limited to the classes named in the pleadings. This hearing, however, is so limited, and no point is made of this last circumstance. It is broad enough in language to admit of a vast free-carriage business, and might well become a potent factor in the securing of business advantages without transgressing the other provisions of the act. Indeed, there appears to be no legal or ethical grounds for making any presumptions in its favor, as against the letter of the act as amended. Section 22 in terms takes from the operation of the act the carriage, storage, and handling of property free or at reduced rates for the United States and state and municipal governments, and for charitable purposes, and carriage to and from fairs and expositions for exhibition thereat, and the carriage of certain classes of persons named therein specifically. Admittedly, the service herein objected to is not mentioned. It is argued for defendant that the language, "Nothing in this act shall prevent," etc., and "Nothing in this act shall be construed to prohibit," etc., discloses the intention of Congress to make it known that the excepted persons and property were not to be considered within the statute. In *Interstate Commerce Commission v. B. & O. R. R. Co.*, supra, it is said by Mr. Justice Brown:

"The object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust."

And he adds:

"It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust; in other words, this section is rather illustrative than exclusive. Indeed, many, if not all, of the excepted classes in section 22, are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States. * * * It does not operate to the prejudice of a single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one, it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. * * * If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing."

As said by counsel for defendant:

"The purpose of that statute [the Elkins act] was to prescribe penalties and supply remedies for the better and more effectual enforcement of the interstate commerce act."

The amendments of 1906 infuse greater vitality into the act. Furthermore, in the two cases last cited, the transportation was provided in accordance with published rates, and was regarded by the court as a legitimate means to be employed by the carrier in stimulating the particular kind of carriage embraced within it. There was no deviation from the rates filed with the Interstate Commerce Commission. That Congress might have declared the special party rate illegal will hardly be controverted. Whether this be so or not, the facts of those cases differ so greatly from those set out in the pleadings herein, and the construction asked to be placed upon them is so at variance with the later decisions of the court and the language of the statute as it now stands, that it is considered that the granting of the free carriage set out in the pleadings, in the manner in which it is granted, is not justified by law, and is in contravention of the statute.

It is undoubtedly true that, even in the absence of statutory provision, certain free transportation could not be held to be of a discriminatory nature, as, for instance, those persons and that property directly required by the carrier in sustaining its own construction, maintenance, and efficiency. The Interstate Commerce Commission, in general rule issued October 12, 1906, found in 12 Interst. Com. R. 11, held as follows:

"But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing a duty imposed upon, the carrier, nor from giving free carriage over its line to the household and personal effects of an employé who is required to remove from one place to another at the instance of, or in the interest of, the carrier by which he is employed."

Free carriage of persons and property, other than that permitted by the act, and that required solely for the purposes of the carrier and necessary in the performance of its duty to the public, is prohibited by the statute. The acts described in the pleadings come within neither of these classes, and are therefore declared to be in violation of the law.

In re TANG TUN et ux. In re GANG GONG. In re CAN PON.

(District Court, W. D. Washington, N. D. May 18, 1908.)

Nos. 3326, 3606, 3647.

1. ALIENS—DEPORTATION OF CHINESE—REVIEW OF DECISION BY COURTS.

Evidence considered on an application for a writ of habeas corpus by a person of Chinese descent claiming to be a citizen of the United States by birth, but who, with his wife, was denied admission on his return from China, and held to establish his citizenship and right to enter with his wife, and also to clearly sustain his contention that he was not given a fair and impartial hearing by the immigration inspector, nor any hearing on the merits on his appeal to the Secretary of Commerce and Labor, which facts entitled him to apply to the courts for the protection of his constitutional rights as a citizen.

2. SAME—HEARING ON CLAIM OF CITIZENSHIP—DUE PROCESS OF LAW.

A hearing by an immigration inspector of the case of a person of Chinese descent claiming to be a native-born citizen of, and seeking to enter, the United States, upon testimony and unsworn statements taken *ex parte*, without giving the applicant or his counsel the opportunity to be present, is not a judicial inquiry nor due process of law.

[Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

3. SAME—POWERS OF SECRETARY OF COMMERCE AND LABOR.

Laws which confer judicial discretion upon administrative officers must be construed with a degree of strictness requisite to make them consonant with the spirit of the fundamental doctrines of the Constitution, and the power conferred on the Secretary of Commerce and Labor by the Chinese exclusion act to finally determine on appeal the right to enter the United States by a person who claims to be a native-born citizen cannot be exercised by an acting secretary, in accordance with a recommendation made by himself as a solicitor of the Department adverse to the appellant.

Habeas Corpus. For relief of alleged citizens of Chinese parentage, whose right to enter the United States was denied by officers of the Immigration Bureau.

McCafferty & Godfrey and Kerr & McCord, for Tang Tun et ux.

Fred H. Lysons and Will H. Thompson, for Gang Gong.

Hammond & Hammond, for Can Pon.

Elmer E. Todd, U. S. Dist. Atty., Charles T. Hutson, Asst. U. S. Atty., and Frederick G. Dorety, Asst. U. S. Atty.

HANFORD, District Judge. In the first of these cases, a man and his wife are contending for the right to come into the United States to reside permanently, and that right has been denied by officers of the government, on the ground that they are Chinese persons who are, by the laws of this country, prohibited from entering. The husband, although of Chinese parentage, has discarded the queue and garb which distinguish the Chinese in outward appearance from the people of other nationalities, and he claims this as his native country and the rights of a citizen. The evidence proves conclusively that Tang Tun lived at Seattle continuously for a period of about eight years previous to September, 1905, during which period he was an employé of the Wa Chong Company, a well-known Chinese firm engaged in mercantile business and operating a market garden near Seattle, and he became acquainted with well-known citizens, who have given testimony in his behalf, and who were acquainted with the man he claims as his father.

The evidence also proves conclusively that Tang Tun came to Puget Sound from China on the steamship Tacoma in the year 1897, having then in his possession certain affidavits made by citizens of Seattle, which he exhibited to the collector of customs as evidence to establish his identity and nativity. The law in force at that time vested in the collector of customs authority to decide as to the right of Chinese persons coming to the United States by sea to land and remain in this country, and the collector made an indorsement upon said identification affidavits, indicating the date of arrival, the name of the

vessel, and his decision permitting the contestant to land, and signed it and delivered the affidavits so indorsed to the contestant, but retained duplicates, upon which he made an indorsement indicating a contrary decision, and he also made a record that the contestant's right to enter the United States had been denied. Notwithstanding the record in the Custom House, the contestant did live in Seattle, and was employed by the Wa Chong Company, as above stated, until September, 1905, when he was given a \$1,000 interest in his employer's business, and he then went to China and was there married. The marriage was solemnized by Rev. C. A. Nelson, a Christian missionary at the American Consulate in Canton, China, May 21, 1906, and is evidenced by a marriage certificate signed by P. S. Heintzleman, Vice and Deputy Consul General of the United States of America, and authenticated by the seal of the Consulate.

The case appears to me to have been overworked; that is to say, the attorneys have weakened the case for their clients by unnecessarily calling as witnesses Mr. Fitzhenry and Mr. Burritt, whose testimony as to the most important facts is unbelievable. These witnesses having been, in times past, acquainted with many of the Chinese inhabitants of Seattle, are called frequently to testify with respect to the identity of different Chinese persons claiming to have been born in Seattle. Attorneys looking for this kind of evidence find them convenient, and it appears to be easy to convince them of their ability to verify, from memory, facts suggested by others with respect to Chinese families; but their stock of Chinese reminiscences appears to have become exhausted. In this case both of them made bad guesses when interrogated with respect to a photograph of Tang Tun. I reject their testimony entirely, but I deem it to be the duty of the court to give fair consideration to the other evidence, notwithstanding this objectionable feature of the case. After making due allowance for obvious mistakes and errors in the testimony of Tang Tun and his other witnesses, I am convinced by their positive statements that there was a Chinaman named Quong Lee, who was a merchant, and that he lived with his wife in Seattle from 1878 until 1884. There is no contradiction in the record of the positive testimony of Tang Tun that he is Quong Lee's son, that he was born in the year 1879, that he lived with his father in China from about 1884 until his father died, that he came to the United States in 1897, and that before coming, the identification affidavits, above referred to, were procured by the manager of the Wa Chong Company in Seattle. He is a competent witness to prove these facts, and I find no ground for discrediting his testimony, except such minor mistakes and errors as may be found in the testimony of the average run of witnesses.

Mr. William B. Thompson, a member of the police force of Seattle, whose veracity appears to be unquestioned, was examined as a witness, and testified that, during the period from 1878 to 1884, he was engaged in the trucking and draying business in Seattle, and did work in that line for a Chinese firm of which Quong Lee was manager, and that he frequently saw children, a boy and a girl, at the place of business of said firm, who appeared to be Quong Lee's children, and that the boy appeared to be about three years of age when he

first noticed the child, and about six years of age when the family returned to China, which, according to the report of his testimony, was in 1878 or 1879. This last statement is clearly an inadvertence, shown to be such by the testimony in its entirety, and by Mr. Thompson's own statements. The other evidence fixes the time of departure in the year 1884, and, if the boy was five or six years old then, he must have been born during the time of Quong Lee's residence in Seattle. Mr. Thompson saw him after his admission to this country in 1897, and became so well satisfied as to his identity that he felt justified in making a positive statement in his testimony that this is the same boy whom he knew in childhood as the son of Quong Lee.

I consider that there is more than a mere preponderance of the evidence in favor of the contestants, and that the right of Tang Tun to invoke the jurisdiction of this court to protect him in his rights as a citizen of the United States, notwithstanding the provisions of the Chinese exclusion law denying such right to alien Chinese, has been well established. This court must and does respect the decision of the Supreme Court in the case of *Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and must disclaim jurisdiction, unless the contestants have proved that the Chinese inspectors and the Secretary of Commerce and Labor have unjustly denied their right to enter the United States without giving them a fair and impartial hearing. The contestants have charged the representatives of the government with unfair treatment in the investigation made of their case, and with having rendered an adverse decision, contrary to the facts and the law applicable, and, by making such charge, have assumed the burden of proving it. The court finds that the truth of this accusation has been clearly and completely established by the evidence. The reasons which the inspector gave for excluding these contestants from this country are as follows:

"First, that applicant's status had already been adjudicated by officers duly charged with the enforcement of the Chinese exclusion laws; second, though given an opportunity to show that injustice may have been done by the former finding in his case, applicant failed to furnish any evidence to support such a conclusion; and third, the applicant did not furnish sufficient evidence of any status by which he was entitled to admission to the United States. The third reason for rejection was for the purpose of covering the apparent intention of the applicant to set up for himself the claim that he was a domiciled merchant."

The first of the assigned reasons has reference to the determination of the question of Tang Tun's nativity by the collector of customs in 1897, which the inspector assumed to have been adverse; in this, the prejudice of the inspector and the unfairness of his decision is clearly indicated, because the conclusion reached is contrary to the indisputable fact that Tang Tun was not excluded, but was admitted to this country and lived here, not in concealment, but openly, for eight years, his presence being known to many people, including one of the Chinese inspectors, Mr. Thos. M. Fisher, Jr., who so certifies in a report which he made on this case, which report is in the record. The record which the collector made in the Custom House by indorsements on papers filed there furnishes the only supposable

basis for the inspector's conclusion. That record, however, is not by any statute declared to be legal evidence, and it would not be competent in any court of the United States to prove any fact. It is authenticated only by the handwriting and signature of the man who was at the time collector of customs, and it is contradicted by a certificate in the handwriting of and signed by the same collector upon the original document which he delivered to Tang Tun, as evidence of his right to be in this country. In an endeavor to impeach the collector's indorsement, showing that Tang Tun had been admitted to enter the United States, the inspector in his report certifies that several other Chinese persons, having similar documents indorsed in a similar manner by the same collector, had been arrested on the premises of the Wa Chong Company, and had been, notwithstanding their possession of the collector's certificates, deported from the United States, pursuant to an order made by a United States commissioner, after a judicial investigation. If that evidence is relevant to the issue in this case, it is at least a two-edged sword. It tends to prove only that the collector of customs had been guilty in those instances of conniving at evasions of the Chinese exclusion law by furnishing fraudulent certificates. On the other hand, the arrest and deportation of the other Chinese persons holding such certificates proves the vigilance of the officers charged with enforcement of the Chinese exclusion law, other than the collector, and that they had knowledge of his fraudulent practices, and justifies an inference that Tang Tun would have been arrested and deported by them when the others were, if he had not been deemed to be lawfully entitled to remain in this country.

The second of the assigned grounds contains a glaring manifestation of prejudice on the part of the inspector. In this he certifies that, although he considered the decision of the collector of customs as being adverse to the right of Tang Tun to enter the United States, and a final adjudication of the whole matter, he nevertheless afforded a fair opportunity to prove that decision to have been unjust, and that the "applicant failed to furnish any evidence to support such a conclusion." In a sentence he eliminates not only the testimony of Fitzhenry, Burritt, and Coombs, who are regarded by the officers of the Immigration Bureau as professional witnesses in Chinese cases, but the testimony also of a man who for many years has been trusted as a member of the police force of Seattle, whose testimony has not been contradicted and has been corroborated by Mr. Fisher, as to the important fact, that Tang Tun was employed by the Wa Chong Company in Seattle for a considerable time after the date of the supposed adverse decision by the collector of customs.

It is unnecessary to comment on the third of the assigned grounds, because the contestants are not asserting a right to enter the United States as privileged aliens.

If there is error in the opinion of this court with respect to the prejudice and unfairness of the inspector, still the contestants have sustained the charge made against the government, because under the law they were entitled to have the case reviewed by the Secretary of Commerce and Labor, and, when appealed to, his decision constitutes

the final determination of the rights of an alien Chinese person to come into this country. An appeal was taken in this case, and the only response to it, appearing by the record, was the following telegraphic message: "Appeal Tang Tun and Leung Kum Wui dismissed. Murray." There being positive testimony uncontradicted, which, if carefully analyzed and fairly considered, would have justified a reversal of the inspector's decision, I am bound to understand the telegram as being literally true, indicating that the case did not receive any consideration whatever by the Secretary of Commerce and Labor, but some officer of the Department, acting for or in place of the Secretary, refused to entertain the appeal and arbitrarily, without deigning to assign a reason, dismissed it, and I must conclude that a man who by competent evidence had established a right to enjoy liberty to come and go freely in his own country, and to the protection which the Constitution of the United States guarantees, has been denied such a hearing by officers of the government as the laws enacted by Congress provide for, and by reason of such denial this court is obligated to exercise its power for his protection. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. —. His wife has the same legal status that he has, and a legal right to live with her husband in this country. *U. S. v. Mrs. Gue Lim (D. C.)* 83 Fed. 136; *Id.*, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544.

Gang Gong Case.

I have studied laboriously all of the testimony in Gang Gong's case, and the improbability of some of the statements reported to have been made by the contestant when under examination by the Chinese inspector gave rise to a suspicion in my mind that he may have been jobbed by the interpreter, and being unable to render a decision satisfactory to myself, based upon the record submitted to me, without further inquiry, I caused the man to be brought into court, and through a different interpreter, in the presence of his attorneys, I carefully interrogated Gang Gong, in a manner to afford him the fairest possible opportunity to state facts, which, if they existed, should have been known to him, and which would have led me to a conclusion favorable to him; but, although his statements on this examination varied in some particulars from his testimony taken before the inspector, he repeated some of the things which I deem improbable, and he also persisted in contradicting his alleged father in regard to facts of vital importance. I must say that the examination did not dispel the doubts which previously existed, and that there is not sufficient convincing power in all of the evidence to justify a finding that this contestant was born in Seattle, as he claims.

Can Pon Case.

The investigations of the Chinese inspectors, which resulted in their denial of the right of this contestant to enter the United States, were conducted in a manner resembling the work of detectives, more than a judicial inquiry. Mr. Fisher, who made the first report on the case, recommended to the inspector in charge that Can Pon should be admitted. In the record of the subsequent examination of wit-

nesses by Mr. Monroe, whose report to the inspector in charge appears to have been adopted, at different places, without the contestant or his attorneys being present, there is manifested a zeal to elicit adverse testimony inconsistent with that degree of fairmindedness required of a trier in passing upon a question so important as that involved in the assertion of a man's right to return to his native land. It appears that Mr. Monroe received and gave credence to statements made by a Chinese laundryman, named Chin Leong, who refused to make his statement under oath. I find also that in his examination of Look Wing, the father of Can Pon, Mr. Monroe in several instances evinced a hostile disposition by jeering the witness for being unable to give satisfactory responses to vexatious compound interrogatories. In his report to the inspector in charge, besides commenting on discrepancies and contradiction in the testimony and quoting the statement of Chin Leong to the effect that he knew Look Wing personally, and that the latter never had a wife and children in Seattle, Mr. Monroe makes the following statement:

"The census of Seattle Chinese, made in 1895, gives the name of this Look Wing, but not the name of his wife or alleged boys. We have reason to believe this census to be very reliable as great care was taken in its compilation."

The record, however, contains no other information by which the accuracy of the census referred to may be judged.

The case having been decided adversely to the right of Can Pon to come in, an appeal was taken to the Secretary of Commerce and Labor, and in sending up the record the testimony of one of the witnesses which was, in the main, favorable to the contestant, was inadvertently omitted, and therefore did not receive consideration in the Department. The record contains a recommendation by the Commissioner General of Immigration and Naturalization that the appeal be dismissed, also a report by Chas. Earl, solicitor of the Department of Commerce and Labor, which, so far as it is material, reads as follows:

"The appellant, who is now about 15 years old, claims to be the son of Look Wing, and to have been born in Seattle, and to have lived there until he was about 7 years old, when he went to China with his parents. His right to admission depends upon the establishment of the fact of birth as claimed. The testimony taken is so voluminous, and the statements of the various witnesses are so confusing, that an analysis of the testimony is impracticable. Whether or not there might be deduced from the mass of testimony a story which is reasonable and which is consistent with the assumption that the appellant was born in the United States, it is certainly true that he has failed to establish his claim with that degree of certainty which should be required. In order to assume that the appellant was born in the United States, as claimed by the alleged father, it would be necessary to assume that the alleged father made a misstatement when he said in his examination of June 6, 1907 (see record in case of Look Wing) that neither his wife nor his children had ever been in the United States, or that the record of that examination was wrong, and, in short, to assume that the record of his testimony is full of inaccuracies, or that his condition of mind since his sickness in 1905 (see affidavit and testimony of Dr. Maxson, pp. 69, 85, 86) has been such that he did not comprehend the statements he made as to where he worked at different times and the location and name of the laundry which he claims to have owned, and in which he claims that the appellant was born. And if the alleged father's

testimony is thrown out on account of its unreliability, we are no better off, for we must then rely upon the testimony of those who were not in position to know the essential facts, and this testimony is so contradictory and so uncertain as to be of little value in arriving at a satisfactory conclusion. It is recommended that the appeal be dismissed."

And it appears by the record that the appeal was dismissed by Chas. Earl, acting secretary. The statutes cannot be so constructed or applied as to deprive citizens of their birthright, and the power of the judicial branch of the government to relieve against oppression amounting to deprivation of liberty cannot be restricted to any extent greater than is necessary for the exercise of the functions which naturally and properly pertain to the executive branch. Laws which confer judicial discretion upon administrative officers must be construed with a degree of strictness requisite to make them consonant with the spirit of the fundamental doctrines of the Constitution. Having this principle in mind, I hold that, as applied to a case involving a question as to the right of an individual, claiming to be a citizen, to enter the United States, the law which gives the right of appeal to the head of an executive department, from an adverse decision by a subordinate official, places a grave responsibility upon an officer of exalted station, requiring him to give personal consideration to the appeal and to render an impartial decision, which is incompatible with a right to delegate his discretionary power. I do not mean to intimate that the appeal may not be lawfully disposed of by an acting secretary, who for the time being is the incumbent of the office; but I hold that it is contrary to the intent of the law for an acting secretary to dispose of an appeal by dismissing it, on the recommendation of himself acting in the capacity of a solicitor adversely to the appellant.

It is true that the testimony which the solicitor had to consider is, by reason of discrepancies and contradictions therein, confusing and difficult to analyze, and, considering the manner in which it was gathered, it would be unreasonable to expect clear, concise, positive, consistent, and uncontradicted statements. To what extent apparent discrepancies and contradictions might have been harmonized or eliminated, if the contestant had not been deprived of the services of his attorneys in the examination of the different witnesses, it is impossible to conjecture. Experience in judicial investigations teaches the lesson that witnesses are not infallible, and that discrepancies and contradictions in the testimony of a number of witnesses are to be expected. When all the witnesses have been well coached and drilled, and the same story is repeated by them without variation, a natural and justifiable inference arises that all of their testimony is the product of a single mind. Such inferences are usually quite as difficult to dispose of as the doubts created by discrepancies and contradictions. In all cases in which rights depend upon facts to be ascertained, the trier is bound to be patient and painstaking, even when it is troublesome to do so, in sifting the evidence in order to separate kernels of truth from masses of straw and chaff.

Officers charged with the duty of enforcing the Chinese exclusion law are to be commended for being alert to detect attempts to evade its provisions by imposters claiming to be American born, and due

allowance must be made for the inherent difficulty of uniting unswerving fidelity in detective work with judicial impartiality. From all that appears by the record, I am convinced that in this case the zeal of the inspectors who made the original decision adverse to the contestant created a bias sufficient to prevent fair treatment, including an opportunity to interrogate the witnesses against him, or to rebut their statements and fair consideration of the evidence in his favor; and that his appeal to the Secretary of Commerce and Labor was dismissed without a consideration of the case, upon its merits, so that the contestant did not have the semblance of a judicial inquiry or a fair consideration of his case. In order to decide the questions as to the legality and finality of the decision rendered by the inspector in charge adverse to the contestant and of the dismissal of the appeal by the acting secretary, I have necessarily considered the entire mass of testimony, contained in the record, as made up for presentation of the case to the Secretary on the appeal, as well as the testimony reported by the referee appointed by the court in the present proceeding; but the question of prime importance in the case is whether the contestant is or is not a native-born citizen of the United States, and the decision of that question must be founded upon legal and competent evidence. The contestant is not bound by the *ex parte* affidavits, statements, letters, and miscellaneous information collected by the industry of the inspectors. Therefore, for the purpose of this branch of the case, the court excludes all of the record on appeal, except the statements contained therein made by the contestant himself and his witnesses who were examined before the referee. In so far as those statements conflict with the testimony of the same witnesses given before the referee, they will have to be considered as impeaching evidence. In the evidence reported by the referee there is positive testimony to the effect that Look Wing did for a number of years operate a laundry on Western avenue in the city of Seattle at or near the corner of Bell street; that there was living with him in said laundry his wife; that there was born to them in that laundry two boys, of whom Can Pon is the younger; that the family left Seattle and went to China in the year 1899; and that Look Wing returned to Seattle, remained for a time, then made a second trip to China, and returned a few months prior to the appearance of Can Pon at Sumas, where his entrance into the United States was intercepted by the Chinese inspectors. This testimony is so well corroborated by Mr. Raymond, as well as by Chinese witnesses, that, notwithstanding all errors and mistakes, I am convinced that Can Pon was born in the city of Seattle, as he claims. He is therefore, by force of the fourteenth amendment to the Constitution of the United States, a citizen, and entitled to enjoy liberty in his own country. *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

I direct that decrees be entered in the cases of Tang Tun and his wife and Can Pon, discharging each of them from custody; and, in the case of Gang Gong, remanding him to be deported.

Ex parte CHOW CHOK et al.

(Circuit Court, N. D. New York. May 11, 1908.)

1. EVIDENCE—CONCLUSIONS.

Testimony that inspectors, on apprehending Chinese persons who attempted to enter the United States unlawfully, "took charge of them," was objectionable as the statement of a conclusion.

2. ALIENS—CHINESE EXCLUSION—WHAT CONSTITUTES "ENTRY" OR "ENTRANCE."

An "entry" or "entrance" of a Chinese person into the United States, within the Chinese exclusion acts, means more than the mere act or crossing the border, and consists in his going at large or becoming domiciled in the country.

3. HABEAS CORPUS—EVIDENCE—ADMISSIBILITY.

On a hearing of writs of habeas corpus to procure the release of Chinese persons apprehended while attempting to unlawfully enter the United States, testimony of an officer as to what he would have done had they attempted to escape was inadmissible.

4. ALIENS—CHINESE EXCLUSION—DEPARTMENTAL RULES—EFFECT.

Rules of the Department of Commerce and Labor respecting the exclusion of Chinese persons have the force and effect of law when not inconsistent with it or with the Constitution or the treaty with China.

5. SAME.

Chinese persons were not "found unlawfully in the United States," so as to entitle them to a hearing as to their right to remain, where, when they crossed the border into the United States at a point remote from the designated port of entry, they were within sight of inspectors, who, intending to prevent their unlawful entry, followed them closely until they had proceeded about one-fourth of a mile across the border, and until it was apparent that they intended to enter unlawfully, and, taking them into custody, conducted them immediately to the nearest port of entry for investigation of their right to enter; the term "found unlawfully in the United States" referring to those Chinese persons who have entered, gone at large, and mixed with and become a part of the population. Hence such persons having been given opportunity to show their right to enter, and having remained mute, the inspector in charge had jurisdiction to exclude them.

Habeas Corpus. Hearing on eight writs allowed by Hon. A. C. Coxe, and made returnable at Syracuse term of this court, April 7, 1908, held by Judge Ray.

R. M. Moore, for petitioners.

Geo. B. Curtiss, U. S. Atty., H. E. Owen, Asst. U. S. Atty., and Alford W. Cooley, Special U. S. Atty.

RAY, District Judge. These eight Chinese persons, now detained at the Malone, N. Y., detention house, by the Chinese inspector in charge, for the purpose of returning them to China, they having been refused permission to enter the United States after full opportunity to be heard and show their right, if any, on the ground they are alien Chinese persons, not belonging to any class having the right to enter, claim that they are illegally held and detained.

The circumstances are somewhat peculiar, and R. M. Moore, an attorney at law, swears out these writs in behalf of these persons, alleging that their detention is unlawful, in that when apprehended

they had already entered the United States, and were found therein, and were not seeking admission, and that, conceding that they were then unlawfully in the United States and had no right to remain therein, the Chinese inspector in charge, H. R. Sisson, had no jurisdiction or power to hold them in custody and deport them or return them to China or pass on their cases; that they were found in the United States and in no sense have applied for admission into the United States; that they are not seeking to enter, but to remain unmolested; that for these reasons they are entitled to a hearing on the question of their right to be and remain in the United States before a United States commissioner or judge in the regular way with the usual right of appeal in such cases. On the return of the writs, the said persons by their attorney applied for the taking of more testimony so as to fully present the facts. The cases were therefore sent back to the inspector by order of the court, and ample opportunity given to present the cases fully. The matters are now submitted on the returns and such additional testimony.

The facts are not intricate. The government officers, having such matters in charge, learned that these eight persons were on a train approaching the United States, and it was supposed or assumed that their purpose was to illegally enter the United States. Inspectors West and Landis, March 20, 1908, were in the train running from Montreal to Locolle, a small town in Canada near the border, and which train carried these persons. At Locolle the eight Chinese persons got off the train, as did West and Landis. Soon thereafter two teams with carriages and drivers came and took these Chinese persons and went off in the direction of the border between Canada and the United States in the vicinity of Rouse's Point, which is a village in New York about one mile from the line. Inspectors Dunton and Yale had proceeded to the border from Rouse's Point in anticipation of the arrival of these Chinese persons and of their attempt or purpose to enter the United States in an irregular way and, as was believed, unlawfully.

When near the line, the teams referred to halted, and the Chinese alighted and moved towards the border. The inspectors, or some of them, kept them in sight, and, as the Chinese crossed the border, passing from the highway to the railroad track, and thence along it as they crossed, they were closely followed by Inspectors West and Landis, who had been joined by Inspectors Yale and Dunton, who had been waiting at a farm house on the Canada side. All these officers were there for the purpose of preventing the illegal entrance of these persons into the United States, for the purpose of apprehending them if they did enter, and sending them back to China if on due examination found not entitled to enter. The purpose was to prevent their "entrance" into the United States, within the intent and meaning of the Chinese exclusion acts. Nothing was said to them as they crossed the border into the United States, nor until they had proceeded something like a fourth of a mile along the track after crossing the border. Then Inspector Dunton gave them to understand they would have to go along with the inspectors. From

that point into Rouse's Point, the nearest railroad station for taking the train to Malone, the nearest port of entry, these petitioners were accompanied by Inspectors West, Dunton, and Landis, who took possession of and carried most of their baggage. These inspectors were acting under the orders of their superior. I sustain the objection to the statements that the inspectors "took charge of them" as a conclusion. Their purpose in being there, and what was said and done, are acts which speak for themselves. It is evident the officers took them actually into their custody and under their control for the purpose of preventing their actual and completed entry into the United States as "entry" or "entrance" should be construed; that is, to prevent their going at large or becoming domiciled in the United States. It is evident the purpose was to take them from the place where they crossed the border by all necessary force, to Malone, the designated point for the admission of Chinese persons into the United States, for due investigation of the facts bearing on their right to enter into the United States. I sustain the objection to the testimony of the officer as to what he would have done if these persons had attempted to get away.

From Rouse's Point these eight persons were taken direct and immediately to the Malone Detention House, and before the inspector in charge, where each was given full opportunity to make such voluntary statements as he might desire to make relative to his right to enter the United States and duly informed that he might produce any evidence that he had, or might be able to produce, touching his right to enter the United States, each having indicated his desire to enter, and as to his right to counsel and to be heard. In short, the authority and powers of the inspector, the purpose of the proceedings, and the rights of these persons were fully explained to them, severally, and each remained mute. Each refused to answer all questions touching his right to enter the United States, or to furnish the name of any witness or witnesses by whom he might be able to prove such right. Neither of them produced any paper or writing or evidence of any kind showing, or tending to show, a right on his part or on the part of either of said persons to enter or to be in the United States or claimed to have any such document. Landis, Dunton, and West were sworn on the hearing before Inspector Sisson as to the identity, etc., of said persons with those who came across the border and were apprehended as aforesaid, and as to the transaction and the circumstances of their apprehension. Inspector Sisson then closed the cases, each being a separate proceeding and had as such, and decided that each of said persons was an alien Chinese person not entitled to enter the United States, and gave to each a notice, form 429, "Notice to rejected Chinese applicant," and each of such persons was informed of its nature and effect, and was also informed of his right to appeal from such decision to the Secretary of the Department of Commerce and Labor. Instead of taking appeals, these persons, by their attorney, swore out these several writs.

It is perfectly evident that each of these eight persons sought to enter the United States. It is evident that their purpose to enter was

discovered by the United States, and that it was on the ground, by its proper officers, to prevent their illegal entry. Their purpose was not fully developed until they had actually crossed the border, as they sent no messenger or notice in advance announcing their desire to enter; but that they did desire to enter is plain. So soon as they had entered on United States territory and showed their purpose to remain, these inspectors took possession of a part of their baggage, mingled with and accompanied them, and gave them to understand they were subject to their directions. When such Chinese persons undertook to follow the railroad at a point where it branched away from Rouse's Point, the officers told them to come with them, and they did. In short, from the moment when they crossed the border, they were in the actual, though not formal, custody of the inspectors. All the proceedings from the moment these persons crossed the border, and even before, to the time Inspector Sisson made his decision, were taken and had for the purpose of preventing the illegal or unlawful entry of these persons into the United States, and for the purpose of determining their right to enter, if any, in the legal and formal mode prescribed by the laws of the United States and the rules of the Department, which have the force and effect of law when not inconsistent with it, or with the Constitution, or treaty with China. They were actually found in the very act of entering, and, so soon as it was fully developed that such was their purpose, they were virtually taken in charge. It cannot logically be said that they are Chinese persons found unlawfully in the United States, whose deportation is sought. Logically, they are Chinese persons seeking to enter the United States, and who have shown no right to enter, although given ample opportunity so to do.

Jurisdiction to prevent unlawful entry into the United States is vested in these inspectors, representing the Department of Commerce and Labor. Jurisdiction to deport alien Chinese persons "found unlawfully in the United States" and held to be illegally therein is vested in United States commissioners and the District Court. These petitioners were not "found" unlawfully in the United States, but were found before they reached the border line and at the border line, and the proceedings to prevent their entrance into the United States, if found not entitled to enter, were instituted and prosecuted diligently from the moment it became certain they intended to enter. They were not "permitted to enter," or allowed to enter, within the meaning and intent of the law. "Enter" means more than the mere act of crossing the border line. Those who seek to enter in the sense of the law, and those the policy of the law seeks to prevent from entering, are those who come to stay permanently, or for a period of time, or to go at large and at will within the United States. These persons, on entering, were at once surrounded by officers, silently taken in charge, in effect arrested, and from that time effectually deprived of their liberty and prevented from going at large within the United States. They had no more actually entered the United States than has a Chinese person who escapes from a detention house while awaiting a determination of his right to enter, and were no more "found unlawfully in the United States" within the true intent and meaning of the Chinese exclusion acts than would be a Chinese person, who,

on being actually arrested and physically seized on the exact boundary line, should escape and succeed in running the distance of a mile into the United States and concealing himself for a day or week before being rearrested. Literally, such a person would be found unlawfully in the United States, but not in the sense of the statute, and, I apprehend, no one would seriously contend the inspector had lost jurisdiction of the case. No such narrow construction is to be put upon the acts of Congress and the rules and regulations of the Department of Commerce and Labor.

Section 12 of the act of July 5, 1884 (chapter 220, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1310]), provides that:

"No Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel."

Also:

"And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came," etc.

By the same section, and also in section 13 of the act of September 13, 1888 (chapter 1015, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1317]), it is provided (section 13) "that any Chinese person or person of Chinese descent found unlawfully in the United States" may be arrested on a warrant issued "by any justice, judge, or commissioner of any United States court," etc. See, also, Act May 5, 1892, c. 60, § 4, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320), as to Chinese persons convicted and adjudged under any of said laws "to be not unlawfully entitled to be or remain in the United States," and their removal. Section 32 of the act of March 3, 1903 (chapter 1012, 32 Stat. 1221), provides for rules as to the entry and inspection of aliens along the borders of Canada and Mexico; Act Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 (U. S. Comp. St. Supp. 1907, p. 90), transfers jurisdiction as to the exclusion of Chinese and others to the Department of Commerce and Labor, and then we have rules which it is unnecessary to recite or refer to. Rule 4, approved July 27, 1903, provides that:

"No Chinese person other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States except at the ports of * * * Malone, N. Y."

Rule 2 provides:

"Only those Chinese persons who are expressly declared by the laws and treaty relating to the exclusion of Chinese to be admissible shall be allowed to enter the United States, and those only upon compliance with the requirements of said laws and treaty and of regulations issued thereunder."

Having in view the law, the treaty, the rules, the duty of the inspectors, the fact that these Chinese were seeking to cross into the United States along a railroad track at a point remote from the designated port of entry, and the purpose of these officers in being at such point, and what occurred, it is impossible to hold that either of these eight Chinese persons was "found unlawfully in the United States." It was a proceeding on the part of the proper and duly authorized officials of the Executive Department of the United States to exclude

these Chinese persons from entry; to prevent their entrance into the United States, their going at large, or becoming domiciled therein. The same question, in effect, was raised in *Nishimura Ekiu v. United States*, 142 U. S. 651, 661, 12 Sup. Ct. 336, 339, 35 L. Ed. 1146, where *Nishimura*, pending the determination of her right to enter the United States, was taken from the vessel and landed on United States soil and confined in a mission house. On this point the court said:

"Putting her in the mission house, as a more suitable place than the steamship, pending the decision of the question of her right to land, and keeping her there, by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of habeas corpus, left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship."

In the *Japanese Immigrant Case*, 189 U. S. 86, 87, 99, 23 Sup. Ct. 611, 613, 614, 47 L. Ed. 721, the petitioner actually landed and had been at large four days when she was apprehended by the immigrant inspector by order of the Secretary of the Treasury and ordered sent out of the country as a person not entitled to enter, and who had "sur-reptitiously, clandestinely, unlawfully and without any authority come into the United States." On habeas corpus, the Supreme Court, affirming the lower court in dismissing the writ, said:

"It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the Legislature and executive branches of the national government. As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. * * * Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082. * * * Therefore it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."

In *United States v. Ju Toy*, 198 U. S., at page 263, 25 Sup. Ct., at page 646, 49 L. Ed. 1040, the court said:

"The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate."

I think it clear that "found unlawfully in the United States" refers to those Chinese persons who have entered the United States, gone at

large, mixed with and become a part of our population, and not to those who, arriving at the border, and suspected of having an intention to enter unlawfully, are followed by the officers having authority to exclude them and actually taken into custody and immediately conducted to the nearest port of entry for investigation of their right to enter, so soon as it is developed that it is their purpose to enter unlawfully and go at large in defiance of law. Entertaining, as I do, these views, and not stopping to discuss the proposition that in no event can a writ properly issue in such a case as this until the remedy by appeal to the Department of Commerce and Labor has been exhausted, which I think true (*United States v. Sing Tuck*, 194 U. S. 161; 168, 24 Sup. Ct. 621, 48 L. Ed. 917), I hold that Inspector Sisson had jurisdiction; that full opportunity was given each of the petitioners to present his case and show his right, if any, to enter the United States; and that his order was lawful and proper.

The writs are dismissed, and the persons remanded.

In re KANE.

(District Court, N. D. New York. May 22, 1908.)

1. DESCENT AND DISTRIBUTION—INHERITANCE FROM MINOR CHILD.

Where a bankrupt's five children were the sole owners in fee as tenants in common of certain real property and machinery, etc., connected with a mill thereon, on the death of one of such children leaving the bankrupt surviving him, 2½ months prior to the bankruptcy, the bankrupt became the owner and seised and possessed in fee of an undivided one-fifth of the real estate by operation of law, and to one-fifth of the personal property subject to administration in due course and to the rights of the creditors, if any, of such deceased child.

2. BANKRUPTCY—PROPERTY ACQUIRED BY TRUSTEE.

Where 2½ months prior to bankruptcy the bankrupt inherited from his child an undivided one-fifth of certain real and personal property, such interest passed to and vested in the bankrupt's trustee as of the date of the adjudication, subject to administration of the personal estate and the rights of creditors of the deceased child, if any.

3. SAME—POSSESSION.

Where a bankrupt prior to bankruptcy inherited real and personal property from a deceased child, the child's administrators, while entitled to possession of the personal estate pending administration, had no right or interest in the real estate for any purpose.

4. SAME—DISBURSEMENT OF FUNDS—SUMMARY PROCEEDINGS—RECOVERY—PARTIES.

A bankrupt's five children were the sole owners of certain real and personal property, constituting a mill insured for \$47,200. Two and one half months prior to bankruptcy one of the children died, leaving the bankrupt as his sole heir entitled to an undivided one-fifth of the realty and one-fifth of the personal estate subject to administration. Two months after the appointment of a trustee for the bankrupt the property was substantially destroyed by fire, and \$40,000.35 was recovered from the insurance companies, which was paid to defendant bank. The bankrupt being indebted to the bank in the sum of \$19,000 on a note secured by an indorsement and by certain collateral, the bank paid such amount out of the proceeds of the insurance to itself, by an agreement with the parties in interest other than the bankrupt's trustee, who was not consulted, and transferred to them the note and collateral. The four

children who executed the agreement with the bank to transfer to it the \$19,000 had an interest in the fund equal to that sum at the time of the transfer. The bank thereafter permitted the balance of the fund to be checked out on the joint checks of the four surviving children and the administrators of the deceased child, with knowledge that a portion of such fund belonged to the bankrupt's trustee. *Held*, that a summary application by such trustee to compel the bank to pay over the remaining \$6,474.45 was not maintainable against the bank alone; the other parties who participated in the withdrawal of such fund to the prejudice of the bankrupt's trustee being necessary parties.

5. SAME—TRUSTEE—NEGLECT OF DUTY.

Where a bankrupt's trustee permitted money in which the bankrupt was interested to be paid out and dissipated by a bank and certain joint owners without objection, when he could have ascertained the existence of the fund and prevented such payments, he was guilty of negligence or misconduct.

In Bankruptcy. Review of order of Referee Edwin A. King dismissing this proceeding, which seeks a summary order directing the National State Bank of Troy, N. Y., to pay over to Henry A. Conway, as trustee of the estate in bankruptcy of the above-named bankrupt, Pierce D. Kane, the sum of \$6,895.65, and which sum the said trustee alleges belongs to such estate and is in the hands of the said bank, or that, in the eye of the law, such sum is in its possession.

See 131 Fed. 386.

Thomas S. Fagan (H. D. Bailey, of counsel), for trustee.

Henry J. Speck (George B. Wellington, of counsel), for the bank.

RAY, District Judge. Pierce D. Kane, on his own petition, was duly adjudged a bankrupt July 6, 1899, and the first meeting of creditors was held July 26, 1899, of which the National State Bank of Troy, N. Y., had notice. On the same day Henry A. Conway was duly chosen and appointed trustee of the bankrupt estate. He at once duly qualified and became vested with the title of the bankrupt in all his real and personal estate, etc., as of the 6th day of July, 1899. Bankr. Act July 1, 1898, c. 541; § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451). This, of course, the bank knew.

Pierce D. Kane had five children, of whom J. Francis Kane was one. J. Francis Kane, an infant 14 years of age, died intestate on the 16th day of April, 1899, leaving his said father, Pierce D. Kane, the above-named bankrupt, his sole and only heir at law. The five children of said Pierce D. Kane were the sole owners in fee as tenants in common of a certain property, known as the "Mill Property," consisting of real estate and personal property, machinery, etc., connected therewith, and on the death of said J. Francis Kane, April 16, 1899, and about 2½ months prior to the bankruptcy, said Pierce D. Kane, now bankrupt, became the owner and seised and possessed in fee of the one undivided one-fifth part of said real estate by operation of law, and also the owner of the one undivided one-fifth part of the said personal property, subject, of course, to administration in due course and the rights of the creditors of J. Francis Kane, if any. This is the property and these the property rights that passed to and vested in the trustee in bankruptcy on or as of the 6th day of July, 1899. The

personal estate was, of course, subject to administration in due course and to the rights of the creditors of J. Francis Kane, if any, as the trustee took same in the same plight and condition it was in when bankruptcy intervened. No administrator of the estate of said J. Francis Kane was appointed until December, 1899, when James H. Kane, a brother of said J. Francis Kane, and said Pierce D. Kane, then bankrupt, were duly appointed the administrators of the estate, goods, chattels, and credits of said J. Francis Kane, and in the proper Surrogate's Court having full jurisdiction of that question it has been duly adjudged that said J. Francis Kane owed no debts. Title to the personal property was therefore in these administrators for the purpose of paying funeral expenses and expenses of administration. Subject thereto, as stated, title to the personal property was in the trustee in bankruptcy from and after July 6, 1899. We therefore have the bankrupt, in the capacity of administrator, administering upon an estate which had passed to and vested in the trustee in bankruptcy subject to administration. The administrators were, of course, entitled to the possession of such personal estate pending administration; but they had no right or interest in the real estate for any purpose.

At the time of the adjudication there were outstanding 21 policies of insurance on said "Mill Property," insuring the owners thereof, named in said policies, viz., James H. Kane, Nicholas T. Kane, Pierce D. Kane, Jr. (not the bankrupt), J. Francis Kane, and Elizabeth Kane, said children of Pierce D. Kane. Thirteen of these were written and delivered prior to the death of J. Francis Kane, and three thereafter prior to July 6, 1899, and five (rewritten evidently) thereafter. All were written under the direction of the same agent, who represented the various companies. The insurance was carried in the name of J. Francis Kane after his death, and after the title to the one-fifth had passed to Pierce D. Kane, and even after the title had passed from him to the trustee in bankruptcy, Henry A. Conway. It is evident that this trustee was negligent and unfit for the place, as he effected no insurance, and did not even take the pains to ascertain whether or not the property was insured. Under the 21 policies the real estate was insured for \$19,500, and the fixed and movable machinery and other personal property for \$24,500, and the stock in process of manufacture for \$3,200; total, \$47,200. The trustee had no knowledge of this insurance until after a fire which substantially destroyed the property, and which occurred on the 18th day of September, 1899, about two months after his appointment. Proofs of loss were made by James H. Kane and presented, and the loss was adjudicated at \$16,597.56 damage to the real estate and buildings, and \$23,402.79 damage to fixed machinery, etc.; total, \$40,000.35. Each policy contained a clause reading:

"Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured."

The proof of loss against the German Fire Insurance Company, one of the insuring companies, and which is a sample of all, states:

"Personally appeared James H. Kane, for himself, N. T. Kane, P. D. Kane, Jr., Elizabeth Kane and as administrator of Est. of Francis Kane, dec'd, who, being duly sworn, deposes and each for himself says that the following state-

ment and the papers therein referred to and signed with his own hand contains a particular, just, and true account of their loss," etc.

After the fire the National State Bank of Troy, N. Y., made claims on the property and insurance money which seem to have been debts owing the bank by Pierce D. Kane, the bankrupt, with Mrs. Nicholas T. Kane as indorser; for the attorney for the trustee called James H. Kane as a witness, and he testified:

"They were debts of my father. Mrs. Nicholas T. Kane was an indorser for my father, and these were debts of his."

The bank, by arrangement with the other owners of the property and the administrators, ignoring the trustee in bankruptcy in the transaction, secured the indorsement over to itself of all the checks and drafts given by the several insurance companies, amounting to \$40,000, and took possession thereof. The bank had no claim against Pierce D. Kane which had ripened into a lien on the share or interest in the estate of J. Francis Kane which fell to him. If it had any claim or claims against Pierce D. Kane, it or they are provable in bankruptcy. It seems that the bank held certain securities which belonged to Mrs. Nicholas T. Kane, the indorser of the notes of Pierce D. Kane. Soon after, or about the time the bank obtained possession of the insurance money, it made an agreement with James H. Kane, Nicholas T. Kane, Pierce D. Kane, Jr., and Elizabeth Kane, by which it was to take, and under which it did take, \$19,000 of this money as its own in satisfaction of its claims against Pierce D. Kane, bankrupt, and Mrs. Kane, the indorser, and made an assignment thereof and of the collateral to them. Five thousand dollars was checked out or taken out to pay a mortgage on the insured property; but in doing this the trustee in bankruptcy had no part, nor was he consulted or invited into the transaction. He was either stupid, dishonest, or a silent party in the transaction. He denies all knowledge and participation. On getting the checks or drafts into its possession, and having made collection thereof, the bank, when the collections amounted to \$25,474.45, and on the banking day of January 24, 1900, of its own motion placed this sum in a deposit account subject to joint check in the names of James H. Kane, Nicholas T. Kane, Pierce D. Kane, Jr., Elizabeth Kane, and the administrators of J. Francis Kane, crediting the account that sum, but simultaneously debited the account \$19,000, without check, leaving \$6,474.45 to the joint credit of such persons, and gave no notice to the trustee, although it then knew of the bankruptcy proceedings and of the rights of the trustee in the fund. This is made plain by the evidence of Henry J. Speck, then attorney for the bank in this very transaction. As the drafts or checks came in from the insurance companies thereafter, the amount of same, after they were indorsed by such persons and the bank, to whom they were made payable, was placed to their credit in such account. It was all checked out subsequently on the joint checks of these persons; but who had the money, to whom the checks were payable, etc., does not appear. One thing is certain. The trustee in bankruptcy got none of it, and he made no effort to obtain any of it, until cited to an account in 1903 before the referee in bankruptcy. He then or soon thereafter

cited the administrators to an accounting for this money; but on the showing made, not before me, or appearing in this proceeding, the surrogate held that, as all this money was derived from insurance on real estate, he had no jurisdiction to call the administrators to an account therefor; and this notwithstanding the facts that the policies were payable to the legal representatives of such of the insured as were dead, that they applied for it with the others as administrators of J. Francis Kane, obtained it as such, and checked it from the bank as such administrators. This ruling was cordially acquiesced in by this trustee, who then or soon thereafter commenced this summary proceeding against the bank.

It is clear that the four persons, who executed at some time the written agreement with the bank to transfer to it the \$19,000, had that interest in the fund and had a perfect right to transfer it to the bank in exchange for the claim and collateral it held against the bankrupt and his indorser. As to the balance of the fund it seems clear that it was perfectly proper to pay the mortgage, which was a lien on the real estate. When I speak of realty or real estate, I refer to buildings and fixed machinery, etc., which were insured. The settlement of the loss, while it specifies the loss on building, and also that on fixed machinery and other machinery, does not separate the fixed machinery from the other. Hence it is not known how much the loss on personal property was, and no pains has been taken to show that. Under the evidence, in many respects there being a dispute as to material facts, but assuming everything in favor of the trustee, or petitioner here, I do not see how this summary proceeding against the bank alone can be sustained. The bank was an interloper in getting possession, and succeeded in so doing by misrepresentation; and it succeeded in getting its pay out of the fund, but not from the share of the bankrupt. It assumed to put the balance to the credit of the persons named, ignoring the rights of the trustee; but still it did not appropriate any part of it to its own use, or hold it or claim it as its own. The bank allowed and aided the administrators and James H. Kane, Nicholas T. Kane, Pierce D. Kane, Jr., and Elizabeth Kane, to whom, with the bank, the checks or drafts of the insurance companies were made payable, to draw out the money, ignoring the trustee, who really owned a one-fifth interest. But that interest was sent to the bank as payable to the administrators. It may be that the bank is liable with the others in a plenary action for taking an active part in dissipating this fund. It may be it had a duty to perform to the trustee under all the circumstances, and that it is liable for a breach of that duty; that it was a trustee, etc. But, if so, that question must be determined in a suit brought for the purpose. This proceeding is not the appropriate one. I do not understand that a summary application of this description can be maintained to enforce the liability of a party for damages or to enforce a trust arising by operation of law. It goes upon the theory that the party proceeded against has property or money in his possession—or in the eye of the law has it—which it is his duty to pay over, but will not.

The bank put in three different answers, finally changing its attitude completely, and on the trial before the referee changed again;

but, after all, the facts are what should determine, and must determine, the action of the court. As to the \$19,000, the only part of the fund which the bank retained or had when this proceeding was instituted, in August, 1903, the bank sets up an adverse claim of absolute ownership, which arose in December, 1899, or January, 1900, after the adjudication in bankruptcy, and after the appointment of the trustee; but on the evidence this money came to it from a fund four-fifths of which actually belonged to the parties delivering it over to the bank, or consenting that it take it. One-fifth or more remained on deposit in the bank. It was agreed that the \$19,000 taken by the bank was to come out of the share of such four parties. It is presumed that it did. If, after that, the bank allowed those four persons to participate with the administrators in drawing it out, it may be presumed it supposed it would go to the party entitled. It stood in their names in the bank, and they only could properly check it out. If the bank was guilty of any actionable wrong or negligence in allowing that money, and what came in and went into the account thereafter, to be drawn out and dissipated, if it was, there must be a proper plenary action or proceeding, with all the actors made parties, in which the rights and liabilities of all can be determined. The insurance companies sent the drafts or checks payable to the order of the insured who were living and to the administrators of the one who was dead. It may be, and is, a question whether the bank could lawfully do otherwise than pay the proceeds over to the payees of such drafts and checks. Was there collusion, and an executed scheme and conspiracy, to which the bank was a party, to divert this money from the trustee in bankruptcy and prevent his obtaining it? There is much evidence pointing in that direction. But, assume such to be the fact; is the remedy by such a summary proceeding as this? I think not.

This court does not agree with the referee in some of his findings of fact; but it would be futile for me to make new findings, as the Circuit Court of Appeals makes its own and proceeds accordingly. So the referee has failed to find, or present in proper findings, many facts which would be very pertinent in some forms of action. Taking the view of the law he did, and in which this court concurs, it was unnecessary to pass on many important questions of fact and law; and this court has purposely refrained from so doing, or from forming any opinion, as the matter may be before it in a different form, when their proper decision may become very important. The trustee made demand for the share of this money belonging to the estate in bankruptcy, but not until the bank had paid over all of it except the \$19,000. No part of this money received from the insurance companies ever came into the actual possession of the trustee. The insurance companies sent all the money to other parties. Those parties took it and disposed of it. Can this court, in this summary proceeding against the bank alone, determine that it was not properly disposed of so far as the bank is concerned, and hold it liable if it finds it was not?

Elizabeth Mahoney now, formerly Elizabeth Kane, and James H. Kane, the administrator of J. Francis Kane, were sworn. It does not appear that Kane was asked in particular what was done with all the

money. It does appear that some of it was used to pay the funeral expenses of Pierce D. Kane, who died, and those of his wife and of J. Francis Kane. The checks upon which it was drawn from the bank have disappeared. A part of this money, that derived from the insurance in the real estate, in equity and in law belonged to the trustee. Can it be that James H. Kane, who drew it from the bank, and those who knowingly participated in its dissipation, are not accountable and liable for it in a proper suit or proceeding against them? I am not now called upon to decide whether or not these participants in the dissipation of this money can be brought into this proceeding, and held liable, and directed to pay over the money. I am clear that the proceeding cannot be maintained against the bank alone. I am not intimating it is not liable, with others, in a proper action or proceeding, to account for these moneys and make the estate in bankruptcy good. The proposition of the bank that no one is liable or accountable to the trustee in bankruptcy therefor is, in my judgment, entirely unfounded. The insurance covered the valuable interest of the bankrupt. It was paid on the claim and demand of the administrator of the former owner, to whose title and interest the bankrupt and his trustee succeeded, to such administrator. It did not thereby become his money, or no one's money. It was and remained the property of the bankrupt estate. That the trustee has been negligent in the matter and is accountable to the creditors is beyond all question. Instead of proceeding to care for the estate of the bankrupt, protect and preserve and reduce it to money, by inattention and negligence, seemingly, he has allowed it to be dissipated. It may be that the Circuit Court of Appeals can find a way to hold this bank alone liable in this proceeding; but I cannot. That this trustee has a cause of action, and a remedy by action or by summary proceedings, against some one, is very plain. Is it the bank, or the person or persons who took the money from the bank and failed to turn it over to the trustee? Could the bank have refused to pay it over to the persons to whom the checks or drafts of the insurance companies were payable? But, as it had the possession of the money and knew of the rights and interests of the trustee, if it aided and abetted the administrator, or the administrator and others, to misapply or waste it, or withhold it from the trustee, for such wrong it is, of course, liable. But is this a proper proceeding in which to determine such a question?

However, it seems to me that, if so advised, the trustee should be permitted to bring in the other parties and proceed against all in this summary way; that when this is done, if done, the referee should pass upon the merits. The title to real estate and fixed machinery vested in the trustee directly. The insurance money took its place. It was property of the estate. It was in the custody and subject to the jurisdiction of this court. I think it clear that, within *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, these persons held the one-fifth of this insurance money for the trustee in bankruptcy except that derived from insurance on purely personal property, and that this court has jurisdiction to compel its surrender on petition and rule to show cause. In *Mueller v. Nugent*, *supra*, it is held that:

"The bankruptcy court has jurisdiction to compel the surrender of money or other assets of the bankrupt, or that of some one for him, on petition and rule to show cause."

By section 2 of the bankruptcy act the court has power to bring in other parties and cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto.

The order of the referee, dismissing the proceeding, is reversed, so that, in case the petitioner is so advised and elects so to do, he may amend and bring in all other necessary parties. In case that is done, the matter will be heard and decided on the merits; but, in case the petitioner does not so elect, then the referee will make an order dismissing the proceeding, without prejudice to other appropriate actions or proceedings.

THE ANNIE L. VANSICVER.

(District Court, E. D. Virginia. April 22, 1908.)

SHIPPING—INJURY TO PASSENGERS—NEGLIGENCE IN HANDLING LINES ON CROWDED FERRYBOAT.

A steamer running as a ferryboat between Newport News and Sewell's Point, one of the landings for the Jamestown Exposition, on what was called its "workmen's trip" early in the morning, as usual on such trips carried its full complement of 500 passengers, who were so crowded that they were obliged to stand close together on both decks. Libelants, who were carpenters working at the Exposition, stood with many others on the bow end of the main deck. The lines used to make fast the boat were coiled across such part of the deck. On reaching the landing when the lines were drawn out, libelants' feet were caught in the coils, and they were seriously injured. They testified that they did not see the ropes, owing to the crowd in which they were packed. *Held*, that those operating the vessel were chargeable with negligence which rendered it liable for the injuries in permitting the passengers to crowd, without warning, within the coils of the lines, or in not so coiling or handling the lines as to remove the danger; that libelants under the circumstances were not guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 544, 551.]

In Admiralty.

These two libels, heard together by consent of parties, as they depend upon the same state of facts, are to recover for injuries received by the libelants on April 11, 1907, while passengers on the ferry steamer Annie L. Vansciver plying on the waters of Hampton Roads between Ivy Avenue Pier, Newport News, Va., and Pine Beach, or Sewell's Point, Va., one of the landings for the Jamestown Exposition. The libelants are carpenters, and at the time of the accident lived on the Newport News side of the Roads, and were employed at the Jamestown Exposition, which necessitated their taking passage on the Vansciver to get to their work. On the morning in question they boarded the Vansciver at Ivy Avenue Pier about 7:30 to go to Pine Beach, en route to the Exposition grounds, that being the first regular morning trip made by the vessel between the points named, and which was known as the "workmen's trip," and on which trips only passengers were transported. The vessel on this morning carried the largest crowd, some 500, she had ever taken across, and many passengers had to stand on the main and saloon decks and in the saloon, because there were not sufficient seats for all. Quite a number, including the libelants, not being able to get seats, went

below on the main deck, which was also crowded, and one of the usual places for passengers to congregate, where they were allowed to smoke. Across this deck, forward of the gangway, the lines used in making the steamer fast to the pier had been placed by the crew having charge of them so as to lie from port to starboard of the vessel in long coils, closely formed, with loops at each end, making a compact surface apparently, and which the libelants did not see or observe, nor was their attention called thereto by any one, and the crowd being so great that passengers could observe but little as to the condition of the deck. These libelants continued to stand on this deck without objection through the trip across Hampton Roads, and while so standing, just prior to the steamer's approaching the pier at Pine Beach, there being no obstruction to prevent the passengers on the upper deck from crowding down the companion way to the main deck, a large number of passengers from the upper deck came down to the lower deck, so increasing the crowd on the main deck as to fill the gangway space. Upon the vessel's arriving at her destination, and attempting to make fast, in some manner the libelants, without warning, were each suddenly caught and entangled in one of the ropes used in making fast to the pier, dragged to the side of the vessel, cutting off one of Saunders' feet, and breaking one of the legs of Fernin, causing a serious and permanent injury thereto.

George C. Cabell and Edward R. Baird, Jr., for libelants.
W. H. Venable and Hughes & Little, for respondent.

WADDILL, District Judge (after stating the facts as above). Many acts of negligence and want of proper care for the libelants as passengers are charged against the respondents, and, likewise, the respondents aver that the libelants were negligent in many respects contributing to their own injury, and should not on that account recover; and on these issues thus joined between the parties considerable testimony, as well of passengers upon the vessel as of the libelants and officers and crew of the steamer, was taken orally before the court, in which there is much conflict, though on the crucial questions affecting the causes of the accident, as viewed by the court, there is but little difference. The cases turn upon whether the libelants were guilty of such contributory negligence in taking and remaining in the positions they did as passengers on the vessel as to disentitle them to recover for the injuries sustained by becoming entangled in the boat's lines used in making her fast at the point of destination. Ordinarily it may be conceded that passengers who expose themselves to dangers incident to landing, while the officers and crew of the vessel are making the ship fast, such officers themselves being in the exercise of proper care and caution, with a properly equipped steamer, would be disentitled to recover; but just what the passenger should do, and where he should remain, while the ship is making fast must necessarily depend upon the character of the vessel, and the number of passengers aboard. In this case the conditions were such, having regard to the large number of passengers carried on a vessel of the size of the Vansciver, her licensed capacity being 500 (though she had a permit of local inspectors, so far as the waters of Delaware River were concerned, to carry 280 additional), that at the time of the accident, she having about her licensed number of passengers, especial care should have been exercised to avoid the very accident which occurred. This vessel was being used as a ferry steamer, over a route on which, by reason of the Jamestown Exposition, there

was very heavy travel, and it was known to the officers that the vessel at this hour would be crowded to her full capacity, and the respondent should, therefore, have provided commensurate safeguards against accidents such as occurred to the libelants. The libelant Saunders, who was making his third trip on this boat, thus described his conduct on the occasion:

"I came in on the express car, the last car, and, when I got to the pier, I noticed the upper deck seemed to be crowded to its utmost. I noticed that they blocked the door of the saloon, and were standing against that, and had closed the door, and no one could get in, and I went on the forward gangplank, and as far as I could see pretty much every place was taken up by passengers, and there was a space right where the gangplank went out, where no passengers were standing, and I went forward and crowded myself up right up against the passengers, and still left that open for the gangway, and stood with my back to the bow of the boat.

"Q. Did you observe the presence of ropes or other things on that part of the deck where you were standing?

"A. No, sir; I never saw any rope at all. The passengers were crowded in the bow of the boat as thick as they well could stand, and I backed up into the crowd in order to get away from the gangplank, and where I was standing apparently was as clear as this floor, as far as I could see."

He further testified that he had no knowledge of the existence of the rope, heard no warning on the part of any one to change his position, or to stand back, or get out of the way, and that he never saw any officer of the vessel on the deck where he was standing. "The first I knew I was caught in the rope. Where it came from or anything I do not know. My leg was caught, and I was first dragged a little to the bow of the boat, and then carried to the hawsepipe, and I was dragged some little distance before I fell. The passengers were so thick that I could not fall until I got to the hawse hole. I was held up by the passengers they were so thick, and in that way I never saw the rope at all until after the accident had occurred. As the rope tautened on me, it seemed to pull me to the side of the boat, and, when my leg went to the hawsepipe, I felt there was quite a rush of passengers, and I never saw the rope at all, and did not know there was a rope until I was caught in it." George W. Dean, mate of the Vansciver, and in charge of her navigation at the time of the accident, a witness examined by the libelants, in describing the circumstances of the landing, says:

"I stopped the boat as soon as she was in position, and I got the other line out, and got the boat in position. The crowd commenced falling aft. It was a matter of impossibility to get from the pilot house down through the crowd, no matter what hurry you are in, until they can get away from the stairway."

And the captain of the vessel, examined by the respondent, in answer to a question as to what precautions had been taken prior to the accident to prevent passengers coming down on the freight deck from the upper deck, and what he did as to keeping them off until the landing was made, answered:

"We asked them not to do it, and keep clear of the gangboard, and not go forward of the gangboard, and we would rather not have them go on that dock.

"Q. Did you do anything to keep them off?

"A. Yes, sir; we stand at the gangway and keep pushing, 200 or 300 of the crowd behind them pushing them down on you, and shoved you on the deck, and I put lines up, and they cut them, and untied them, and we did not do it. After that I stopped using the lines, and ordered gates to be put up there, and put them up as soon as I got them, and they stopped them some little, but not much. They got over them after I put them up."

With a vessel crowded as this was at the time of the accident, of which the respondent had full knowledge by reason of carrying the same crowd substantially daily, and the likelihood of danger to passengers, it should not escape liability for the failure to properly provide for the holding back and detention of the crowd in a place of safety until the boat could be made fast; and there was no excuse for allowing this crowd to fill up the entire standing space of the boat on all of her decks, and at the same time so stretch and place the lines upon and across the bow of the boat as to endanger the lives and limbs of passengers allowed to stand in the bow by their becoming entangled in the lines when making the vessel fast. To place these lines, as was done, across the bow of the boat, with loops in each end so the lines could be drawn to the side of the steamer on which the landing happened to be made, with the bow of the steamer filled with passengers, would almost inevitably result in causing just such an accident as took place here. Knowing the size of the crowd to be handled, and the difficult landing to be made, at exposed points on Hampton Roads, common prudence required that these passengers during the landing should have been locked out of or entirely cut off from the place at which the lines were handled, and the gangboard thrown out; and if this precaution was not taken, and, on the contrary, the whole bow of the boat from which the landing was to be made was filled with passengers, to further endanger them by spreading the lines athwartship, from port to starboard, instead of safely coiling the same on each side of the boat, was culpable negligence. That the respondent knew of the necessity for this precaution, so far as holding the passengers back until the boat was made fast, was manifest; and, besides, they had previously to this trip used ropes across the companion way from the upper to the lower decks, and had taken the same down with a view of substituting gates, and this occurrence took place between the removing of the ropes and the placing of the gates, and was almost inevitable with a crowd thus turned loose, and lines so placed on the deck, and the vessel taxed to its utmost capacity.

Libelants insist, further, that there was a defective snub line in use by the Vansciver at the time of the accident, and that she had neither a competent nor sufficient complement of employes engaged in and about the landing of the steamer, taking into account the number of passengers on board and the character of landing to be made, and, also, that she negligently entered the slip at too high a rate of speed. There is much force in these contentions, and considerable evidence to sustain the same; and the court thinks it is highly probable that one, and all of them to some extent entered into the happening of the accident; but the real cause thereof, in the opinion of the court,

was the failure of the respondent to properly provide for the control of the crowd such as was on board at the time of the landing, and the negligent placing of the line across the bow of the vessel, in view of the fact that passengers were invited to occupy the same, and it was necessary for them to do so because of the large crowd carried.

The court finds that the libelants were not guilty of any negligence, such as would disentitle them to recover, under the circumstances of this case, and the only question remaining is the ascertainment of the damages they are respectively entitled to. The libelant Saunders sustained the loss of one foot, which was amputated above the ankle, and Fernin a broken leg, the ends of the bone of which have not yet formed a union, owing to his physical condition, and may not do so for a long time to come. Both libelants were great sufferers, were long confined to the hospital, especially Fernin, who at the time of the trial was under the care of his physician, and each of them was able to stand only by the aid of crutches. They were both carpenters, and aged Saunders 55 and Fernin 24, and at the time of the accident were receiving high wages at the Exposition, namely, \$4.50 per day, and had been receiving the same for some time, their usual compensation being \$2.50 to \$3.

The court believes, under all the circumstances, that an award to Saunders of \$4,000 and to Fernin of \$3,500 should be made, and decrees may be entered for the same, respectively.

UNITED STATES v. COMSTOCK.

(Circuit Court, D. Rhode Island. May 11, 1908.)

No. 2,622.

1. INDICTMENT AND INFORMATION — OFFENSE UNDER BANKRUPTCY ACT — CONCEALMENT OF PROPERTY.

The provision of Bankr. Act 1898, c. 541, § 29a, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), subjecting any person to criminal prosecution for "having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy," sets forth all the elements of the offense, and an indictment in the terms of the statute is sufficient.

2. BANKRUPTCY—OFFENSES—CONCEALING ASSETS—INDICTMENT—SUFFICIENCY—"CONCEAL."

The word "conceal," as used in said section, is of plain import, and, when coupled in an indictment with the words "unlawfully, knowingly, and fraudulently," clearly excludes unintentional acts.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1377, 1382.]

3. SAME.

It is not an essential element of the offense under such provision, which must be averred in the indictment, that the bankrupt at the time of concealing his property knew either the fact that a trustee had been appointed for his estate or the name of the trustee.

4. SAME—MODE OF CONCEALMENT.

In an indictment under such provision the manner of concealment need not be set out.

5. INDICTMENT AND INFORMATION — OWNERSHIP OF PROPERTY — SUFFICIENCY OF AVERMENT.

An averment in such an indictment that defendant concealed property "which then and there belonged to the estate in bankruptcy" sufficiently alleges the ownership of the property, and is not rendered insufficient or uncertain by further averment that the property was "then and there the personal property of" the bankrupt, which must be construed in conjunction with the prior averment. But, even if the two be regarded as repugnant, the latter will be rejected as surplusage, and will not vitiate the indictment.

On Demurrer to Indictment.

C. A. Wilson, U. S. Atty., and Geo. H. Huddy, Asst. U. S. Atty.
W. H. Barney and J. J. Hahn, for defendant.

BROWN, District Judge. The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]) in section 29a refers to the offense of having "knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy."

The indictment uses the words "unlawfully, knowingly and fraudulently" to characterize the word "conceal." Upon demurrer, it is contended that no wrongful intent is sufficiently charged by these words. The terms of the statute, however, are themselves inconsistent with an honest or lawful purpose, and set forth all the elements of the offense. In such case it is sufficient to charge the offense in the terms of the statute.

The defendant assigns as cause of demurrer the omission of the word "willfully." The language of the statute used in the indictment is the substantial equivalent of a charge that the defendant did willfully conceal. *Bullis v. O'Beirne*, 195 U. S. 606-617, 25 Sup. Ct. 118, 49 L. Ed. 340.

The term "conceal," itself a word of plain interpretation (U. S. v. 350 Chests of Tea, 12 Wheat. 493, 6 L. Ed. 702), when coupled with the words "unlawfully, knowingly, and fraudulently," plainly excludes unintentional acts. In the case above cited the question arose of the meaning of the word "concealed" in the act of March 2, 1799 (chapter 22, § 68, 1 Stat. 678), and the court said:

"The term 'concealed' used in this section is one of plain interpretation and obviously applies to articles intended to be secreted and withdrawn from public view on account of their being so subject to duties, or from some fraudulent motive."

The word "conceal," according to chapter 1, § 1, subd. 22, Bankr. Act, shall include "secrete, falsify, and mutilate." See, also, 8 Cyc. 543.

It is further assigned as cause of demurrer that it does not appear that at the time of the supposed concealment the defendant knew that Arthur P. Johnson had been duly appointed trustee of his estate in bankruptcy. I am of the opinion that it is not an essential element of the offense that the bankrupt at the time of concealing his property should know either the fact that a trustee had been appointed or the name of the trustee. Otherwise the statute would be deprived of much of its force.

For example, after the filing of the petition and before the appointment of the trustee, the bankrupt might dispose of his property and absent himself from the jurisdiction, or willfully avoid all knowledge of the appointment of a trustee, and thereby relieve himself from punishment under the act, although having effectively concealed his property from his trustee and from his creditors.

The case of *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, is not in point. There knowledge or notice was an essential part of the offense. The offense of concealment of goods may be completed by a physical act intended or calculated to prevent a trustee when appointed from securing the goods, and the character of the offense is in no way dependent upon knowledge that a particular person is clothed with legal authority.

It is further urged that the count is defective, in that there is no explanation of the word "conceal," and no specifications whatever in relation to it. The defendant relies upon *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *Evans v. United States*, 153 U. S. 584-587, 14 Sup. Ct. 934, 38 L. Ed. 830; *Batchelor v. United States*, 156 U. S. 426-429, 15 Sup. Ct. 446, 39 L. Ed. 478; *United States v. Cruickshank*, 92 U. S. 542, 23 L. Ed. 588; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

The argument is that as the statute says that the word "conceal" shall include "secrete, falsify, and mutilate," three acts widely different in their nature, the indictment should define which one of these acts is intended. The decisions of the Supreme Court as to the words "willfully misapply" in the laws relating to national banks do not seem to be applicable. As the words "willfully misapply" in the statute did not set forth all the necessary elements of the offense, it was considered not sufficient to charge the offense in the words of the statute.

Under the statute now in question, the mode of concealment is entirely immaterial. The word "fraudulently" limits the word "conceal," and supplies the element of criminality which was not contained in the words "willfully misapply," which were not limited by express terms, but by construction of the statute in view of the subject-matter. It was necessary, therefore, that this limitation arrived at by construction should be set forth in the indictment in specific terms; for otherwise the terms of the indictment addressed to a defendant, informing him of the nature of the act with which he is charged, would be broader than the true import of the statute. By this indictment the defendant is charged with fraudulent concealment of goods, and is given due notice that evidence may be offered against him of various modes of concealment.

To require the government to specify a particular mode of concealment would unnecessarily limit it to a particular mode, and deprive it of the right to introduce evidence that all the modes of concealment—the actual hiding of goods, hiding of books, accounts or documentary evidence by secreting or mutilating the same, etc.—were used.

It is unnecessary to set forth the evidence upon which the government relies, and the defendant, as in ordinary cases, must take notice that any testimony relevant to the question of fraudulent concealment may be introduced against him.

It is further urged that the allegations of the ownership of the property supposed to have been concealed are also uncertain and repugnant. The indictment first charges that the defendant "did conceal a large amount of personal property which then and there belonged to the estate in bankruptcy, to wit, a large number of cases containing shoes and footwear of leather and rubber, of great value; to wit, of the value of ten thousand dollars, a more particular description of which is to the grand jurors aforesaid unknown."

No allegation of ownership is made essential by the statute, save that the property was "belonging to his estate in bankruptcy." These words have a definite signification throughout the bankruptcy act, and no doubt can arise as to their meaning. A question of some importance, however, arises from the fact that in the concluding portion of the indictment the following language occurs:

"And the personal property aforesaid was then and there the personal property of the said Benjamin W. Comstock, and then and there belonged to his estate in bankruptcy, as the said Benjamin W. Comstock then and there well knew."

It is argued that, as it is alleged that the property was then and there the personal property of the said Benjamin W. Comstock, it did not belong to his estate or to his trustee in bankruptcy, and that he therefore had the right to conceal it. This argument seems to me to be founded upon a misreading of the language of the indictment. The statements that the personal property was the personal property of Benjamin W. Comstock, and then and there belonged to his estate in bankruptcy, are conjunctive in the indictment, and it can hardly be inferred, according to the natural import of this language, that the pleader has charged that it did not belong to his estate in bankruptcy.

It is usual to speak of the property of the bankrupt, or of the bankrupt's estate, even after the title of the bankrupt is vested in the trustee under section 70.

If, however, we admit that upon a strict construction there is a repugnancy between the allegation that the property was the personal property of Benjamin W. Comstock and the allegation that it then and there belonged to his estate in bankruptcy, this does not vitiate the indictment. It is said that, where a repugnant matter is inconsistent with some preceding averment, it may be rejected as surplusage, and there is quoted the language in *Wyatt v. Alard*, Salk. 325, that:

"Where matter is nonsense by being contradictory and repugnant to somewhat precedent, that the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected."

See *Clark's Criminal Procedure*, 179, 180; *Bishop's New Criminal Procedure*, §§ 489-491.

In the body of the indictment there is a preceding allegation that the personal property then and there belonged to the estate in bankruptcy. Under the foregoing rule, this allegation may stand, and is

not destroyed by the subsequent allegation even if that be so narrowly construed as to involve repugnancy, though when fairly construed conjunctively the meaning is clear, though perhaps informally expressed. Whether a defect of this character is cured by section 1025 is doubtful.

Many other points have been raised upon demurrer, but it does not seem necessary to deal with them specifically. While the indictment is open to technical criticism, I have no doubt that it fully and completely apprises the defendant of the offense wherewith he is charged, that it enables him to prepare to meet a specific charge, and that a conviction upon this indictment would be a bar to a subsequent indictment.

The demurrer is overruled, and the defendant will plead to the indictment.

PREST-O-LITE CO. v. AVERY LIGHTING CO.

(Circuit Court, N. D. New York. May 18, 1908.)

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—UNFAIR COMPETITION.

Complainant manufactures and sells for use on automobiles patented tanks containing acetylene gas. It packs such tanks with asbestos, and charges them with gas by a method of its own, and keeps a record of each tank, which is numbered. When the gas is exhausted, it exchanges a filled tank for the empty one which it repairs, repacks, if necessary, and refills. Each tank bears a metal plate on which is engraved complainant's trade-mark for its gas, "Prest-O-Lite," the number, and a patent notice. Defendant, which is a competitor in business making and selling tanks and gas under a different name, buys or exchanges for empty tanks of complainant and refills and resells the same without removing the plate, but in some cases covering a part of the same by a paper label easily removed, stating that the tank had been refilled by it. *Held*, that the same was an infringement of complainant's trade-mark, and also unfair competition, which entitled complainant to an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78-88.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 135; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Motion for preliminary injunction, restraining infringement of trade-mark and unfair competition in trade.

Winter & Winter, for complainant.

Walter H. Chamberlin, for defendant.

RAY, District Judge. On the 25th day of December, 1906, the Concentrated Acetylene Company registered its trade-mark, "Prest-O-Lite," stating it had been continuously used in the business of the corporation since October, 1904, and:

"The class of merchandise to which the trade-mark is appropriated is class 6, chemicals not otherwise classified, and the particular description of goods comprised in said class upon which said trade-mark is used is illuminating gas in portable tanks for supplying automobile headlights, boat

lights, etc. The trade-mark is displayed on the tanks containing the gas by attaching thereto a metallic plate on which the same is shown."

By order of the court, the said company, on due application, changed its name to "Prest-O-Lite Company." Since its organization the complainant company has been extensively engaged in the manufacture and sale of acetylene gas for use on automobiles, which it sells to and distributes to its customers in cylindrical tanks so constructed, the complainant claims, that the maximum amount of gas is delivered in the smallest bulk consistent with safety. Complainant's tanks of special construction and patented are tightly packed with asbestos, which is porous and fireproof, and a certain definite volume of liquid acetone which has the property of absorbing acetylene gas under pressure to an amount many times its volume. The effect is that each tank is filled with this porous asbestos into which has soaked equally throughout the tank a certain definite amount of acetone, and, when the tank is charged with acetylene gas, it is absorbed by the acetone equally all over the tank in amounts proportionate to the heat under which the tank is charged. The result is that, properly packed and charged, there are no spaces within the tank where the gas can collect under pressure and cause combustion. To the side of these tanks, filled with Prest-O-Lite gas, is affixed a removable metallic plate bearing the trade-mark of complainant, "Prest-O-Lite," with other words, and these in this condition are sold by complainant to the dealers and users, but never without the gas. The metal cylinder itself is not destructible, and can be used for years; but the safety valves and other parts get broken, the asbestos settles, the acetone between depleted; the gas is exhausted after a little time, and empty spaces are left in which the gas under great pressure congregates, or settles, and becomes liable to explode. Hence the asbestos and acetone become a material part of the tank itself, and some skill and judgment is required in refilling and recharging. Each tank is numbered, and complainant company keeps a correct record of the amount of acetone contained in each tank, and, when a tank requires refilling with gas after use, it is possible, and not very difficult, by referring to these records, to properly recharge and refill the tank and restore its maximum efficiency. In the absence of these records, the tanks cannot be so restored to usefulness except by a crude and imperfect method and not, as a rule, to its full efficiency. As a rule it is necessary to recharge or refill a tank after about 40 hours use. In order to facilitate the sale of its acetylene gas, the complainant makes it an invariable practice and a part of its business to take back any of these tanks of its own manufacture when it has become exhausted of gas, or otherwise depleted in its parts, and give in exchange therefor, for a small additional compensation, a Prest-O-Lite tank filed with Prest-O-Lite gas and acetone to the maximum quantity; the tank being newly copper plated with all broken or missing parts restored. Complainant company has also established at large expense pumping plants throughout the country, and numerous agencies, so that a user, without difficulty, can obtain a newly filled and perfect tank in place of his exhausted one.

The engraved plate used by complainant on all its tanks, until about a year ago, read as follows:

Prest-O-Lite
Gas Tank.

Manufactured solely by

The Prest-O-Lite Company, Indianapolis, Indiana.

No. _____

Exclusive licenses under patents No. 619,552-661,401-664,383-727,609.

Other patents pending.

Each plate has a different number. For about a year past a plate has been attached to these tanks reading as follows:

Prest-O-Lite Gas Tank. No. _____

The Prest-O-Lite Co.

New York—Boston—Indianapolis—San Francisco—Toronto.

Patented Dec. 25th 1900—May 12th 1903.

Notice this device is sold and purchased for sale and use only when charged with gas by the undersigned. No license is granted to use or sell this device when charged by anyone else and no license is granted to anyone else to recharge this device. Any sale or use of this device when sold or used in violation of this condition and limited license will be considered as an infringement of letters patent of the United States under which this device is made and sold and all parties so selling and using this device contrary to the terms of this limited license will be treated as infringers of said letters patent and render themselves liable to suit for injunction and damages without farther notice. This license is good so long as this plate remains upon the device. Any erasures or removals of this plate will be considered a violation of the license.

A purchase is an acceptance of these conditions. Agents and dealers are not authorized to vary this license.

The Commercial Acetylene Company.

The Prest-O-Lite Company.

It is assumed that any person may make and sell acetylene gas, but each person so making and selling has the right to put it in some particular receptacle, specially stored and all ready for use in a particular place or places, as is done by the complainant here, and when this is done, as here, it becomes something more than mere acetylene gas. "Prest-O-Lite" gas means therefore acetylene gas prepared and tanked as the complainant company prepares and tanks it in these specific tanks. No one has the right to palm off on the public, purchasers, and users, acetylene gas as "Prest-O-Lite" acetylene gas either in these tanks or others. If such gas is sold by others in these tanks, when not prepared or put therein in the careful and particular manner described, the mode, etc., used by complainant company, the impression is given that the gas contained therein is not only acetylene gas, but acetylene gas prepared and put or stored in the tank in the combination, etc., described. If the gas is not so stored therein, and it proves inferior or less efficient in any respect to that sold by the complainant company, when so prepared and placed in the tank, a wrong and injury are done to the complainant. Its gas is brought into disrepute.

The fact remains, however, that when complainant company sells the tank filled with gas, without restriction as to use, such tank becomes the property of the purchaser, and he may use the tank as he sees fit and have it refilled with gas by any one or with something else. This,

however, is a different proposition from the one presented in this case. The defendant company either buys up these old tanks with the plate first described, or trades for them, thus becoming the owner. This it has the right to do. It then fills them in its way with its own acetylene gas, and, in some cases, pasting over a part of the copper plate on the tank a paper label, easily removed, either sells them outright, or gives them to users in exchange for others. This label is sometimes above or below the plate, and sometimes is bottom side up when the tank stands on end. This label reads as follows:

"This tank has been refilled with acetylene gas by the Avery Portable Lighting Company, Milwaukee, Wis., Albany, N. Y., Manufacturers of Autogas Tanks."

The defendant is a competing company in this business and has a tank of its own which it can and does fill with its own gas, described and advertised as "Autogas." Avery, of the defendant company, was formerly with the complainant company, and is familiar with its business methods.

It is evident to me that the defendant pursues this method and gets hold of these "Prest-O-Lite" gas tanks and passes them out to its customers for the purpose of taking trade from the complainant company. It in no way changes the appearance of the tank, except by pasting on the label, easily removed, and which only covers a part of the plate, and when it says, "This tank has been refilled with acetylene gas by the Avery Portable Lighting Company," etc., it implies and fairly represents to the purchaser not only that he is getting acetylene gas made by the Prest-O-Lite Company, but that he is obtaining a properly refilled "Prest-O-Lite gas tank." When the lower part of the plate is not covered by the label, surely the user or purchaser recognizes it as a "Prest-O-Lite gas tank," and will naturally assume that it holds "Prest-O-Lite gas," and this is especially true as the defendant company has a different tank if its own make bearing a different plate and the purchasers will naturally assume that, when they take a "Prest-O-Lite tank," they get Prest-O-Lite acetylene gas properly placed therein, and that when they take an "Autogas tank," they obtain Autogas properly placed therein. The natural result is that would-be purchasers of the Prest-O-Lite gas get Autogas imperfectly placed in the Prest-O-Lite tank. If the purchaser has doubts that he is getting a Prest-O-Lite tank properly filled with Prest-O-Lite gas, he easily scrapes off the label, and, finding the complainant's trade-mark "Prest-O-Lite," he feels assured he has obtained what he desired. I think, and am constrained to hold, that this is an improper use of these tanks bearing complainant's trade-marks, and that these acts constitute unfair competition in trade, and should be restrained. It would be easy and not expensive to remove the engraved plate from the tanks and prevent confusion and imposition. If defendant company would use these tanks, it should do this. I am not passing on the question of infringement of the patents where there has been a violation of the license notice now placed on the copper plates attached to the tanks. I am bound to presume that the patents are valid, but that question is not before me. Complainant's trade-mark is valid, and it is always used on his plate

referred to. To cover the trade-mark with a paper label leaving most of the plate well known to bear complainant's trade-mark, uncovered, informs every one familiar with complainant's goods that it is a Prest-O-Lite tank presumably filled with Prest-O-Lite gas. Purchasers and users are not informed to the contrary. It would be easy to say on the label: "This refilled tank contains acetylene gas made by Avery Lighting Company, and not Prest-O-Lite gas."

I think this case is covered in principle by the following: *Pontefract v. Isenberger* (C. C.) 106 Fed. 499 (defendant restrained from refilling plaintiff's barrels carrying the trade-mark "Golden Wedding," applied to whisky); *Van Hoboken v. Mohns & Kaltenbach* (C. C.) 112 Fed. 528 (defendants restrained from refilling with gin, and selling, bottles stamped with plaintiff's monogram trade-mark, firm name, and address); *Evans v. Von Laer* (C. C.) 32 Fed. 153 (defendant enjoined from selling lime juice in bottles stamped with complainant's name, both parties being dealers in lime juice); *Hostetter Co. v. Martinoni* (C. C.) 110 Fed. 524 (defendant enjoined from selling bitters in a demijohn marked H. Bitters and in Hostetter Bitters bottles, complainant having exclusive right to name "Hostetter"). See, also, *Hostetter Co. v. Sommers* (C. C.) 84 Fed. 333, per Townsend, D. J.

I have not gone extensively into the numerous affidavits or the numerous decided cases.

The complainant is entitled to a preliminary injunction restraining the defendant from selling or passing off to its customers or the trade any of these "Prest-O-Lite gas tanks" filled with acetylene gas, unless it shall remove therefrom the metal engraved plate thereon, or completely erase the words and figures thereon, and place on same a plainly printed label stating that it does not contain gas and acetone made by the Prest-O-Lite Company.

So ordered.

KENDALL v. LYMAN.

(Circuit Court, D. Massachusetts. March 20, 1908.)

No. 167.

1. CUSTOMS DUTIES—RELIQUIDATION—STATUTE OF LIMITATIONS.

Where a protest that had been filed by an importer had been sustained by the collector of customs and was no longer pending, and more than one year after entry of the importation in dispute the collector reliquidated the entry pursuant to instructions of the Secretary of the Treasury. *Held*, that, as a protest had been filed, this action was not in conflict with Act June 22, 1874, c. 391, § 21, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986) making final the liquidation of duties "after the expiration of one year from the time of entry, in the absence of * * * protest."

2. SAME—PROTEST—DUTY TO TRANSMIT TO GENERAL APPRAISERS.

It is a breach of duty for a collector of customs to refuse to forward to the Board of General Appraisers protests which have been filed under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933); and for this breach the protestant is entitled to damages.

3. SAME--FAILURE TO FORWARD PROTEST TO GENERAL APPRAISERS--TECHNICAL BREACH OF DUTY.

Only nominal damages are recoverable for a breach of the duty of a collector of customs to forward an importer's protest to the Board of General Appraisers, where the breach is technical, and actual damage has not been sustained.

At Law. Action for damages.

This case involves the following statutory provisions:

"Sec. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury. * * * And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed: * * * Provided, that the Secretary of the Treasury may order the reliquidation of any entry at a different value whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred." Tariff Act of Aug. 27, 1894, c. 349, 28 Stat. 552 (U. S. Comp. St. 1901, p. 2375).

"Sec. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise * * * shall be final and conclusive * * * unless the owner, importer, consignee or agent of such merchandise * * * shall within ten days after * * * liquidation of duties, * * * if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically * * * the reasons for his objections thereto, and if the merchandise is entered for consumption, shall pay the full amount of the duties. * * * Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers * * * which board shall examine and decide the case thus submitted. * * * " Customs Administrative Act of 1890, Act June 10, 1890, c. 407, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933).

"Sec. 21. * * * Whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, * * * such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent or consignee, be final and conclusive upon all parties." Act of June 22, 1874, c. 391, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986).

This action is brought by Frederick Kendall, an importer at the port of Boston, against George H. Lyman, collector of customs at that port. The case relates to imports subject to an ad valorem rate of duty, made from India in 1898, and invoiced in the rupee of that country. In converting the rupee into United States money, the collector computed on the basis of the exchange value of that coin and assessed duty accordingly. The importer protested, contending for assessment on the basis of the pure-metal value.

The collector did not send this protest to the Board of General Appraisers, but on August 21, 1905, acting under instructions from the Secretary of the Treasury, reliquidated the entry on the basis of the pure-metal value, as contended by the importer. He withheld from the importer, however, the refund accruing under this reliquidation, and on November 23, 1905, reliquidated the entry on the basis of the exchange value, thus re-establishing the original assessment.

This step was taken by the collector pursuant to a letter from the Secretary of the Treasury in which it was stated that satisfactory evidence had been produced to the Secretary that at the date of the consular certification of the invoice in question the value of the Indian rupee in United States currency exceeded by more than 10 per cent. the value estimated and proclaimed for

the quarter in which the consular certification occurred. This action of the Secretary was taken on the authority of section 25, *supra*.

The importer duly protested against this final liquidation, contending (1) that it was illegal under section 21, *supra*, because made more than one year after entry, and (2) that the Secretary of the Treasury had exceeded his powers in ordering it. The plaintiff requested the defendant to forward said protest to the Board of General Appraisers for their decision; but the defendant, acting under instructions from the Secretary, declined to do so.

The ground of the present action, as stated in the importer's brief, is substantially that the collector refused to obey the command of section 14, *supra*, that protests should be forwarded to the Board of General Appraisers, under which the importer had a right to have his case decided by the board, and that the collector in thus disobeying such command violated a duty that he owed to the importer, and became liable to him for all damages sustained thereby; that is, the amount of the refund which the importer would have been entitled to recover from the United States.

Whipple, Sears & Ogden, for importer.

William H. Garland, Asst. U. S. Atty.

COLT, Circuit Judge. Under the agreed statement of facts I have reached the following conclusions:

1. Section 21 of the act of June 22, 1874, c. 391, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986), has no application to this case, because the statute is limited to cases in which no protest has been filed. *Gulbenkian v. Stranahan*, United States Circuit Court, Southern District of New York, April 29, 1907 (T. D. 28,451) 158 Fed. 836; *Klump v. Thomas* (United States Circuit Court, Eastern District of Pennsylvania, February 25, 1907) T. D. 28,453, 162 Fed. —; *Klump v. Thomas* (United States Circuit Court, Eastern District of Pennsylvania, February 11, 1908) T. D. 28,818, 162 Fed. —.

2. The Secretary of the Treasury had the power to order the reliquidation of November 23, 1905, since this case is clearly governed by the decision of the Supreme Court in *United States v. Whitridge*, 197 U. S. 135, 25 Sup. Ct. 406, 49 L. Ed. 696 (T. D. 26,126).

3. Since there was a technical breach of duty in the failure of the collector to transmit the papers to the Board of General Appraisers, as required by section 14 of the customs administrative act of 1890, judgment should be entered for the plaintiff for nominal damages in the sum of \$1.

CARMEL WINE CO. v. PALESTINE HEBREW WINE CO.

(Circuit Court, S. D. New York. April 8, 1908.)

TRADE-MARKS AND TRADE-NAMES—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction granted restraining defendant from infringing certain trade-marks and trade-names used by complainant to distinguish its wines, on a prior adjudication establishing the validity of other trade-marks similarly used and claimed by it.

In Equity. Motion for preliminary injunction.

Walter F. Rogers, for complainant.

Morris E. Gossett, for defendant.

HOLT, District Judge. It is the practice in this court to refuse injunctions in patent and trade-mark cases when there has been no case brought to final hearing and decision involving the validity of the patent or trade-mark. If, therefore, there had been no such case involving substantially the validity of the trade-marks on which this suit is brought, this motion for a preliminary injunction would ordinarily be denied; and in this case it would undoubtedly have been denied in deference to the decisions of the New York Supreme Court at Special Term and in the Appellate Division, on a similar application for a preliminary injunction. But in the case of *Jewish Colonization Association v. Solomon* (C. C.) 154 Fed. 157, the essential questions involved in this suit were tried and decided. The Carmel Wine Company, the complainant in this case, was one of the complainants in that case, and it was there held that the Carmel Wine Company had a trade-mark in the names "Carmel" and "Rishon-le-Zion"; that those names were not geographical names, in the sense of the trade-mark law; and that the names "Carmel" and "Rishon-le-Zion" were valid trade-marks of the Carmel Wine Company.

The facts set forth in the affidavits upon this motion, in respect to the other names by which the complainant distinguishes its wines, such as "Tabor," "Esra," "Rehoboth," "Lebanon," "Akron," and "Pinah," show that they are, for the same reasons, valid trade-marks of the complainant. The evidence also establishes that the Carmel Wine Company adopted these trade-marks as early as 1900; that they have built up a large and valuable business; that no wines were known to the trade by these Jewish names until they were used by the complainant; that the defendant never began to use these names until about 1906; that they began with labels which were essentially different from the Carmel Wine Company's; and that since then they have gradually adopted labels, forms of bottles, and methods of arranging the seals and putting up their product which more and more resemble the complainant's. The proof shows the usual attempt by an infringer to imitate a successful trade-mark closely enough to deceive the public, or at least a portion of the public, while skillfully preserving some points of difference, upon which to claim, when sued, that there is no infringement. The defendant has a right to sell wines from Palestine, but it ought to put up its wines in such a manner that nobody would mistake them for those of the complainant.

The motion for a preliminary injunction is granted.

BOWKER v. HAIGHT & FREESE CO.

(Circuit Court, S. D. New York. March 20, 1908.)

RECEIVERS—ANCILLARY RECEIVERSHIP—ALLOWANCE OF COUNSEL FEES.

Counsel for a creditor, who has obtained an adjudication of insolvency against a corporation and the appointment of receivers in an ancillary suit in another jurisdiction, is entitled to an allowance from the fund in such ancillary suit only for services rendered in securing the appointment of such receivers and in the trial of the case in that court, and any

claim for services rendered elsewhere should be submitted to the court of original jurisdiction.

In Equity. On exceptions to report of master.
See 147 Fed. 923.

Wm. P. Maloney, for complainant.
Franklin Bien, for defendant.
Frederick J. Moses, for receivers.

LACOMBE, Circuit Judge. The report of the master on claims is confirmed.

As to the report on allowances to receivers and counsel:

The master, in recommending allowance for counsel for complainant, has evidently erred in two particulars. Counsel made claim for services rendered to the receivership, after appointment of receivers and their counsel. Whatever may be the practice in the bankruptcy courts, such services by complainant's counsel are not included in this court as a charge against the fund. Moreover, a critical examination of the bill of particulars shows that a large part of the services was rendered in the main suit or in proceedings in other jurisdictions. The consideration thereof and allowance therefor should be had and made in the court of original jurisdiction. It is in that suit that consideration should be given to the circumstance that by his initiation of a judicial inquiry the general body of creditors has benefited. Such service was undoubtedly highly meritorious; but it should not be considered twice as an element, here and in the original suit both. The allowance to counsel for complainant, to be charged against the fund here, is reduced to \$3,000, covering the appointment of ancillary receivers and the trial of the cause.

The counsel for defendant is entitled as such to no allowance from the fund.

The allowance to counsel for claimants who have proved through Boardman & Co. is increased to \$2,000. The circumstance that he was also counsel for defendant does not defeat his claim.

The allowance to counsel for Receiver Colt is increased by \$500, and the allowance as thus increased shall be additional to payment already made under prior order of the court.

The allowances to Receiver Robinson and to his counsel are approved, as additional to payments already made them.

The allowance to Receiver Taft is increased to \$300.

Master's fees are fixed at \$750.

The exceptions are overruled, and, as modified, the report is confirmed.

CHICAGO GREAT WESTERN RY. CO. V. McDONOUGH.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1908.)

No. 2,405.

1. APPEAL AND ERROR—PRACTICE—ASSIGNMENTS OF ERROR.

The practice of filing interminable assignments of error tends to defeat the purpose of the rule requiring such assignments, and is not to be approved.

2. TRIAL—CHARGE TO JURY—TO BE CONSIDERED AS A WHOLE RATHER THAN IN FRAGMENTS.

In examining the charge, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single or detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

3. SAME—CHARGE TO JURY—GENERAL EXCEPTION UNAVAILING.

A general exception to a considerable portion of the charge cannot be regarded as presenting a specific objection to a lesser portion, which in fairness to the trial court should have been specially called to its attention, in order that the appropriate correction might be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 689.]

4. SAME—RELATIVE WEIGHT OF AFFIRMATIVE AND NEGATIVE TESTIMONY—INSTRUCTION.

The rule that affirmative testimony is to be preferred to negative is not absolute, and whether or not in any particular case it shall be called to the attention of the jury is so largely in the discretion of the trial judge that the refusal to do so is not ordinarily reversible error.

5. MASTER AND SERVANT—ASSUMPTION OF RISK—DEFECTIVE MACHINERY—SERVANT NOT REQUIRED TO EXERCISE CARE TO DISCOVER DANGERS.

In determining whether a servant assumed the risk of injury incident to the use of a boiler negligently permitted by the master to become unfit and unsafe for use, the true test is, not whether the servant exercised care to discover dangers, but whether they were known to him, or were so patent as to be readily observable by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

6. APPEAL AND ERROR—EXPERT EVIDENCE—QUALIFICATIONS OF WITNESS.

Whether or not a witness tendered as an expert possesses the requisite qualifications rests largely in the discretion of the trial court, and its decision thereon ought not to be disturbed unless it can be said that it was clearly erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3852.]

7. EVIDENCE—EXPERT EVIDENCE—HYPOTHETICAL QUESTIONS.

Hypothetical questions propounded to an expert witness are not objectionable merely because the evidence tending to establish the facts assumed therein is contradicted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2368-2375.]

8. NEGLIGENCE—STANDARD OF REASONABLE CARE—PRACTICE OF OTHERS—EVIDENCE—INSTRUCTION.

The controlling standard or test of reasonable or ordinary care is what a reasonably prudent person would ordinarily have done in the like cir-

cumstances, rather than the prevailing practice of others engaged in the same business. The practice of others, even though not a general or prevailing one is some evidence of what could have been done, and so has a material bearing upon whether the requisite care was exercised in what was actually done; and an instruction which treats what a reasonably prudent person would ordinarily have done in the like circumstances as the controlling standard or test of reasonable or ordinary care, and also treats the prevailing practice of others engaged in the same business as evidence only of that standard, and directs that such practice be considered with all the other evidence bearing upon the subject in fixing upon that standard, is not objectionable as permitting the jury to find that the conduct in question was negligent, even though it conformed to the prevailing practice of others, because that practice was not in itself the legal standard, but, as indicated in the instruction, was evidence only thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 6, 371-377.]

9. STEAM—INJURIES FROM PRODUCTION OR USE—EVIDENCE OF OTHER SIMILAR ACCIDENTS.

In an action for injuries sustained through a boiler explosion, where the gravamen of the charge was that the defendant had negligently failed to exercise reasonable care in maintaining the boiler in a reasonably safe condition, evidence of recurring explosions, not otherwise explained, occurring in the course of its prior use, when the conditions were substantially the same, was admissible as bearing upon its tendency to become impaired by the particular use to which it was subjected, the defendant's knowledge of that tendency, and the precautions which, in the exercise of reasonable or ordinary care, should have been taken thereafter in inspecting and testing it to determine whether it was in reasonably safe condition for use; but such evidence was not admissible for any other purpose.

10. SAME—EVIDENCE OF CONDITIONS AFTER ACCIDENT.

Evidence of the condition, shortly after an accident, of the instrumentality which caused it, is admissible as bearing upon its condition at the time of the accident, or just prior thereto, when it appears that there has been no intervening change.

11. TRIAL—PRACTICE—MOTION TO STRIKE OUT EVIDENCE SOME OF WHICH IS UNOBJECTIONABLE.

Upon a motion to strike out all evidence relating to a specified subject, some of which is unobjectionable, the court, while at liberty to select or separate what is objectionable from what is unobjectionable, and to strike out the former, is not obliged to do so, but may respond to the motion in the terms in which it is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 248.]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Thomas D. Healy (A. G. Briggs, John L. Erdall, M. F. Healy, and Robert Healy, on the brief), for plaintiff in error.

Sylvester Flynn and Robert M. Wright (J. W. Henneberry, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. This case arose out of the explosion of a stationary boiler in the car shops of the Chicago Great Western Railway Company at Oelwein, Iowa, whereby severe and

permanent personal injuries were inflicted upon John A. McDonough, the fireman who was attending the boiler at the time. In the Circuit Court he obtained a verdict and judgment against the railway company, and it now insists that error prejudicial to it was committed in the progress of the trial.

There was nothing very unusual about the case as it was presented in the Circuit Court, as respects either the volume of evidence produced or the number of questions of law arising for decision, and yet more than 60 assignments of error are made and seemingly relied upon. All of these have been attentively considered, but we feel constrained to repeat the admonition given in *Michigan Home Colony Co. v. Tabor*, 72 C. C. A. 480, 141 Fed. 332, that:

"The practice of filing such a large number of assignments cannot be approved. It thwarts the purpose sought to be subserved by the rule requiring any assignments. It points to nothing. It leaves opposing counsel and the court as much in the dark concerning what is relied on as if no assignments were filed."

And we also repeat the observation made in *Shepard v. United States*, 85 C. C. A. —, 160 Fed. 584, 592, that, generally speaking:

"Such interminable assignments, instead of impressing the court with the thought of an imperfect trial, rather cast discredit upon the worth of any of them."

Of the issues presented by the pleadings it is enough to say that the petition charged that the defendant failed to exercise reasonable care in inspecting the boiler and in otherwise maintaining it in a reasonably safe condition for use, that its water tubes or flues were thereby permitted to become and to remain worn, burned, blistered, and weakened to a degree which made the boiler unfit and unsafe for use, and that by reason thereof the explosion occurred and the plaintiff was injured, and also to say that the answer denied the negligence charged against the defendant, and alleged that the plaintiff contributed to his injuries by his own negligence, and that they resulted from an assumed risk. The plea of contributory negligence was withdrawn from the jury, with the assent of the defendant, because not sustained by any evidence; so it need not be further noticed.

At the close of the evidence the court declined to direct a verdict for the defendant, and error is assigned thereon; but as a careful reading of the evidence set forth in the bill of exceptions satisfies us that the jury reasonably could have found therefrom that the defendant was negligent substantially as charged, that the plaintiff did not assume the extraordinary risks arising out of such negligence (see *Chicago, Milwaukee & St. Paul Railway Co. v. Donovan*, 85 C. C. A. —, 160 Fed. 826), and that it was the proximate cause of his injuries, we think the ruling was right.

Several assignments call in question the refusal to give various instructions, and the giving of others, defining the issues presented by the pleadings, the elements of a right of recovery on the part of the plaintiff, the measure of care which the defendant was required to exercise for the plaintiff's protection, the burden of proof, the probative force of the accident itself, and what might rightly be

considered in determining the weight to be given to the testimony of the several witnesses. None of these assignments is well grounded; nor is it necessary to take them up in detail here. All that was material and otherwise unobjectionable in the instructions refused was substantially and fairly incorporated in the charge given. It was in the main exceptionally pertinent, plain, full, and accurate. But some portions of it, if separated from the rest, would justly be regarded as objectionable. That, however, is not a fair test of their meaning, for, as was said in *Magniac v. Thompson*, 7 Pet. 348, 390, 8 L. Ed. 709, and *Spring Co. v. Edgar*, 99 U. S. 645, 659, 25 L. Ed. 487:

"In examining the charge, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the court and the jury, at the time when it was delivered."

A reading of the entire charge makes it plain that the faults in the portions covered by these assignments were inadvertent, rather than intentional, and were so fully corrected by the effect of the charge as a whole that the jury could not have been misled or confused by them. They, therefore, afford no ground for complaint. *Railroad Co. v. Gladmon*, 15 Wall. 401, 409, 21 L. Ed. 114; *Evans-ton v. Gunn*, 99 U. S. 660, 668, 25 L. Ed. 306; *Baltimore & Potomac R. Co. v. Mackey*, 157 U. S. 72, 86, 15 Sup. Ct. 491, 39 L. Ed. 624. Besides, if the defendant entertained any fear that the jury would be misled or confused by that which was faulty, it should, in fairness to the court, have specially called attention thereto, in order that the appropriate correction could be made. *Baltimore & Potomac R. Co. v. Mackey*, supra; *Choctaw, Oklahoma & Gulf Ry. Co. v. Tennessee*, 191 U. S. 326, 332, 24 Sup. Ct. 99, 48 L. Ed. 201; *McDermott v. Severe*, 202 U. S. 600, 610, 26 Sup. Ct. 709, 50 L. Ed. 1162. This was not done, but instead a general exception was taken to each of several considerable portions of the charge, covering matter that was unobjectionable along with that which was faulty.

Among the instructions requested was one to the effect that, if the witnesses for the defendant, who testified affirmatively to the making of certain inspections and tests of the boiler, and the witnesses for the plaintiff, whose testimony upon that question was of a negative character, were equally credible, the testimony of the former was entitled to the greater weight; and complaint is made because it was refused. The existence of the rule upon which the request was predicated and the propriety of calling it to the attention of the jury, when there is warrant therefor in the evidence, are not open to question in this jurisdiction. *Stitt v. Huidekopers*, 17 Wall. 384, 394, 21 L. Ed. 644; *Denver & R. G. Co. v. Lorentzen*, 24 C. C. A. 592, 594, 79 Fed. 291; *Rhodes v. United States*, 25 C. C. A. 186, 189, 79 Fed. 740. But the rule is not absolute. *Chicago & N. W. Ry. Co. v. Andrews*, 64 C. C. A. 399, 404, 130 Fed. 65; *Baltimore & O. R. Co. v. Baldwin*, 75 C. C. A. 211, 144 Fed. 53. And whether or not in

any particular case it shall be called to the attention of the jury is so largely in the discretion of the trial judge that the refusal to do so is not ordinarily reversible error. *Denver & R. G. R. Co. v. Lorentzen*, supra; *Olsen v. Oregon, etc., Co.*, 9 Utah, 129, 140, 33 Pac. 623. Here some of the testimony for the plaintiff, although negative in character, was so substantial that we cannot say that the refusal was error.

In furtherance of its claim that the plaintiff's injuries resulted from an assumed risk, the defendant preferred several requests for instructions bearing upon that subject, each of which was constructed upon the theory that the risks assumed by a servant include such as arise out of defective appliances or machinery negligently provided by the master, if the servant knows of the defect, or "by the exercise of ordinary care" ought to know of it. These were refused, and the jury were instructed, in effect, that, if the boiler had been negligently permitted to become unfit and unsafe for use as charged, and its condition was known to the plaintiff, or was plainly observable by him, he then, but not otherwise, assumed the risks incident to its continued use in that condition. These rulings are assigned as error; but we think the Circuit Court took the right view of the question, for the true test, in respect of risks arising out of the master's negligence, is not whether the servant exercised care to discover dangers, but whether they were known to him, or were so patent as to be readily observable by him. *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 671, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Choctaw, Oklahoma & Gulf R. R. Co. v. Holloway*, 191 U. S. 334, 337, 24 Sup. Ct. 102, 48 L. Ed. 207; *Texas & Pacific Ry. Co. v. Swearingen*, 196 U. S. 51, 62, 25 Sup. Ct. 164, 49 L. Ed. 382; *Missouri, Kansas & Texas Ry. Co. v. Wilhoit*, 85 C. C. A. —, 160 Fed. 440; *Kirkpatrick v. St. Louis & San Francisco Ry. Co.*, 85 C. C. A. —, 159 Fed. 855.

It is complained that one Saddler, a witness for the plaintiff, was permitted to qualify as an expert, in respect of the tests to which boilers should be subjected, by stating that he was qualified to testify upon that subject, and was permitted to so testify when it plainly appeared that he was not qualified. The first part of the complaint has reference to the following in his testimony:

"Q. Well, is your knowledge, from reading and observation and your experience as a boiler maker, such as to enable you to determine what tests boilers should be subjected to generally? A. I think it is."

There was nothing objectionable in this. It was only preliminary or precautionary, and was not made the test of his qualification. He was also required to state the extent of his reading, observation, and experience, and it was in the light of that testimony that he was held to be qualified. The second part of the complaint has reference to the fact that, while he stated that he had had 12 years of experience in the actual construction, inspection, and testing of different types of boilers, both locomotive and stationary, he also stated that he had not come in contact with any of the same type as the one which ex-

ploded, and that his knowledge of its construction and principle of operation was confined to what was disclosed at the trial and to what he had read in a book obtained from the town library and then in the courtroom. Whether or not, in the light of these statements, and of the differences between the boiler in question and those which had come under his observation—and the record makes it plain that he accurately understood these differences—he was qualified to testify as an expert, upon the subject to which his attention was directed, was a matter which rested largely in the discretion of the trial court, and its decision thereon ought not to be disturbed, unless we can say that it was clearly erroneous. *Spring Co. v. Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487; *Montana Ry. Co. v. Warren*, 137 U. S. 348, 353, 11 Sup. Ct. 96, 34 L. Ed. 681; *Chateaugay Iron Co. v. Blake*, 144 U. S. 476, 484, 12 Sup. Ct. 731, 36 L. Ed. 510; *Gila River R. R. Co. v. Lyon*, 203 U. S. 465, 475, 27 Sup. Ct. 145, 51 L. Ed. 276. We cannot so say. Indeed, a careful examination of the testimony given by the witness satisfies us that he was qualified.

As bearing upon the frequency with which, in the exercise of reasonable care, the boiler should have been cleaned and inspected, the plaintiff was permitted to give in evidence certain opinions of experts elicited by hypothetical questions in which it was assumed that in such cleaning as had actually occurred prior to the explosion it had been found that some of the tubes or flues, especially those nearest to the fire, were obstructed or choked with incrustations to such an extent as to prevent the free passage through them of the water drill and the air hammer, appliances used in cleaning them; and it is urged that this was error, because there was no proper evidence upon which to base the assumption upon which the opinions were given. The contention involves a misconception of what evidence was produced, as a brief reference to some of it will show. A witness, who had been the assistant engineer at the defendant's Oelwein shops at and prior to the time of the explosion, testified:

"Mud and scale are the obstructions that are found in the flues. This mud and scale comes from impurities deposited in the water. It is hardest in the front set, which is most directly exposed to the fire. * * * Q. Do you know whether or not there was any trouble in cleaning out any of the flues? A. Yes; I do. Q. And what was the trouble? A. There seemed to be some obstruction that prevented the water cleaner from passing freely through the tubes. Q. What tubes were these—the tubes in the front set, or the tubes in the rear set or the middle set? A. I couldn't take my oath as to what particular tubes they were—flue or flues. When the obstruction is least serious the water drill or water cleaner is used, and when this does not answer the air hammer is used. * * * A boiler can be washed out in two or three days. * * * The condition of the boiler, as to whether it is clogged, determines the length of time necessary. * * * If the water cleaner won't remove the scales, and the incrustations are too solid to be removed, then the air hammer is used."

And another witness, who was one of the defendant's boiler washers prior to the explosion, testified:

"Q. Now, what can you say as to the circulating tube; that is, the tube that runs in the form of an arc or circle, and connects the two upper drums? A. The upper circulating tubes, or the lower ones? Q. The lower ones. A. Well, it was most generally always pretty well clogged up. Q. How did

you clean that? A. With the air hammer. * * * Q. Did you leave any of those circulating tubes without cleaning them? A. No, sir. Q. When you say that they would be filled, or partly filled, you mean that they were in that condition when you began the work? A. Yes, sir."

True, there was evidence tending to contradict part of this; but that did not affect the plaintiff's right to elicit the opinions of experts upon the hypothesis of the truth of what his evidence tended to prove. *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Louisville, etc., Co. v. Falvey*, 104 Ind. 409, 413, 3 N. E. 389, 4 N. E. 908; *Orient Ins. Co. v. Leonard*, 57 C. C. A. 176, 120 Fed. 808.

One of the questions to which much evidence was addressed was whether or not, in the exercise of reasonable care, the boiler should have been subjected to the hydraulic test more frequently than was done. This test was applied in 1898 or 1899 when the boiler was installed, in 1901 following general repairs, and possibly again two years before the accident in question. To sustain the affirmative of the question, the plaintiff introduced the testimony of experts to the effect that, when the tubes or flues of a boiler become incrustated as before described, the fire and flame to which they are subjected in ordinary use have a tendency to burn, blister, and weaken them, and therefore to increase the occasion for inspecting and testing them; that the hydraulic test was a known and practical one, applicable alike to all types of stationary boilers, and was more efficient than other tests; that it should have been applied once in each year, and whenever there were circumstances tending to excite suspicion as to the safety of the boiler; and that such was the practice of the Chicago & Northwestern Railway Company, and possibly of some other owners of stationary boilers. The defendant excepted to the admission of the evidence of the practice of the Chicago & Northwestern Railway Company, and now contends that, while evidence of a general practice of that character among boiler owners would have been admissible, it was not permissible to show anything short of a general practice. In our opinion the evidence was properly admitted. The Chicago & Northwestern Railway Company had long owned and operated many stationary boilers in the various shops connected with its extensive railroad, several of which were in the same region as the shops of the defendant, and the fact that the practice stated was followed by that company was some evidence of what could have been done by the defendant, and so had a material bearing upon whether it exercised reasonable care in what was actually done. This is illustrated, as we think, in *Washington, etc., R. R. Co. v. McDade*, 135 U. S. 554, 574, 10 Sup. Ct. 1044, 34 L. Ed. 235, where, in quoting approvingly from *Myers v. Hudson Iron Co.*, 150 Mass. 125, 138, 22 N. E. 631, 633, 15 Am. St. Rep. 176, it was said:

"The plaintiffs were allowed to show that other machinery or appliances than those used by the defendant would have been safer; for example, a strap brake, a friction V, so called, or a reversible engine. In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kinds of machinery or appliances were used elsewhere, and might have been used in shaft No. 1. *Wheeler v. Wason Manuf. Co.*, 135 Mass. 294, 298. It does not follow from the introduction of such evidence that

the defendant was bound to use the very safest, or newest, or any particular, machinery or appliances; but, as 'reasonable care' is a relative term, the jury might properly consider what could be done to secure safety, and the evidence was competent."

The defendant did not question that there was a general practice among owners of stationary boilers to subject them to the hydraulic test when they were installed and following general repairs; but it introduced the testimony of several witnesses to the effect that this practice did not include the application of such test at other times, and that it was not so applied in the shops of ten or more railroad and other companies with which they had been connected. Some of these witnesses, however, conceded that to have so applied it was practicable, would have disclosed any serious impairment of the resisting power of the boiler, and would not have strained or injured it, if it was in reasonably safe condition. In that connection the defendant requested that the following instruction be given:

"Evidence as to custom has been received to throw light upon the question of what method, system or custom as to tests and inspection are ordinarily and usually exercised by ordinary prudent persons operating steam boilers. You are told that the standard of care to be applied, in order to determine whether or not defendant is negligent, cannot be measured by the custom and practice of a single employer so operating steam boilers, or made to depend upon the custom and practice of such single employer. The defendant was bound only to exercise such reasonable care and prudence as an ordinarily prudent person, operating such steam boilers in his business, would exercise under like circumstances; and if you find such care was exercised, you cannot find the defendant negligent for failure to adopt such system of inspection as a single employer has adopted, if that system was not in general use and not usually employed by ordinarily careful and prudent persons under like circumstances."

The request was refused, and the following instruction was given:

"As bearing upon this question of inspection, and the failure to inspect is one of the charges that the plaintiff makes against the defendant, you are to consider all the testimony in the case bearing upon it. There has been a great deal of it. It is your province to determine, and in doing so you are to consider all the facts and all the evidence that is shown here before you, and determine whether or not the defendant has exercised that degree of care in so doing that a reasonable and prudent person, under the circumstances and surroundings that existed there at Oelwein at that time, would have exercised. * * * While the conduct of the other companies is not necessarily conclusive here, because the conditions may vary somewhat from the conditions surrounding this situation at Oelwein, still it is proper for you to consider what they do in determining whether the defendant in this case has exercised that degree of care that the law required. * * * There is no definite rule which will determine the number of times that the boiler or the flues in the boiler should be cleaned, or what particular tests should be applied to them to determine whether or not they were in a reasonably safe condition. That depends upon the circumstances of the particular situation in this case, what was the character of the water that was used in those boilers, what was the amount of sediment or deposit that is left in them, and what was the character of that sediment when it was subjected to the fire; and from the character and quality of the water and the sediment that it produced, and the nature of that sediment and all the other facts shown by the evidence, you will say what would have been the frequency of the cleaning of the boiler that a reasonable and prudent person would ordinarily have done to have kept it in a reasonably safe condition for use, and whatever such a person would have done under the circumstances of the situation there at Oelwein the defendant was required to do and no more and no less. * * * If you should find that

this explosion * * * was because of some latent defect in the flue, some hidden defect there, that could not be discovered by ordinary care and reasonable diligence, why the defendant would not be liable. * * * The defendant is not required to furnish the best and safest appliances that can be obtained in the market. It is required to furnish only those that a reasonable and prudent person would furnish as applicable to the purpose for which they were to be used and the circumstances under which they were to be used."

It is said that the action of the court in this matter was error, because it permitted the jury to test the character of the defendant's conduct, in respect of the application of the hydraulic test, by the practice of the Chicago & Northwestern Railway Company alone, and because it permitted them to find that the defendant was negligent, even though they believed from the evidence that its conduct conformed to the prevailing practice among boiler owners. The contention must fail. It rests upon a misconception of the true import of the instruction given, and also confuses the controlling standard of reasonable or ordinary care with what is only evidence thereof. Instead of being permitted to test the character of the defendant's conduct by the practice of the Chicago & Northwestern Railway Company alone, the jury were required to test it by what a reasonably prudent person would ordinarily have done in the like circumstances, as disclosed by all the evidence, including that relating to the conduct or practice of other boiler owners; and the test so prescribed, rather than the usual conduct or prevailing practice of others, was the controlling standard of reasonable or ordinary care. What was done by others, even though usually done, was evidence only of that standard, and was to be considered and weighed with the other evidence, and not to the exclusion thereof. A particularly apt and comprehensive statement of the law on this subject is found in Prof. Wigmore's recent treatise on Evidence, where it is said (volume 1, § 461):

"The distinction is in itself a simple one: (1) The conduct of others evidencing the tendency of the thing in question; and such conduct—e. g., in using brakes on a hill, felt shoes in a powder factory, railings around a machine, or in not using them—is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and that its maintenance was or was not negligence in spite of the above evidence. (2) Meanwhile the substantive law tells them what the standard of conduct for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law. This distinction is patent enough, but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it, with an express caution that it is merely evidential, and is not to serve as a legal standard."

And such is plainly the effect of the decisions of the Supreme Court of the United States. *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 469, 23 L. Ed. 356; *Wabash Railway Co. v. McDaniels*, 107

U. S. 454, 461, 2 Sup. Ct. 932, 27 L. Ed. 605; Northern Pacific R. Co. v. Mares, 123 U. S. 710, 719, 721, 8 Sup. Ct. 321, 31 L. Ed. 296; Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 470, 23 Sup. Ct. 622, 47 L. Ed. 905.

In the McDaniels Case it was said by Mr. Justice Harlan:

"If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due care, or reasonable care, or proper care, and therefore not ordinary care within the meaning of the law."

In the Mares Case the following instruction, given at the request of the plaintiff over the objection of the defendant, was fully approved:

"Ordinary or due care in such cases is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless. Ordinary care in the selection or retention of servants in such cases implies that degree of diligence and precaution which the exigencies of the particular service reasonably require—that is, such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered."

In the Behymer Case, where error was alleged because of a refusal to rule that the defendant's liability for injuries sustained by the plaintiff, in being thrown from a freight train of which he was brakeman by a sudden jerk thereof, "depended on whether the freight train was handled in the usual and ordinary way," it was said by Mr. Justice Holmes:

"Instead of that, the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

And in the recent case of Shandrew v. Chicago, Milwaukee & St. Paul Railway Co., 73 C. C. A. 430, 434, 142 Fed. 320, 324, it was said by Judge Adams, in speaking for this court:

"What other railroad companies did is not in itself a standard of care for the defendant, but is evidence only of that standard. It is evidence that the jury may consider under proper instructions in determining whether this defendant exercised ordinary care; that is, such care as other prudent persons engaged in the same business ordinarily exercised. The Supreme Court of the United States well expressed this thought in the case of Texas & Pacific Railway Co. v. Behymer. * * * From these observations it appears that the proof of what other railroads did under similar circumstances was properly treated in these instructions as evidence only of the standard of that ordinary care which the law required the defendant to observe."

Tested by the result of these decisions, the instruction given accurately stated what consideration should be given to the practices of other boiler owners, including the Chicago & Northwestern Railway Company.

The explosion in question occurred in June, 1904, and resulted from the bursting of one of the tubes or flues nearest the fire, when the pressure was only normal, or the usual working pressure. Over the defendant's objection, evidence was admitted of a similar explosion in 1900, something over a year after the boiler was installed, of two others in the fall of 1901, and of still another in the fall of 1903. The admissibility of this evidence is one of the questions presented by the assignments of error. It was admitted as tending to show some notice to the defendant of the probable length of time that the tubes or flues could be used with reasonable safety, in the conditions surrounding their use in that boiler, and as bearing upon the precautions which, in the exercise of reasonable or ordinary care, should have been taken thereafter in inspecting and testing them to determine whether they were in reasonably safe condition to be used; and the jury were plainly instructed that it could be considered for that purpose, and none other, and particularly that it could not be regarded as evidence of any negligence at the times of the prior explosions. Considering the restricted purpose for which the jury were permitted to consider it, we entertain no doubt that it was properly admitted. What is reasonable or ordinary care in the inspection and testing of a boiler depends in part upon its tendency to become impaired by use, because to be reasonable or ordinary the care must be proportionate to the danger; and as the tendency to impairment results from natural laws, and usually is continuous, the observed exhibitions thereof in the past are generally indicative of what may be expected in the future. In consequence, due regard for them must be had in what is done to make the future use reasonably safe, and when the reasonableness of what is so done becomes the subject of inquiry they have a material bearing thereon. Recurring explosions, such as were shown at the trial, when there is no other known cause for them, are indicative of a pronounced and dangerous tendency to impairment, to which the care to be exercised in future inspection and testing must be proportionate. As quite apposite, we quote from Dr. Wharton's work on Evidence (volume 1, §§ 40, 41), wherein, after a reference to the general rule which excludes evidence of other independent, though similar, acts of negligence, it is said:

"But when a party is charged with the negligent use of a specific agency, and when the case against him is that he did not use care proportionate to the danger, then the question becomes material whether he knew, or ought to have known, the extent of the danger. On such an issue as this it is relevant for the party aggrieved to put in evidence of disconnected acts, of which it was the duty of the defendant to have been cognizant, and which, if he were cognizant of them, would have advised him of the extent of the danger, and would have made it his duty to take precautions which would, if faithfully applied, have prevented the injury sued for."

An instructive and leading case upon the subject is *Morse v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 465, 471, 16 N. W. 358, 361, where recovery was sought for injuries sustained in the derailment of an engine which was alleged to have been caused by a defective switch, and where the plaintiff was permitted, for the purpose of showing the defective character and dangerous tendency of the switch,

to prove that other engines and cars had left the track at the same point. In holding this evidence admissible for the purpose stated, it was said by the late Judge Mitchell:

"It is, of course, not competent for the purpose of showing independent acts of negligence; but we think on principle it is clearly admissible when it tends to show that the common cause of these accidents is a dangerous or unsafe thing. It would be certainly competent to prove by an expert that, at a time either before or after the accident, when the instrument claimed to have caused it was in the same condition as when the accident complained of occurred, he examined and experimented with it, and found it capable of producing like results. Hence there seems no reason for excluding ordinary experience, when confined within the same limits and for the same purpose. These effects are in the nature of experiments to show the actual condition of the instrument. Upon any issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served, when put to the use for which it was designed, would seem to bear directly upon the issue. It is sometimes objected that this presents new and collateral issues of which a defendant has no notice. In a certain sense every item of evidence material to the main issue introduces a new issue; that is, it calls for a reply. In no other sense does it make a new issue. Its only importance is that it bears on the main issue, and, if it does, it is competent. Evidence of similar accidents resulting from the same cause has often been held competent for the purpose referred to. *Kent v. Town of Lincoln*, 32 Vt. 591; *Quinlan v. City of Utica*, 11 Hun (N. Y.) 217; *Wiley v. Portsmouth*, 35 N. H. 308; *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *Piggott v. Eastern Cos. R. Co.*, 3 C. B. 229; *House v. Metcalf*, 27 Conn. 631; *Hill v. P. & R. R. Co.*, 55 Me. 438, 92 Am. Dec. 601; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55. But to render such evidence competent it must appear, or at least the evidence must reasonably tend to show, that the instrument or agency whose condition is in issue was in substantially the same condition at such times as it was at the time when the accident complained of occurred."

True, this view is rejected by some of the courts; but the reasoning upon which it is founded is sustained by controlling decisions of the Supreme Court of the United States, and by many other satisfactory decisions. *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 470, 23 L. Ed. 356; *District of Columbia v. Arms*, 107 U. S. 519, 524, 2 Sup. Ct. 840, 27 L. Ed. 618; *Vicksburg, etc., R. R. Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; *Texas & Pacific Ry. Co. v. Watson*, 190 U. S. 287, 289, 23 Sup. Ct. 681, 47 L. Ed. 1057; *Chicago, etc., Co. v. Gilbert*, 3 C. C. A. 264, 52 Fed. 711; *Gulf, etc., Co. v. Johnson*, 4 C. C. A. 447, 54 Fed. 474; *Central Vermont R. R. Co. v. Soper*, 8 C. C. A. 341, 353, 59 Fed. 879; *Chicago, etc., Co. v. Netolicky*, 14 C. C. A. 615, 622, 67 Fed. 665; *Wabash Screen Door Co. v. Black*, 61 C. C. A. 639, 645, 126 Fed. 721; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Findlay Brewing Co. v. Bauer*, 50 Ohio St. 560, 35 N. E. 55; *City of Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216; *Frohs v. City of Dubuque*, 109 Iowa, 219, 80 N. W. 341; *Colorado, etc., Co. v. Rees*, 21 Colo. 435, 440, 42 Pac. 42; *Pacheco v. Judson Mfg. Co.*, 113 Cal. 541, 45 Pac. 833; *Yates v. City of Covington*, 119 Ky. 228, 83 S. W. 592; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 131, 138, 22 N. E. 631, 15 Am. St. Rep. 176, 1 Wigmore, Ev. § 458.

But it is urged that this evidence was not admissible, because the conditions at the times of the prior explosions were not substantially

the same as those at the time of the explosion in question. If the premise be correct, the conclusion undoubtedly follows. Is the premise correct? Primarily, it is well to observe that sameness in every detail is not necessary, but only similarity in essential conditions; that is, in such as reasonably might be supposed to affect the tendency in question. 1 Wigmore, Ev. § 442. The changes relied upon are (1) that following the later of the two explosions in 1901 the tubes nearest the fire were all taken out and replaced by new ones, and (2) that in 1902 the source from which water was secured for the boiler was changed, and thereafter the water was subjected to filtration before it entered the boiler. As both changes were effected before the explosion in the fall of 1903, it is plain that they produced no dissimilarity between the conditions at the time of that explosion and those at the time of the succeeding one in 1904, when the plaintiff was injured. All the explosions occurred in the tubes nearest the fire, where, according to the undisputed evidence, the tendency to impairment was the greatest. These had been in use something over a year at the time of the explosion in 1900, and all but a few of them had been in use something over two years at the time of the explosions in 1901. Obviously, the removal of the old tubes and the substitution of new ones, following these explosions, produced for a time a substantial change in the conditions, because it eliminated the prior use to which the old tubes had been subjected. But it had ceased to be operative, in any substantial sense, at the time of the explosions in 1903 and 1904; for the new tubes, which were like the old ones, had then been subjected to the same kind and amount of use as had the old ones at the times of the earlier explosions.

We pass, therefore, to the other change. The only way in which it could have materially altered the conditions was in preventing or lessening the incrustation of the tubes. But the evidence, including that for the defendant, tended strongly to establish that it did not have any appreciable effect in that regard; that thereafter, as before, the incrustations in the tubes nearest the fire were not infrequently "like granite or crockery—that is, harder, you might say, than iron or steel"—and as much as one-sixteenth of an inch in thickness, which was one-half the thickness of the tubes; and that the filtration, while removing some of the sediment from the water, had but little effect upon other impurities, which, under the influence of the great heat to which the water was subjected, attached themselves to the tubes in the form of these hard and particularly objectionable incrustations. We cannot say, therefore, that this change was sufficiently substantial to render the evidence of the earlier explosions inadmissible; and we more readily give effect to this conclusion because the jury were instructed that, in determining whether the defendant had exercised reasonable care in cleaning and testing the boiler, they should consider, in connection with the other evidence bearing thereon, the character of the water that was used, and the amount and nature of the sediment or deposit that it left in the tubes when subjected to the fire, which, of course, required them to consider any improvement in that respect that may have resulted from changing the source from which the water was secured and subjecting it to filtration.

Finally, it is complained that error was committed in admitting, and afterwards in refusing to strike out, evidence showing the removal and condition of 11 of the tubes or flues immediately following the explosion in question. As respects the evidence of their removal, it is enough to say that it was not offered or admitted as an admission or confession that the tubes were defective, or that the defendant had been in any manner negligent, but only as a mere incident in showing their condition; some of the witnesses having examined them as they were being removed, and others after their removal was accomplished. Besides, the fact of their removal was shown by the defendant in the same incidental way. As respects the rulings in respect of the evidence of their condition, the facts are these: When plaintiff's counsel indicated his purpose to offer such evidence, the court interposed:

"Well, I understand it is for the purpose of showing the condition of the flues at the time of the accident."

And plaintiff's counsel replied:

"Yes, sir; it is for the purpose of showing the condition of the flues, so far as we can, at the time of the accident."

Plaintiff's counsel then inquired of a witness, who was present when the flues were removed:

"Will you describe the condition of the flues that were taken out? I allude now to the condition when they were taken out."

Whereupon defendant's counsel objected that this was "seeking to elicit evidence to establish negligence by a condition found subsequent to the explosion." The objection was overruled, the defendant excepting, and, without any further objection, testimony was elicited from that witness and others tending to show that some of the flues were slightly warped, that the one which burst and caused the explosion was reduced in thickness at the place of the rent or rupture, and that it and others were pitted, blistered, and burned. Subsequently the defendant requested that all of this evidence be stricken out, because it related to "a condition subsequent to the accident," and because the disturbance wrought by the explosion made it of no value for the purpose for which it was offered. The request was denied, the defendant excepting, and, in its charge to the jury, the court referred to this evidence, saying that it—

"was admitted for the purpose of more accurately and clearly showing you the actual condition of those flues at the time of that accident, and for no other purpose, and you will consider it for that alone, and not as evidence of neglect on the part of the defendant company. There is also testimony which tends to show that the explosion itself might have affected or changed the actual condition of the flues or the boiler at the time of the explosion. You have heard that testimony, and, like the other testimony in the case, it is for you to say to what extent those flues were injured by the effect of the explosion itself. And from all the testimony you will say what was the actual condition of those flues at the time just prior to the explosion which resulted in the injury of Mr. McDonough. The testimony was admitted for that purpose, and will be considered for that purpose alone."

It is not here seriously insisted that the evidence that the flue which burst and others were pitted, blistered, and burned was inadmissible,

and, if it were, we would have to hold otherwise. It was made perfectly plain that the explosion could not have wrought any change in that respect, and therefore that, if that was their condition immediately following the explosion, it must also have been their condition just prior to the explosion. There was, however, substantial evidence which tended quite persuasively to show that the reduced thickness of the flue which burst and the warping of others could as well be attributed to the force of the explosion as to anything which had occurred in their prior use; and it may be that it would not have been error to have stricken out the evidence of their being in that condition. 6 Thompson, Neg. § 7870. But in our opinion the defendant is not in a position to complain that this evidence was admitted or that it was not stricken out. The objection interposed when the after condition of the flues was about to be shown was not tenable, because it was nothing less than an assertion that no evidence of that character was admissible for the purpose indicated, which was not the case, as the authorities amply show. *Dronney v. Doherty*, 186 Mass. 205, 71 N. E. 547; *Creamery Package Mfg. Co. v. Hotsenpiller*, 159 Ind. 99, 64 N. E. 600; 1 *Wigmore*, Ev. § 437. And the motion to strike out was in terms directed against "all evidence" of that character, and so covered that relating to the pitted, blistered, and burned condition of some of the flues, as well as that which it is now said was objectionable. To have sustained the motion in the terms in which it was made would undoubtedly have been error, and yet the court was not bound to do more than to respond to it as made. As has been well said:

"Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection." *Elliott v. Piersol*, 1 Pet. (U. S.) 328, 338, 7 L. Ed. 164.

But this does not mean that the court is not at liberty, on such a motion, to select or separate objectionable evidence from what is unobjectionable, and to strike out the former, but only that it is not obliged to do so. *Elliott v. Piersol*, *supra*; *Moore v. Bank of Metropolis*, 13 Pet. (U. S.) 302, 310, 10 L. Ed. 172; *United States v. McMasters*, 4 Wall. (U. S.) 680, 682, 18 L. Ed. 311; *Smith v. Brown*, 8 Kan. 609, 619; *Louisville, etc., Co. v. Falvey*, 104 Ind. 409, 416, 3 N. E. 389, 392, 4 N. E. 908; *Jones v. State*, 118 Ind. 39, 20 N. E. 634; *Davis v. Hopkins*, 18 Colo. 155, 32 Pac. 70. It follows that the instruction relating to the evidence of the after condition of the flues put that matter before the jury in as favorable a light for the defendant as, in the circumstances, it was entitled to demand.

In what has been said it has been assumed, for present purposes only, that the evidence of the reduced thickness of the flue which burst and of the slight warping of others might well have been stricken out; but we would not be understood as holding that, if that had been properly requested, the refusal to do so would have been reversible error. See *Holmes v. Goldsmith*, 147 U. S. 150, 164, 13 Sup. Ct. 288, 37 L. Ed. 118. That question is not here, and requires no further notice.

We find no error in the record, and the judgment is affirmed.

MORRIS v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. March 17, 1908.)

No. 2,677.

1. CRIMINAL LAW—NATURE OF OFFENSE—FELONY OR MISDEMEANOR.

There are no crimes or offenses cognizable in the federal courts outside of maritime or international law or treaties except such as are created and defined by act of Congress, and where the statute designates and denounces a crime of the character or class which at common law was regarded as a felony, without naming it as a misdemeanor, it is to be classed as a felony, but not if it is termed by the statute a misdemeanor. If the statute adopts a state statute as to an offense made a felony by the state law, it may be so treated by the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 29-31.]

2. INDICTMENT AND INFORMATION—JOINDER OF OFFENSES—OFFENSES OF SAME CLASS.

The offenses created by the Oleomargarine Act Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), were unknown to the common law, and are all merely statutory misdemeanors and of the same class regardless of the various penalties prescribed, and charges under its different provisions may be joined in the same indictment under Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 419, 420.]

3. JURY—COMPETENCY OF JURORS IN FEDERAL COURTS—PRIOR SERVICE.

Rev. St. § 812 (U. S. Comp. St. 1901, p. 627), which provides that "no person shall be summoned as a juror in any Circuit or District Court more than once in two years and it shall be sufficient cause of challenge to any juror called to be sworn in any case that he has been summoned and attended said court as juror at any term of said court held within two years prior to the time of such challenge" as modified by Act June 30, 1879, c. 52, § 2, 21 Stat. 43 (U. S. Comp. St. 1901, p. 624), by reducing the time to one year, prescribes the rule of procedure in the federal courts to the exclusion of any state statute or rule, and under such provisions it is not ground of challenge to a juror that he has served as a juror within one year unless it was in the same court.

4. INTERNAL REVENUE—PROSECUTION FOR CARRYING ON BUSINESS WITHOUT PAYING SPECIAL TAX—ISSUES AND BURDEN OF PROOF.

In a prosecution for carrying on a business without having paid the internal revenue tax required by statute it is sufficient for the government to prove that defendant carried on the business at a certain time and place and payment of the tax is a matter of defense, which if relied on must be proved by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, § 149.]

5. INDICTMENT AND INFORMATION—MODE OF MAKING OBJECTIONS—OBJECTING TO INTRODUCTION OF EVIDENCE.

The practice of attacking the sufficiency of an indictment by objecting to the introduction of any evidence thereunder is not recognized in the federal courts.

6. CRIMINAL LAW—WRIT OF ERROR—FORMAL DEFECTS—CURATIVE STATUTE.

The objection that an indictment in a federal court fails to show on its face that the grand jury which returned it came from the district in which it was found is one to a matter of form only and under Rev.

*Rehearing granted as to the sufficiency of the eighth count of the indictment.

St. § 1025 (U. S. Comp. St. 1901, p. 720), does not render the indictment insufficient, at least when first raised in an appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2627.]

7. INTERNAL REVENUE—INDICTMENT FOR VIOLATION OF OLEOMARGARINE ACT—SUFFICIENCY—"MANUFACTURER."

An indictment for carrying on the business of a manufacturer of oleomargarine without having paid the special tax therefor, based on the amendment to section 3 of the oleomargarine act added by Act May 9, 1902, c. 784, § 2, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 636), which provides that any person that sells, vends, or furnishes oleomargarine for the use and consumption of others "except to his own family table without compensation," and who shall color the same to resemble butter, shall be deemed a manufacturer, need not negative such exception which is in fact mere surplusage, since it does not exempt from the operation of the statute anything which would otherwise be within it.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4346, 4358.]

8. SAME.

An indictment in the language of section 4 of the oleomargarine act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2229), charging that the defendant at a certain time and place did unlawfully "carry on the business of a manufacturer of oleomargarine without having first then and there paid the special tax therefor as required by law," states all the elements of the offense and is sufficiently specific in the absence of a motion for a bill of particulars showing whether the defendant is charged with being a manufacturer in the ordinary sense under the original act or as defined in the amendment of May 9, 1902, c. 784, § 2, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 636).

9. SAME.

An indictment for a violation of section 6 of the oleomargarine act of August 2, 1886, c. 840, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230), by packing oleomargarine in packages which had previously been used for that purpose considered, and *held* sufficient.

10. SAME.

An indictment for using for packing oleomargarine stamped packages which had previously contained oleomargarine in violation of section 13 of the oleomargarine act of August 2, 1886, c. 840, 24 Stat. 211 (U. S. Comp. St. 1901, p. 2232), which prohibits such use, and provides that "any person who fraudulently gives away or accepts from another, or who sells, buys or uses for packing oleomargarine any such stamped package," shall be guilty of a criminal offense is good, at least after verdict, although it does not charge that such packages were "fraudulently" used.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri.

Shepard Barclay (Thomas T. Fauntleroy, on the brief), for plaintiff in error.

Jesse W. Barrett, Special Asst. U. S. Atty.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (hereinafter, for convenience, designated the defendant) was indicted and convicted on various counts for the violation of certain provisions of the stat-

ute respecting the manufacture and sale of oleomargarine. Act Aug. 2, 1886, c. 840, 24 Stat. 209; volume 2, p. 2228, c. 7b, U. S. Comp. St. 1901. Some of the counts on which convictions were had were predicated of the amendment to section 3 of said act. 32 Stat. 194, approved May 9, 1902, c. 784, 32 Stat. 194. The eighth count on which conviction was had was under section 6 of said chapter 7b. The tenth count on which the defendant was convicted was based upon another provision of the statute, hereinafter adverted to. The penalty imposed by the statute for the offenses embraced within the first five counts of the petition on which convictions were had is a fine, without imprisonment. The penalty imposed by section 6 of the act, on which the eighth count was founded, is a fine of not more than \$1,000, and imprisonment not more than two years. Under the tenth count of the indictment the statute authorizes a fine of not more than \$100 and imprisonment not more than one year. On each of the said first five counts, the court imposed a fine of \$1,000. On the eighth count, the sentence was a fine of \$1,000 and imprisonment in the United States penitentiary at Ft. Leavenworth for two years. On the tenth count, the sentence was a fine of \$100 and 24 hours in jail.

At the opening of the trial, counsel for the defendant moved that the district attorney be required to elect upon which of the counts he would prosecute. The denial of this motion is assigned for error. The contention made is that the several offenses are so incongruous in law as not to admit of their joinder in the same indictment under the provisions of section 1024, Rev. St. (U. S. Comp. St. 1901, p. 720). The assumption of counsel is that all the counts, save the eighth, are for misdemeanors, while the eighth is a felony. If, however, all the offenses charged constitute only misdemeanors under the federal statute, they would be "of the same class of crimes or offenses," being violations of the same statute "defining butter,, also imposing a tax upon and regulating the manufacture, sale, etc., of oleomargarine"; and as such, it was permissible to join the several offenses in one indictment, setting forth the different acts in separate counts. *Pointer v. U. S.*, 151 U. S. 396, 400, 14 Sup. Ct. 410, 411, 38 L. Ed. 208. The only limitation, which is addressed largely to the discretion of the trial court, upon such joinder of several offenses in one indictment is that their multiplication ought not to be so great as to tend "to confound the accused in his defense, or to prejudice him as to his challenges in the matter of being held out to be habitually criminal to the distraction of the attention of jury." In such case, the court might confine the indictment to so many of the offenses as would prevent such prejudice. *McElroy v. U. S.*, 164 U. S. 80, 17 Sup. Ct. 31, 41 L. Ed. 355.

It is conceded that, inasmuch as the defendant could be sentenced under the eighth count to imprisonment in the penitentiary, the offense is an infamous crime, within the purview of the fifth amendment to the federal Constitution. *Mackin et al. v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909. It does not follow, however, that such result designates the offense a felony so as to take it out of "the same class of crimes or offenses" as those embraced in the

other counts of the indictment, which are admittedly mere misdemeanors.

Without reviewing the authorities, as this would be but a work of supererogation, the following summary may be regarded as the settled law within the federal jurisdiction: (1) There are no crimes or offenses cognizable in the federal courts, outside of maritime or international law or treaties, except such as are created and defined by acts of Congress; (2) where the statute designates and denounces a crime of the character or class which at common law was regarded as a felony without naming it as a misdemeanor, such as burglary, robbery, et id omne genus, which at common law had a well-defined meaning as a felony, these are classed as felonies; (3) although the offense proscribed by the state may at common law come within the category of a felony, yet if termed by the statute a misdemeanor, it is not to be regarded in federal procedure as a felony; (4) when Congress adopts a state statute or law as to an offense made a felony by the state law, it may be so treated by the federal court. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Bannon et al. v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709; *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272; *Hume v. United States*, 118 Fed. 689, 698, 55 C. C. A. 407. Offenses proscribed under the oleomargarine act were unknown to the common law. They are solely the creatures of the act of Congress. As they are not designated as felonies by the statute, they are only statutory misdemeanors, entitling the defendant to only three peremptory challenges to the trial jury. *Considine v. United States*, supra. This assignment of error, therefore, must be overruled.

Error is assigned to the action of the court in overruling the defendant's challenge to certain jurors. The regular panel having been exhausted, the following occurred in making inquiries of the talesmen: Defendant's counsel asked, "Have any of you served upon a jury within the past year?" to which some of the jurors replied in the affirmative; who were then challenged for cause, "on the ground that they had served as jurors within the past year." The challenge was overruled, the court adding:

"Let the record show that these jurors have not served within twelve months. They cannot serve more than once in twelve months in any case, except during the present term of this court, they being members of the jury at this term."

The meaning of this was that the jurors had been in attendance at that term of court, and had, perhaps, been discharged, which did not disqualify them on the ground that they had been jurors within the 12 months preceding, within the meaning of the statute. Thereupon, counsel for the defendant said:

"Our contention is that they are not entitled to serve under the ruling of the Missouri Supreme Court."

From which it is manifest counsel conceived that the provisions of the state statute respecting the qualifications of jurors obtained in this respect in the federal courts. In other words, if a juror had served on a

state jury within the year next preceding, he would be disqualified from serving within that year on a jury in the federal court. This is a misconception of the law. It is the well-recognized rule that where Congress has spoken touching a matter of procedure or regulation within its constitutional competence, it is exclusive of any state statute or regulation of the subject-matter. *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 458, 24 L. Ed. 251; *White v. Wansey*, 116 Fed. 347, 53 C. C. A. 634; *Travis v. Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653. This rule has been held to apply to the matter of impaneling jurors. *Walker et al. v. Collins et al.*, 50 Fed. 737, 1 C. C. A. 642; *Pointer v. U. S.*, 151 U. S. 397, 14 Sup. Ct. 410, 38 L. Ed. 208; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117. Congress has spoken on this subject. Section 812, vol. 1, Comp. St. 1901, p. 627, declares that:

"No person shall be summoned as a juror in any Circuit or District Court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any case that he has been summoned and attended said court as juror at any term of said court held within two years prior to the time of such challenge."

By the amendment of June 30, 1879, c. 52, § 2, 21 Stat. 43 (U. S. Comp. St. 1901, p. 624), the two years' provision was reduced to one year. Clearly enough, the statute has exclusive reference to the like service performed in the United States court, for it distinctly says the qualification shall extend "to any juror called to be sworn in any cause that he has been summoned and attended said court." Evidently, the term "said court" refers back to the Circuit or District Court of the United States where the jurors are called to serve. He who complains of an erroneous ruling must make that error appear affirmatively. The question asked and answered should have been followed up with the further inquiry as to whether or not the juror had been summoned and attended within the year preceding in that court. This objection, therefore, was rightly overruled.

Complaint is made of the action of the court in ruling that it devolved upon the defendant to show that he had paid the tax as a manufacturer of oleomargarine, if he so claimed. The government introduced the witness Buehrman, the deputy collector of revenue, at St. Louis, who testified that the defendant had made application for what is termed a license as a retailer of oleomargarine at certain places covered by the indictment. To this evidence, counsel for the defendant first objected on the ground that "there is no statement on which one of the different sorts of license the party engaged in that business was referred to." After some further colloquy between counsel and the court as to what he desired to argue, counsel said:

"He (the witness) is asked whether he ever made an application, and the question of the sort of application is what is concerned in this indictment. Our point is, that there is no allegation in this indictment that brings him within the terms of this section."

Thereupon the district attorney said:

"I have no intention at this time to ask Mr. Buehrman anything except to identify the stand at No. 117 Union Market and whether this man took it

out, to show his connection with the premises as a retail dealer and not as a manufacturer."

Thereupon, the applications were shown to counsel for the defendant who objected thereto, "because they did not relate to the matter charged in the indictment. It applies to a retail dealer." Thereat, the court said:

"It will be admitted for the purpose that it will tend to establish that he was engaged in business at that place. It is not for the purpose of proving that he is guilty of any offense. It will be admitted for that purpose only."

Afterward, before the conclusion of the evidence on the part of the government, this witness was recalled by the district attorney. In answer to the inquiry of the court as to what he wished to prove by the witness now, the district attorney answered, "just to prove the fact, which of course is the defense which will be set up, that this man never had a license." The court said that the government need not prove that. Counsel for defendant said that what he wanted the witness for was to have him produce the papers which he had formerly as a witness. The court said, "Whenever you want to make him your witness, you can do so;" upon counsel answering that he did not care to do that, the court said, "If you want to recall him to cross-examine him on what he testified to yesterday you may do so;" and that in view of the evidence which had been brought out, he would instruct the jury that they need not regard the application made. Thereat, counsel for the defendant said that he excepted, because he was entitled to show that the defendant was a retail dealer. The court said, "You may prove that by him." This colloquy discloses that the court distinctly stated to defendant's counsel that he might cross-examine the witness as to the issue made in chief, which counsel declined to do. He now complains especially of the remark by the court, "You may prove that by him." The contention made is that this was an invitation by the court to have the defendant, against his wishes, go upon the witness stand. We do not think this a fair implication. It purported nothing more than this: If the defendant has paid the tax, he can show the fact, not by going upon the stand as a witness and testifying thereto, but by merely exhibiting the receipt, presumptively in his possession. If lost or destroyed, he could show the fact of its issue by the proper book in the collector's office, which was in the building where the court was sitting. It has been the universal rule in the federal courts in proceedings by indictment for failure to pay the revenue tax to the government, authorizing the carrying on of the business by the defendant, for the government to show in the first place that the defendant had engaged in the business at a certain time and place, leaving him to produce his receipt for the tax, if he have one. This rule is expressed in *Greenleaf on Evidence*, vol. 1, § 79, as follows:

"Where the subject-matter of the negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like."

Accordingly, it is the recognized rule that "Licenses are intrinsic matters of defense and must be shown by the party claiming under them." Wharton, *Crim. Evidence* (8th Ed.) § 332; *State v. Lipscomb*, 52 Mo. 33; *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081; *Blackman v. Commonwealth*, 124 Pa. 578, 17 Atl. 194.

The sufficiency of the allegations of the indictment is assailed in argument, especially the counts charging that the defendant carried on the business of a manufacturer of oleomargarine without having paid the required government tax. As these counts are alike, with the exception of the dates of the commission of the offense and the places where the business was conducted, it will be sufficient to present the first count which, after the caption, is as follows:

"The grand jurors of the United States, impaneled, sworn and charged at the term aforesaid of the court aforesaid, on their oath present that heretofore, to wit, between the 1st day of October, 1905, and the 1st day of November, 1906, Johnson R. Morris, at the division and district aforesaid, and within the jurisdiction of said court, did then and there unlawfully, at the premises known as No. 1117 St. Ange avenue, in the city of St. Louis, Missouri, carry on the business of a manufacturer of oleomargarine without having first then and there paid the special tax therefor as required by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

Section 4 of the statute which defines the offense is as follows:

"That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined," etc.

No motion to quash or demurrer was interposed to any of the counts of the indictment. When the trial began counsel for defendant objected to the introduction of any evidence, "because each and all of the counts fail to state in a proper manner any charge which would constitute an offense against the laws of the United States." This method of attacking the sufficiency of an indictment is not recognized in this jurisdiction. *Shepard v. United States*, 85 C. C. A. —, 160 Fed. 584; *United States v. Harmon* (D. C.) 45 Fed. 419; 1 Wharton, *Crim. Law* (7th Ed.) 519, 524, 525; *State v. Risley*, 72 Mo. 609. The only questions raised in the motion in arrest of judgment touching the sufficiency of the indictment are, (1) that the indictment does not state any offense against the laws of the United States, and (2) that each count of the indictment fails to state the facts constituting a crime or offense against the laws of the United States. These objections are no broader than their terms. No specific defect is suggested.

In the brief of counsel, specific objection is made that the indictment on its face does not show that the grand jury came from the district in which the indictment was found. The record and caption do show that the indictment was presented to the court in the Eastern Division of the Eastern District of Missouri, and that the defendant committed the alleged offense in said division of the district. No challenge to the array was made, nor was this objection raised at any time, or any place on the record as it should have been. *Caha v. United States*, 152 U. S. 221, 14 Sup. Ct. 513, 38 L. Ed. 415. This objection is not specified in the motion in arrest, nor is any such de-

fect specified in the assignment of errors. As the objection goes merely to the matter of the form of indictment, if it were conceded to be important, which we do not decide, it was cured by the provisions of section 1025 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 720). Especial criticism was made in argument by the learned counsel for the defendant respecting the sufficiency of the counts, which the evidence shows were predicated of the amendment to section 3 of the oleomargarine act. The objections are (1) that the indictment does not negative the exception contained in the statute, to wit, "except to his own family table, without compensation," and (2) the failure to specify that the manufacturing consisted in adding to or mixing with such oleomargarine any artificial coloration that caused it to look like butter of any shade of yellow. Said amendment is as follows:

"And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table, without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow, shall also be held to be a manufacturer of oleomargarine within the meaning of said act and subject to the provisions thereof."

That is to say, this amendment was added to section 3, of the original oleomargarine act of August 2, 1886.

The exception is peculiar, if not a misconception. Clearly enough, it has no relation to the act of selling, as it would be a legal absurdity to speak of a person selling, or vending "for his own family table," as the law expects a man to provide for his own table. And it would be more absurd to speak of a person selling an article without compensation, as the term "sell" implies for a consideration. The exception, therefore, has exclusive reference to the word "furnished." It would challenge our conception of the constitutional powers of Congress for it to undertake to tax a person as a manufacturer of oleomargarine whose housewife, as a matter of fancy or taste, should color white oleomargarine so as to give it the hue of yellow butter, for the sole use of the family table. Even as applied to the state, in the exercise of its police power in the matter of regulation of oleomargarine, it has exclusive reference to its sale within the state. Mr. Justice Harlan, in *Plumley v. Mass.*, 155 U. S. 468, 15 Sup. Ct. 156, 39 L. Ed. 223, speaking of the oleomargarine act of the state of Massachusetts, said:

"If any one thinks that oleomargarine not artificially colored so as to cause it to look like butter is as palatable or is as wholesome for the purpose of food as pure butter, he is at liberty under the statute to manufacture in that state, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice in such matters a fraud upon the general public. The statute seeks to suppress false pretenses and to permit fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is by preventing its sale for what it is not."

In *United States v. De Witt*, 9 Wall. 41, 19 L. Ed. 593, it was held that the provision of the internal revenue act of March 2, 1867, c. 169, § 29, 14 Stat. 484, which undertook to make it a misdemeanor punishable to mix for sale naphtha and illuminating oils or to sell or to offer such mixture for sale, etc., was a mere police regulation

within the exclusive jurisdiction of the state respecting its internal affairs. The sole justification for the regulation by Congress of such matters is that it comes within the taxing power as a means for raising internal revenue for support of the general government. The tax in question is for carrying on the business of a manufacturer and vender of oleomargarine, and the fee or tax is to license the party, in so far as the general government is concerned, to engage in such business. The requirement respecting labeling, packing, etc., is intended to protect the buyer from being deceived as to what he is really purchasing, and to prevent devices to avoid paying the tax. The statute in question (section 3), declares that "every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine," and "every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine." Clearly enough, this indicates that he alone was to be regarded as a manufacturer of oleomargarine who manufactures for sale. Congress is in no wise concerned in what the private citizen may use on his family table, or how he shall prepare it. Evidently, the exception in question was interpolated through an over-zealous regard for the reserved rights of the citizen. But it excepted from the operation of the statute nothing for which the defendant could have been prosecuted as for the violation of a federal statute. And, therefore, it may be treated as mere surplusage, and disregarded in framing an indictment, upon the section for carrying on the business of a manufacturer of oleomargarine without having paid the government tax.

Be this as it may, this objection should be overruled on the authority of *Ledbetter v. United States*, 170 U. S. 606, 611, 18 Sup. Ct. 774, 776, 42 L. Ed. 1162, which was an indictment against the defendant for carrying on the business of a retail dealer in liquor without having paid the government tax. In discussing the provision contained in section 18 of the statute in question, in defining a retail dealer in liquor, the court adverted to the fact that said section contained an exception as to persons who sell or offer for sale spirits, wine, etc., "otherwise than as hereinafter provided in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors." It was conceded that the words "otherwise than as hereinafter provided," introduced an exception into the general words of the definition, which suggested a doubt as to whether the words being a part of the section, in the enacting clause, should not have been negatived by the indictment. After saying that the words of the exception probably referred to wholesale liquor dealers, brewers, or others who are either exempt from taxation or pay a different tax, the court said:

"Upon the other hand, when it is averred in the language of section 16 that the defendant carried on the business of a retail liquor dealer without payment of a special tax, the description, though brief, was comprehensive, although section 18 may be referred to as defining the offense with more particularity. But we do not think it necessary to charge the offense in the language of the definition. If Congress had not defined a retail liquor dealer, it would be proper to resort to a dictionary for a definition of this term; but

it is no more necessary in one case than in another to charge the offense in the language of the definition."

The foregoing decision also meets the general objection as to the sufficiency of the counts of the indictment in question, in simply charging that the defendant carried on the business of a manufacturer of oleomargarine. The indictment in that case, like the one at bar, followed the words of the statute, that the defendant "did then and there willfully, etc., carry on the business of a retail liquor dealer without having paid the special tax thereunder as required by law." The objection was there made that the indictment should have set out the acts done which constituted the violation of the statute. While conceding that it might be a proper course in framing the indictment to so specialize, it held that the allegation in the language of the statute creating the offense was sufficient. The court said:

"The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all of the elements of the offense as in *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135, where a statute against passing counterfeit money failed to aver the scienter; but where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient, though that evidence be more fully defined in some other section." *U. S. v. Gooding*, 12 Wheat. 460, 473, 6 L. Ed. 693; *U. S. v. Wilson*, *Baldw.* 78, 119, *Fed. Cas. No.* 16,730; *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 767; *Harrington v. State*, 54 Miss. 490, 494. Notwithstanding the cases above cited, in our courts the general rule still holds good that upon an indictment for a statutory offense, the offense may be described in the words of the statute and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense. Where the statute completely covers the offense, the indictment need not be made more complete by specifying particulars elsewhere obtained."

The more serious trouble in respect to the allegations of the different counts arises out of the fact that said amendment of 1902 adds another and different manner of constituting a manufacturer of oleomargarine. So it might well be said by a defendant, charged in general terms with carrying on the business of a manufacturer, that it does not reasonably advise him in advance as to which of said statutes it was the purpose of the prosecutor to invoke. This question could not be raised in advance by demurrer, as the indictment on its face would be good under section 4 of the original statute. The clear course for the defendant in such situation to pursue, for his proper protection against unpreparedness and surprise, is by timely motion to compel the prosecutor to furnish him with a bill of particulars. This was aptly and comprehensively expressed by Judge Van Devanter in *Rinker v. United States*, 151 Fed. 759, 81 C. C. A. 383, as follows:

"When an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced ill upon motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should in advance of the trial, apply for a bill of the particulars; otherwise, it may properly be assumed as against him that he is fully informed of the process of the case which he must meet upon the trial."

See, also, *Putnam v. United States*, 162 U. S. 689, 16 Sup. Ct. 923, 40 L. Ed. 1118; *Dunbar v. United States*, 156 U. S. 192, 15 Sup. Ct.

325, 39 L. Ed. 390; *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *Dunlop v. United States*, 165 U. S. 491, 17 Sup. Ct. 375, 41 L. Ed. 799; *Tubbs v. United States*, 105 Fed. 59, 44 C. C. A. 357.

Unquestionably the safer course, and the one just to the defendant, for the framer of an indictment under the statute in question to pursue, is by proper averments to clearly indicate on which provision of the statute the indictment is founded. But if the pleader employs the language of said section 4 in framing the indictment, the defendant may not stand mute, as to this, and take the chance of an acquittal, and then, after conviction, be heard for the first time to say he was not sufficiently advised as to the specific charge he was called upon to meet.

The eighth count of the indictment was predicated of section 6 of the oleomargarine act. Without quoting it in full, it is sufficient, for the purpose of this case, to say that it provides regulation for the packing of oleomargarine, prescribing penalties for packing in any other manner. Among such requirements is that the package or receptacle shall be new, not before used for such purpose, without any reference to whether there are stamps, marks, or brands on it. The failure to observe this specific requirement constitutes the offense denounced by the sixth section. The indictment charges that at a given time and place, the defendant "did then and there unlawfully pack colored oleomargarine in firkins, tubs, and other wooden packages, which had theretofore been used for that purpose, he, the said Johnson R. Morris, then and there at the time of so packing the said colored oleomargarine in said packages, which had theretofore been used for that purpose, well knowing that said packages had theretofore been used for the purpose of packing colored oleomargarine, contrary to the form of the statute," etc. Without stating the criticisms made by counsel for the defendant, it is sufficient to say that the charge made was so direct as to leave no reasonable doubt in the mind of the defendant as to what the offense was which he was called to answer. *Nurnberger v. United States* (C. C. A.) 156 Fed. 721; *Shepard v. United States*, *supra*.

The tenth count of the indictment was evidently predicated of the last clause of section 13 of the act. The whole section is as follows:

"Sec. 13. That whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars, and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each such offense be fined not exceeding one hundred dollars and be imprisoned not more than one year."

The charge in the indictment is based upon the subdivision of the last clause which inhibits the use for packing oleomargarine in any such stamped package. After laying the time and venue, it charges that the defendant, "did then and there unlawfully, knowingly, and willfully use for packing oleomargarine twenty-five certain stamped pack-

ages which had theretofore been packed with colored oleomargarine and stamped denoting the payment of the special tax of ten cents per pound upon colored oleomargarine, as required by law. He, the said Johnson R. Morris, then and there at the time of so packing the oleomargarine in said twenty-five stamped packages, then and there well knowing that the said twenty-five stamped packages had theretofore contained colored oleomargarine and had been emptied of said colored oleomargarine," etc. The only criticism made upon the charge deserving of consideration is the omission of the word "fraudulently" employed in the first part of said clause. It is, in the first place, doubtful if this term was intended to qualify any other act than that of giving away or accepting from another any such package, to which act it would have some intelligible application. As it is not repeated when it comes to the act of selling, buying, or using such package, it must be supplied by implication. The two acts of giving away a stamped package and using it are quite different. The using of such tub unlawfully, knowingly, and willfully, is itself an act harmful to the government independently of the intent with which it is done. Aside, however, from this, the omission of the word "fraudulently" in the indictment was not raised, if at all, until after verdict, under the general phraseology of the motion in arrest of judgment. When the defendant was charged with unlawfully, knowingly, and willfully doing the particular act, he was certainly advised of the nature and character of the offense with which he was charged. The omission of the descriptive term "fraudulently" is cured after verdict by the provision of section 1025 of the statute. *Clement v. United States*, 149 Fed. 305, 79 C. C. A. 243; *Stearns v. United States*, 152 Fed. 901, 82 C. C. A. 48; *Dunbar v. United States*, 156 U. S. 192, 15 Sup. Ct. 325, 39 L. Ed. 390; *Rosen v. United States*, 161 U. S. 30, 16 Sup. Ct. 434, 40 L. Ed. 606; *Evans v. United States*, 153 U. S. 590, 14 Sup. Ct. 934, 38 L. Ed. 830; *Shepard v. United States*, 85 C. C. A. —, 160 Fed. 584.

The cumulative sentences imposed upon the defendant are severe; but as the several punishments are within the limitations of the statute we cannot on this writ of error modify or mitigate them. The severity of them finds its extenuation in the fact that the evidence shows the defendant systematically, for a considerable time prior to the indictment, engaged in the business of buying in Chicago white oleomargarine, amounting to over \$100,000 worth, on which the tax was only $\frac{1}{4}$ per cent., shipping it to St. Louis, where it was distributed to his several houses or places of business and subjected by him, or under his direction, to a coloring process, giving it the hue of yellow butter, on which the tax was ten cents, whereby he defrauded the Government out of large sums of revenue.

Finding no reversible error in the record, the judgment of the District Court must be affirmed.

SANBORN, Circuit Judge (dissenting). In *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, the Supreme Court held that an indictment which charged in the words of the statute that the defendant did unlawfully carry on the business of a re-

tail liquor dealer without having paid the special tax therefor was sufficient when there was only one way under the statutes in which he could be a retail liquor dealer, and that way was declared by the statute to be by selling or offering for sale foreign or domestic distilled spirits or malt liquors otherwise than as therein provided in less quantities than five gallons at the same time. But the court also said at page 610 of 170 U. S. and page 775 of 18 Sup. Ct. (42 L. Ed. 1162):

"We have no disposition to qualify what has already been frequently decided by this court, that where the crime is statutory it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. *United States v. Cook*, 17 Wall. 168, 174, 21 L. Ed. 538; *United States v. Cruikshank*, 92 U. S. 542, 562, 23 L. Ed. 588; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830."

If, as in the Ledbetter Case, the statute had prescribed a single way by which a defendant could constitute himself a manufacturer of oleomargarine a charge of carrying on the business of a manufacturer of oleomargarine would undoubtedly have been sufficient to sustain a conviction upon the proof that the defendant pursued that way, but the statutes applicable to the case at bar provided, "manufacturers of oleomargarine shall pay \$600. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine." Section 3. "That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor as required by law shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars." Section 4. Act of 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2229). "And any person that sells, vends or furnishes oleomargarine for the use or consumption of others, except to his own family table, without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow, shall also be held to be a manufacturer of oleomargarine within the meaning of said act and subject to the provisions thereof." Act of May 9, 1902, § 2, 32 Stat. 193 (U. S. Comp. St. Supp. 1907, p. 636).

Here were two distinct offenses punishable by like penalties, (1) carrying on the business of manufacturing oleomargarine out of the raw materials of which it is composed without paying the special tax, and (2) carrying on the business, without paying the special tax, of coloring and selling oleomargarine which had theretofore been manufactured out of the raw materials by others. The charge in each of the first six counts of the indictment was that the defendant did unlawfully "carry on the business of a manufacturer of oleomargarine." There was no proof that he ever manufactured oleomargarine, but there was some evidence that he colored oleomargarine which others had previously manufactured, and sold it. At the close of the trial

counsel for the defendant requested the court to instruct the jury to return a verdict in his favor on each of these counts, upon the ground that there was no evidence to sustain them. The court denied this request as to all except the fourth count and charged the jury that if they found that the defendant colored and sold oleomargarine without paying the special tax they might find him guilty. To these rulings the defendant excepted.

The following declarations of the law upon this subject are extracted from the opinions of the Supreme Court in the cases which are cited and reaffirmed in the *Ledbetter Case*. "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital. * * * The doctrine invoked by the solicitor general that it is sufficient in an indictment upon a statute to set forth the offense in the words of the statute does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description with which he is charged." *United States v. Hess*, 124 U. S. 483, 487, 8 Sup. Ct. 571, 573, 31 L. Ed. 516. "It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588. "A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States v. Mills*, 7 Pet. 138, 8 L. Ed. 636, that an indictment for a statutory misdemeanor is sufficient if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll*, 105 U. S. 611, 612, 26 L. Ed. 1135, 'fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States v. Cook*, 17 Wall. 168, 174, 21 L. Ed. 538; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588. 'The fact that the statute in question, read in the light of the common law,

and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135." *Evans v. United States*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 830.

The offenses of which the defendant was found guilty under counts 1, 2, 3, 5, and 6 of the indictment were that he colored and sold oleomargarine which had been manufactured by others. The averment of the indictment that the defendant did "carry on the business of a manufacturer of oleomargarine" was a sufficient charge that he manufactured oleomargarine out of the raw materials, that he made oleomargarine out of substances which were not oleomargarine before he manufactured it out of them, for this is the common, ordinary, and rational meaning of the words of the allegation. But did the averment that the defendant did "carry on the business of a manufacturer of oleomargarine" charge him with the offense of which he was convicted, the offense of purchasing oleomargarine which had been manufactured by others, of coloring it and of selling it without paying the special tax? The elements of the latter offense were coloring and selling oleomargarine which had been made by others, the elements of the offense charged in the indictment were transforming the raw materials into oleomargarine—manufacturing oleomargarine. If the indictment had used the words of the statute of 1902, which described and first made the coloring and vending of oleomargarine without paying the special tax an offense, it would probably have been sufficient, but it used the words of the statute of 1886, which in no way set forth or intimated the charge of any other offense than manufacturing oleomargarine. In my opinion these counts of this indictment do not fall under the rule in *Rinker v. United States*, 151 Fed. 755, 759, 81 C. C. A. 379, 383, that "when an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced ill upon motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should, in advance of the trial, apply for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise case which he must meet upon the trial"; because the indictment does not set forth any of the facts constituting the essential elements of the offense of which this defendant was convicted, and because these counts of the indictment are not ambiguous, because they clearly set forth another offense of which there was no proof, they charge the offense of manufacturing oleomargarine, and they neither aver nor intimate the offense of coloring and vending oleomargarine manufactured by others, or any of the essential elements of that offense. Neither the indictment nor the words of the statute used therein "fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Evans v. United States*, 153 U. S. 587, 14 Sup. Ct. 936, 38 L. Ed. 830; nor was it "accompanied with such a statement of the facts and circumstances as will inform

the accused of the specific offense coming under the general description with which he is charged." *United States v. Hess*, 124 U. S. 483, 487, 8 Sup. Ct. 571, 573, 31 L. Ed. 516. The Supreme Court in the *Ledbetter Case* said:

"Where the crime is a statutory one it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth."

The ingredients of the offense of which the defendant was convicted were coloring oleomargarine and selling it without paying the special tax. None of these ingredients were either set forth, or averred, or suggested by the indictment.

As I read and understand the first six counts of this indictment in the light of the opinions of the Supreme Court to which reference has been made, the defendant was clearly charged thereby with manufacturing oleomargarine out of the raw materials without paying the special tax and there was no proof of that offense. He was convicted of coloring and selling oleomargarine, and there was no charge of that offense. Proof without averment is as futile as averment without proof, and the court below, in my opinion, should have instructed the jury to return a verdict for the defendant on counts 1, 2, 3, 5, and 6 of the indictment, and the judgments below upon them should be reversed, and a new trial should be granted.

FEDERAL LEAD CO. v. SWYERS.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1908.)

No. 2,679.

1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, when injured, was between 19 and 20 years old, sound in body and mind, and had been in defendant's service for 13 months, performing the same duties, which consisted in part of mounting a platform near the roof of defendant's factory and oiling the boxes of a shaft, soaping a belt running over a pulley, and tending to the machinery operated there. On the shaft two pulleys were keyed, over one of which a sprocket chain was operated, and just beyond the shaft and substantially parallel with it was a cable. Plaintiff, while on the platform attending to his duties of oiling the machinery and soaping the belt, undertook to restore the cable, which had worked off the sheave, and in doing so reached over the shaft. His feet slipped on the platform, and in some way he was caught by the revolving shaft or pulleys and injured. Plaintiff was familiar with the situation, and during his entire employment had been on the platform several times every day. He appreciated the danger of replacing the cable while standing on the platform, and took precautions to prevent falling by reason of the slippery condition of the platform, or being entangled in the shaft or pulleys while reaching over them. *Held*, that plaintiff assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. SAME—STATUTES.

Rev. St. Mo. 1899, §§ 6433, 6434 (Ann. St. 1906, pp. 3217, 3218), requiring dangerous machinery in factories to be guarded, and prohibiting the

employment of minors or women to work between the fixed or traversing part of any machine while in motion by action of mechanical power, does not deprive the master of the defense of assumed risk in an action for injuries to an employé by the master's alleged violation of such sections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 544-546.]

3. SAME—APPLICATION OF DOCTRINE—COMMON LAW.

Rev. St. Mo. 1899, § 4151 (Ann. St. 1906, p. 2250), declares that the common law of England and all statutes and acts of Parliament made prior to the fourth year of the reign of James I, of a general nature and not local to the kingdom, nor repugnant to or inconsistent with the Constitution of the United States and of the state of Missouri, or the statutes of that state, shall be the rule of action and decision in that state, any law or custom of usage to the contrary notwithstanding. *Held*, that such section was sufficient to make the doctrine of assumed risk in an action against a master for injuries to a servant applicable as a part of the common law of Missouri, though such doctrine first received judicial utterance in 1837, the principle having existed prior to the reign of James I.

4. COURTS—FEDERAL COURTS—RULES OF DECISION—INTERMEDIATE COURTS OF APPEAL.

The decisions of the Missouri Courts of Appeal, while entitled to respectful consideration, are not the decisions of the highest judicial tribunal of the state, which are alone binding on the federal courts in their construction of local statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 950.

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468.]

5. WORDS AND PHRASES—"REQUIRE."

The word "require" means to demand; to ask as of right and by authority; to insist on having; to exact.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6122, 6125.]

6. MASTER AND SERVANT—INJURIES TO SERVANT—AGE.

Where a servant was between 19 and 20 years old, sound in body and mind, at the time he was injured, and possessed of the knowledge and experience of an adult, he was chargeable with the consequence of such knowledge, and the fact that he was under 21 years of age was not material in determining whether he assumed the risk of the dangers he involuntarily encountered in the operation of defendant's machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 601-609.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Robert A. Holland, Jr. (James A. Seddon, on the brief), for plaintiff in error.

Edward A. Rozier (B. H. Boyer, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge. This was an action in the nature of trespass on the case by a servant for damages resulting from negligence of the master. The defenses were the general issue, contributory negligence, and assumption of risk. The verdict and judgment

below, from which the defendant prosecutes error, were in favor of the plaintiff. Ten different specifications of negligence are found in the petition, three of which only require consideration by us. It is charged (1) that defendant failed to exercise reasonable care in providing plaintiff a place to work in and machinery to work with, and thereby violated a primary duty imposed upon the master by the common law; (2) that plaintiff was required to work dangerously near to belting, shafting, gearing, and drums which were not guarded as required by a statute of Missouri; (3) that plaintiff was required to work between the fixed or traversing parts of a machine while in motion, in violation of a statute of Missouri, and that as a result of the foregoing the plaintiff sustained an injury. The statutes just referred to are sections 6433, 6434, Rev. St. Mo. 1899 (Ann. St. 1906, pp. 3217, 3218). They are as follows:

"Sec. 6433. The belting, shafting, gearing and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments.

"Sec. 6434. No minor or woman shall be required to clean any part of the mill, gearing or machinery in any such establishment in this state, while the same is in motion, or work between the fixed or traversing parts of any machine while it is in motion by the action of steam, water or other mechanical power."

Plaintiff at the time of his injury was between 19 and 20 years old, sound in body and mind, had been in the service of defendant for 13 months before he was injured, and during all that time had been performing the same duties. These duties consisted in part of mounting the platform located near the roof of defendant's factory or mill for the purpose of oiling the boxes of a shaft, soaping a belt running over a pulley located near by, and otherwise attending to the machinery operating there. The platform was 22 feet long and 3 feet wide, without a railing. The power shaft for running the machinery below, consisting of elevators, jigs, and rolls for handling and crushing ores, ran horizontally near to and a little above the platform. On this shaft were keyed two pulleys, about 18 inches apart, over one of which a belt and over the other a sprocket chain operated. Just beyond the shaft, and running substantially parallel with it, a cable used for hauling ores up an incline for treatment in the mill was in operation. This cable occasionally worked off the sheave over which it ran and needed replacement.

The testimony tends strongly to show that the duty of watching the cable and replacing it when necessary devolved upon another person; but there is evidence that plaintiff esteemed it his duty, and had frequently performed it, to reach over the shaft while standing on the platform and, when necessity required it, replace the cable on the sheave. The shaft ran parallel with and about two feet higher than the platform, and it was necessary to reach over it at a point about midway between the pulleys in order to manipulate the cable. On the occasion in question Swyers, while on the platform attending to his duties of oiling the machinery and soaping the belt, under-

took to restore the cable, which had worked off the sheave, to its proper place on the sheave. In doing so he reached over the shaft, his feet slipped on the platform, and in some way he was caught by the revolving shaft or pulleys and injured. There was evidence tending to show that the platform was slippery, the shaft slightly bent, and the boxes through which it passed loose.

The plaintiff, testifying in his own behalf, frankly admitted that he had been familiar for 13 months with the full situation disclosed by the proof as just stated. During all this time he had been on the platform several times a day in the discharge of his duties. He knew well the relative location and physical condition of the platform, shaft, pulleys, and cable, and fully realized each and every peculiarity or defect now claimed by him to have existed. He fully appreciated the danger of replacing the cable on the sheave while standing on the platform, and admitted that he had always been on guard and had taken watchful precautions to prevent falling by reason of the slippery condition of the platform or being entangled in the revolving shaft or pulleys while reaching over them. He testified that the condition of things existing at the time of his injury had prevailed and had been fully known and appreciated by him for a long time theretofore. With these undisputed facts, admitted to be true by plaintiff, there can be no question, under the firmly established doctrine of this court, that he assumed the risk and danger of the injury which befell him, unless the statutes of Missouri released him therefrom. The rule governing this matter has frequently been stated, and recently in the case of *Kirkpatrick v. St. Louis & San Francisco Railroad Co.* (C. C. A.) 159 Fed. 858, has been restated as follows:

"If the risks and dangers which caused his [the servant's] death were the usual and ordinary risks and dangers of the employment, he assumed them, provided they were known to and appreciated by him. *St. Louis Cordage Co. v. Miller*, 61 C. C. A. 477, 126 Fed. 495, 511, 63 L. Ed. 551, and cases cited. If, on the other hand, they were not the usual and ordinary risks and dangers, but arose from negligent defects in appliances or a negligent method of operating them required by the master, then he assumed all risks and dangers arising from such defects and such operation, if they were known to him, or if they were plainly observable by him."

The present case in any or all of its aspects falls so well within the doctrine of assumption of risk just stated that, except for the statutes, no claim of defendant's liability is seriously made. This brings us to the only remaining question: Do the statutes cut off the defense of assumption of risk? In *St. Louis Cordage Company v. Miller*, *supra*, *Glenmont Lumber Co. v. Roy*, 61 C. C. A. 506, 126 Fed. 524, *Denver & R. G. R. Co. v. Norgate*, 72 C. C. A. 365, 141 Fed. 247, 6 L. R. A. (N. S.) 981, and *American Linseed Co. v. Heins*, 72 C. C. A. 533, 141 Fed. 45, we, after exhaustive consideration, have repeatedly answered this question in the negative. A reference to those cases will disclose that the authorities in this country and England were carefully and critically examined, compared, and considered, and no pains spared in the effort to reach the right conclusion. In such circumstances we deem it unprofitable and unwise to open up

the subject or enter upon a reconsideration of the doctrine there announced, and, notwithstanding the able and insistent argument of learned counsel for plaintiff, must decline to do so; but, as they have invited our attention to certain matters supposed not to have been considered before, we will take them up.

It is said that the defense of assumption of risk rests in a common-law principle expressed by the maxim "*volenti non fit injuria*," and that this principle first received judicial sanction in England in the case of *Priestly v. Fowler*, 3 M. & W. 1 (in 1837), and therefore was never adopted in Missouri, where this cause of action arose, and is not now the law in that state. This contention would probably surprise the learned judges of the Supreme Court of Missouri, who have repeatedly recognized and applied that principle in the administration of civil justice in that state. However that may be, the adoption of the common law of England by section 4151, Rev. St. Mo. 1899 (Ann. St. 1906, p. 2250), does not in terms or by necessary implication limit it to such law as might have been judicially declared prior to the fourth year of the reign of James I. That section is:

"The common law of England and all statutes and acts of Parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any law, custom or usage to the contrary notwithstanding."

Principles of right are never born of a judicial utterance. They exist before the utterance, and the fact of their existence affords the sole ground for their recognition and employment in the administration of remedial justice. Moreover, section 4151 does not purport to fix the time when "the common law," as distinguished from "statutes and acts of Parliament," was required to be known or recognized in England in order to become the rule of action in Missouri.

Our attention is next called to three cases in the Kansas City Court of Appeals (*Stafford v. Adams*, 113 Mo. App. 717, 88 S. W. 1130; *Nairn v. National Biscuit Co.*, 120 Mo. App. 144, 96 S. W. 679; *McGinnis v. Printing Co.*, 122 Mo. App. 227, 99 S. W. 4) wherein that court decided, in substance, that the defense of assumption of risk was not available to a manufacturing company which, by its failure to conform to the requirements of the factory acts in question, had caused injury and damage to an employé. While those decisions, by reason of the learning and ability of the distinguished judges who pronounced them, are entitled to our respectful consideration, they are not the decisions of the highest judicial tribunal of the state (Const. Mo. art. 6, § 3, and amendment of 1884, § 2) construing local statutes, which alone are binding upon federal courts (*Leffingwell v. Warren*, 67 U. S. 599, 17 L. Ed. 261; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204, *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795), and, inasmuch as we had deliberately placed a different construction upon acts in question before those cases were promulgated, we are not inclined to now recede from it.

We are again asked to say that, even if the defense of assumption of risk may prevail in a case predicated upon a violation of section 6433, requiring the guarding of belting, shafting, gearing, and drums, it cannot prevail in a case predicated upon section 6434, providing that a minor or woman shall not be required to work between the "fixed or traversing parts of a machine." We think it is extremely doubtful if the facts of this case bring it within the contemplation of section 6434. This court took occasion in the recent case of *National Candy Company v. Miller*, 160 Fed. 56, to comment upon the meaning of that section, and Philips, District Judge, speaking for the court, said:

"Precisely what is meant by the fixed or traversing parts of a machine is difficult to define."

Assuming, however, that it means, as there suggested, "between the fixed and traversing parts of a machine," and that the Legislature meant that minors or women should not be required to work in a place of distraction between the parts of a machine which are fixed and those which are movable with traversing action, we are still in grave doubt whether the work which Swyers was engaged in when injured was of that character. He was quite a distance away from the machines used by defendant for the purpose of crushing and concentrating ores. He was engaged at the top of the building, about the shaft and belt designed to carry the power to the machines. Was this between the fixed and traversing parts of a machine? No evidence was introduced to show how, mechanically speaking, it could be so, and certainly it is not so clear to the judicial mind that we can conclusively take judicial cognizance that it was so. However, let us assume, as counsel have assumed, that it was. The statute in question (section 6434) is not only doubtful, as suggested by Judge Philips, *supra*, but appears to be so worded as to naturally suggest a certain freedom of action and choice by the servant. It is not in terms a command prohibiting the master from permitting a minor or woman to work between the fixed and traversing parts of a machine. It says:

"No minor or woman shall be required to * * * work between the fixed or traversing parts of a machine."

As commonly understood and employed, the word "require" means "to demand," "to ask as of right and by authority," "to insist on having," "to exact;" and these meanings have the sanction of lexicographers. See Webster's and Century Dictionaries. If a servant, uncontrolled by any insistence of the master, voluntarily and of his own choice takes work between the parts of a machine in question, as the plaintiff in this case did, it is doubtful if he is required to do so within the meaning of the statute. If the Legislature had intended to absolutely prohibit the doing of such work, and to subject the master to the civil liability attendant thereon, as well as to the fine and imprisonment denounced by section 6450 (Ann. St. 1906, p. 3220) for its violation, it would have been an easy matter to employ appropriate language to clearly express that intent, such as, "No servant shall be permitted, allowed, suffered,"

etc., to do so. These observations are made with the hope that the Supreme Court of Missouri will appreciate the embarrassment evidenced by them and soon place a definitive construction upon the statute in question, and thus make its meaning certain and authoritative. For the purposes of this case, however, we assume, without deciding, that the work of a minor between the fixed and traversing parts of a machine is prohibited by the statute.

Learned counsel for plaintiff argue that as the basis of the doctrine of the Miller and Norgate Cases is knowledge by the servant that the machine was not guarded as required by the statute, or, in other words, knowledge of some positive observable fact, that doctrine can have no application to this case, in which a minor is involved and in which knowledge of the fact that he is a minor is all that can be imputed to him; and the question is asked: "How can a minor assume the risk of being a minor?" The age, experience, and intelligence of the plaintiff afford a complete demonstration that the mere fact that he had not reached the age of legal majority is of no importance in this case. He had the knowledge, experience, and discretion of an adult, and must be held to their consequences. It is not correct, we think, to say that all that can be imputed to the plaintiff is knowledge of the fact that he was a minor. The record discloses long length of service by him for the defendant in the same position he occupied when injured, perfect familiarity with the condition, defective, dangerous, or otherwise, of the machinery and appliances about which he was working, and an unusually acute appreciation of the risk and danger incident thereto. He knew what he was doing, and where and in what relation to the machines or machinery he was working. No one could have known more accurately about those things than he. His daily experience with the machinery for 13 months at least precludes the legal possibility of any contention that he did not understand its construction or operation, and his own admission estops him from denying that he did not appreciate the danger of working with or near it. If he was required to work between the fixed or traversing parts of a machine, within the meaning of section 6434, he knew it as well if not better than anyone. The doctrine of the Miller and Norgate Cases in our opinion is strictly applicable to a servant seeking to hold the master liable for violating the provisions of this section of the law. By voluntarily accepting and continuing for a year or more in service of the kind assumed to be prohibited, and with the knowledge and appreciation of the risks and danger connected with it as shown by the proof, he assumed the risk of so doing.

The conclusions already announced dispose of this case without the necessity of passing on other questions presented by the assignment of errors.

The judgment below must be reversed, and the cause remanded to the Circuit Court, with direction to grant a new trial; and it is so ordered.

JACOBS v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 29, 1908.)

No. 747.

1. INDICTMENT AND INFORMATION—MATTERS REQUIRING PROOF—RECITALS IN INDICTMENT.

The rule applied that recitals in an indictment that certain details of the offense charged were to the grand jurors unknown do not require the prosecution to prove on the trial that they were in fact so unknown, nor is the fact that a witness at the trial discloses a knowledge of such facts evidence to the contrary of such recitals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 530.]

2. WITNESSES—RE-EXAMINATION—DISCRETION OF COURT.

The rule applied that under the federal practice, permitting the re-examination of witnesses in a criminal case with respect to matters not brought out in cross-examination is within the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 930.]

3. BANKRUPTCY—OFFENSES AGAINST BANKRUPT LAW—EVIDENCE—COMPETENCY.

On the trial of a bankrupt who was a dealer in jewelry, charged in the indictment with having concealed from his trustee certain jewelry, it was not under the circumstances error to admit evidence of the amount and value of defendant's stock in trade a few days prior to the filing of the petition in bankruptcy, and also a short time afterward, where the jury were properly instructed and cautioned in reference to such testimony.

4. SAME.

On such trial proofs of claims filed against the defendant's estate in bankruptcy not shown to have been examined or approved by him were not admissible as admissions as to the amount of property he had purchased prior to his bankruptcy, and to be accounted for.

5. WITNESSES—COMPETENCY—HUSBAND AND WIFE—CONFIDENTIAL CHARACTER OF COMMUNICATION.

On the trial of a criminal case, the admission of the testimony of the divorced wife of defendant as to the contents of a lost paper, which had been handed to her by defendant while she was still his wife, during a consultation between them and others relating to matters out of which the prosecution arose, was not reversible error, where it did not appear from the record that the communication was confidential, or that the paper was not read by the others present.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 739, 740.]

6. SAME—DEFENDANT IN CRIMINAL CASE—PRIVILEGE.

On the trial of a bankrupt for a criminal offense, it was error to permit the prosecuting attorney, on the cross-examination of defendant as a witness, to read from a copy of his examination before the referee in the bankruptcy proceedings, and to interrogate him thereon for the purpose of impeachment, under Bankr. Act July 1, 1898, § 7a (9), c. 541, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424).

In Error to the District Court of the United States for the District of Massachusetts.

Elbridge R. Anderson (Charles W. Bartlett and Arthur Smith, on the brief), for plaintiff in error.

Asa P. French, U. S. Atty., and Guy A. Ham, Asst. U. S. Atty.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. The plaintiff in error was convicted on an indictment based on that portion of the twenty-ninth section of the bankruptcy act of July 1, 1898 (chapter 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), which punishes a bankrupt who has "knowingly and fraudulently concealed while a bankrupt from his trustee any of the property belonging to his estate in bankruptcy." He assigned 41 alleged errors, covering 13 printed pages of the record. A number of his propositions are so clearly contrary to law, and have been so thoroughly settled, that we ought not to have been troubled with them. Among these is the claim with regard to an allegation in the indictment as to which the grand jury reported that the details were unknown to them. The plaintiff in error maintains that the burden rested on the United States to show that they were in fact so unknown, when it has been twice held otherwise by the Supreme Court in cases not brought to our attention by either party. *Coffin v. United States*, 156 U. S. 432, 451, 15 Sup. Ct. 394, 39 L. Ed. 481, and *Frisbie v. United States*, 157 U. S. 160, 167, 15 Sup. Ct. 586, 39 L. Ed. 657. Another proposition is the exception taken to the re-examination of witnesses with reference to matters not brought out in cross-examination; while, if anything is settled in federal practice, it is that the direction of the examination of witnesses in such particulars is within the discretion of the trial court. As to the first proposition, we may add that it is clear that the mere fact that a witness is called at the trial who then discloses that he knows that which the grand jury reported unknown to them, is not evidence to the contrary of the allegation of the indictment. It is merely subsequent matter. As to the second proposition, we may also add that, with reference to every topic which is ordinarily controlled by the discretion of the court, there may be such an abuse of discretion that an exception lies; but no attempt at a showing of that character is made here. Like well-known rules dispose of all exceptions based on the fact that the court allowed re-examination of the witnesses for the United States after they had been cross-examined.

There are two counts in the indictment; one alleging that the bankrupt concealed from his trustee a diamond brooch, and the second the concealment of "certain jewelry," a more particular description of which is said to have been to the grand jurors unknown. The traverse jury returned a verdict on each count, finding Jacobs guilty on each; and, so far as anything is shown in the record, he was sentenced on both.

The record shows that the bankrupt had been a jeweler in Worcester, and that his stock consisted of jewelry, and more particularly of diamonds. Therefore any evidence with reference to his stock in trade, although not more particularly described, may well be regarded to have related to "jewelry" as that word is used in the second count.

One alleged error called to our attention relates to the testimony of a witness in regard to the amount and the value of the stock found in Jacob's store about the 15th day of October; the petition in bank-

ruptcy having been filed on the 3d day of September. Subject to the objection of Jacobs, this witness, who made an appraisal of the stock at the date named, was permitted to testify what he then found, and also to estimate the value of it, which he did at from \$2,000 to \$3,000. Each branch of this proof was objected to on the ground that it was immaterial what was found at that late date. On the other hand, the United States offered the testimony saying that they would show that, just prior to the bankruptcy, there was a much larger amount of stock on hand of great value; and on that assurance the testimony was admitted. Subsequently, the United States introduced a witness who testified that, on the 16th day of August, Jacobs took him outside his shop, and showed him the goods in the window, and said that the stock was worth about \$15,000. Of course such a comparison of values is a very dangerous class of testimony, and very apt to mislead; but, as the court is to be presumed to have fully cautioned the jury in reference to it, we see no possible ground on which it could be entirely excluded under the second count in view of the description of the property which that count alleges to have been concealed, and of the fact that the stock wholly consisted of jewelry.

Another alleged error relates to the testimony of the witness who had the conversation with Jacobs in August. The conversation as a whole was objected to as immaterial, but what we have already said disposes of this. During the course of the conversation, as the witness testified, Jacobs showed him some promissory notes, claiming to own them, and he also testified in reference to prices which Jacobs paid for certain goods. These were objected to; but, as the objections and exceptions were both general, they do not, under the circumstances, and especially under the practice in this court, require our attention because, so far as we can discover, the conversation as to these topics was immaterial and could not have been prejudicial.

Another topic brought to our attention by the plaintiff in error is covered by the following extract from the record:

"William Nelson, recalled, testified that he had all the papers connected with the bankruptcy proceedings in the case of the defendant, Jacobs, except what had been put in evidence; that he had 23 proofs of claims besides those that were marked in evidence. (Twenty-three proofs of claims are offered in evidence.)

"Objected to on the ground that proofs of these individual claims were not competent to prove anything so far as the ownership of property was concerned, or whether property was in the hands of the bankrupt or not at any time either before or after the date of the bankruptcy. They were offered as admissions of the defendant as to ownership or possession of property.

"The Court: I rule that proofs of claims are admissible, because they are a part of the record of the bankruptcy proceedings.

"Mr. Anderson: And will your honor save my exception?

"The Court: Your exception is saved.

"Mr. Anderson: And to each one of them. I understand I must be particular about them.

"Twenty-three proofs of claims were marked 'Exhibit 7,' which may be referred to at the hearing on this bill."

The purpose of admitting the proofs of claims was evidently in line with the testimony which we have just considered; that is, with the view of showing that the bankrupt had purchased prior to his

bankruptcy a large amount of goods. This, we understand, is what was meant by the expression in the course of the discussion that they were offered as admissions on the part of the bankrupt as to ownership or possession of property. We can conceive of no other purpose for which they were admitted, and we assume that we are right in that particular. Clearly, unless some special reason is shown to the contrary, these proofs were strictly *inter alios*, mere declarations of third persons; and the admission of them was a plain violation of the rule relative to the use of that class of evidence. It is claimed, however, by the United States, that it was the duty of Jacobs, under the statutes in bankruptcy, to examine the claims when offered in proof, and to advise if they were not correct. This, however, is only a partial statement, and what is omitted is fatal to the proposition. It is true that section 7 of the act of July 1, 1898 (30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424]), provides that, in the case of any person having to the knowledge of the bankrupt proved a false claim, he (the bankrupt) shall disclose that fact to his trustee; but it also further provides that he shall not be required "to examine claims except when presented to him unless ordered by the court or a judge thereof for cause shown." There is no evidence in the record of any such presentation to Jacobs of the claims in question, or that he had any actual knowledge of what was proved against the estate, or that he had ever been requested in any way to take any part in reference thereto. Consequently, the admission of this evidence was clearly erroneous and prejudicial. It relates, however, only to the second count, because it was only as to the second count that a comparison could be useful as between the amount of assets which the bankrupt had prior to the bankruptcy and what was turned over to his trustee. The United States claim that the plaintiff in error opened the door for this evidence; but, as the case results, it is not necessary that we should determine this proposition.

An important question arises from the fact that she who had been the wife of the bankrupt, but had been divorced from him before the trial, testified against him. Among other things, she testified to an interview occurring before the divorce. There were present, besides the witness and the bankrupt, the bankrupt's brother and his wife. It is evident that the gathering of the four was an open consultation between them as to the method of meeting certain proceedings against the bankrupt which were anticipated, and, so far as we understand the record, these proceedings included the probability of the indictment now pending before us. At any rate, the nature of the conference was a joint consultation of the character which we have described. The plaintiff's former wife testified that during the conference the bankrupt gave her a slip containing questions that were likely to be asked her as a witness, and proposed answers. This paper was kept for several weeks and then destroyed or lost. She was asked by the prosecuting attorney what she could remember as to its contents. This was objected to on the ground that the paper was a communication given by the husband to the wife, and therefore inadmissible. The testimony asked for was admitted, and an exception saved. The ob-

jection stated that the paper was not read in the presence of any third person, but the record does not show whether it was so read or not. The passing of it by the bankrupt to his wife was a part of the occurrences during the joint consultation of the four persons. The rule is clear that communications between a husband and wife are ruled out only when they are confidential. Chase's Stephens' Digest of the Law of Evidence (2d Ed.) 278. The rule is also stated incidentally to the same effect in *Stein v. Bowman*, 13 Pet. 209, 222, 10 L. Ed. 129, and *Hopkins v. Grimshaw*, 165 U. S. 342, 349, 17 Sup. Ct. 401, 41 L. Ed. 739. Therefore the contents of the paper in question could not be excluded unless it was a matter in confidence between the husband and the wife as that rule is usually understood. Whether it was a matter in confidence between the husband and the wife was, of course, a question to be passed on in the first place by the presiding judge, who must, in the first place, determine whether or not the evidence was admissible or otherwise. His ruling on a question of that character where the facts were clearly doubtful would not be set aside by an appellate tribunal. Inasmuch as the rule of law is such a common one, and so well known, and as the objection was of such a character as to clearly call the attention of the presiding judge to whatever propositions were in issue, we must assume that his ruling involved a finding by him that the delivery of the paper from the husband to the wife was a mere incident to the general consultation between the four parties, and therefore not at all in confidence. There was no such preliminary examination in form, although it might have been insisted on by the bankrupt, and we have therefore nothing to show that the paper was not, in fact, read to the other persons to the interview, or read by them, or to show that it was at all confidential. Therefore this ruling of the learned trial judge must stand.

The most important question in the case arose as follows: Previous to his trial, Jacobs had been examined as a bankrupt. The seventh section of the bankruptcy act of July 1, 1898, provides: "But no testimony given by him"—that is, the bankrupt—"shall be offered in evidence against him in any criminal proceeding." The bankrupt offered himself as a witness. On the cross-examination, a book was produced called the "sales book," which we understand to have been a book kept by the bankrupt in his business as a jeweler, though this is not clear to us. From that book apparently some leaves had disappeared, and apparently there was a claim that this was the result of mutilation by the bankrupt. After he had been somewhat inquired of by the prosecuting attorney in reference to this book, the question was put: "Well, you gave an altogether different description about that, about what happened to that book, didn't you, before the referee?" This was objected to in a proper and clear manner, on the ground that, under the statutory provision which we have cited, it was not lawful to use the examination in these proceedings. The question was admitted, and exceptions were saved to that entire line of interrogation. Following it up, quite a list of questions was asked the bankrupt as to his examination before the referee. The following is illustrative: "Do you remember a question like this: What became of those ac-

counts?" The bankrupt was compelled to answer. Apparently, from the way in which these questions were put, the prosecuting attorney had in his hands the examination before the referee, and read from it in the presence of the jury.

In answer, the United States make two replies: One is that the examination—that is, the paper itself—was not put in evidence, which is true; and the second is that the questions put to the bankrupt on cross-examination come within the general rule with reference to the protection of the fifth amendment to the Constitution, which is waived when an accused person voluntarily offers himself as a witness, in accordance with *Fitzpatrick v. United States*, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078, and *Sawyer v. United States*, 202 U. S. 150, 165, 26 Sup. Ct. 575, 50 L. Ed. 972. The difference, however, between the two positions is fundamental. The waiver of the constitutional provision concerns merely the personal conduct and condition of the witness. He offers himself as a witness, and therefore puts himself in the position of any other witness so far that he may be examined with reference to anything pertinent to the case and admissible in evidence therein. Of course, the cross-examination of one witness may, for the purpose of testing his character, run out into a line of questions which would not be relevant when put to another witness; but a line of questions of the same class might be put to the second witness and be relevant. Here the issue is not with reference to the conduct and situation of the witness himself, but with reference to the conduct and situation of the prosecuting attorney with regard to something prohibited by the statute, and which could not be testified to by any other witness.

Running this out practically, the essential distinction becomes plainer. The United States say that they proceeded as they did for the purpose of testing the credibility of Jacobs as a witness. In the federal courts, when it is desired to contradict a witness or determine his credibility by putting in proof of a prior contradictory conversation, or a contradictory letter or document of any kind, it is necessary to first interrogate the witness in reference thereto. Of course, this does not apply to the full extent where a party is testifying in his own behalf, because there the letter, document, or conversation can be introduced for the purpose of contradicting the party in interest, and showing that his case is in fact otherwise than as stated by him, and, indeed, independently of any statement he makes on the stand. It is not claimed here, however, that under the statute the examination before the referee could be introduced for either of those purposes. Therefore, as the preliminary examination could not have been followed up in the usual way by the subsequent introduction of the written examination, the cross-examination was not within any rule of practice and was clearly unlawful.

In short, the matter cannot stand like the waiver of the constitutional guaranty because that waiver, as we have said, relates to evidence which would be admissible if it came from some other person as a witness, while here the alleged waiver related to evidence which would not be.

Both parties appealed to *Burrell v. Montana*, 194 U. S. 572, 24 Sup. Ct. 787, 48 L. Ed. 1122, but the issue here was not raised in that case. There no objection was made to the use of the examination, and the only question was whether the person charged with an offense was entirely exempt from prosecution. If any of the expressions in that opinion would have any proper weight here, they would be against the United States.

The underlying philosophy of the statute in question is that, as a matter of justice to the bankrupt, and also for the interests of creditors, he should be encouraged to testify freely in his examination; but he would have no encouragement thereto if, on being prosecuted for an offense, he could not undertake to absolve himself by his own testimony except at the risk of being tripped or embarrassed by what he had previously sworn to. To permit a course of cross-examination in the method here, whether the documentary evidence taken before the referee was produced in the presence of the jury or not, would be simply to permit an evasion of the statute, because to do so would involve the mischief which the statute intended to guard against, in that the witness might be more harassed and prejudiced than he would be if the whole document had been frankly put into the case.

With reference to this issue, the plaintiff in error has not called our attention to the question whether or not the course pursued by the United States might have been prejudicial to him. In fact, his propositions with reference to nearly all, if not all, the numerous issues sought to be raised by assigning 41 alleged erroneous rulings are defective in the same particular. The fact seems to be often overlooked that it is not only necessary to show that a ruling was erroneous, but also to point out something which would raise a presumption that the error was, or might have been, prejudicial. In this case the prejudicial nature of the error suggests itself from a perusal of the record, and also by the statement of the prosecuting attorney that the method of examination objected to was for the purpose of testing the credibility of the witness. The proofs as to the first count in the indictment, which related to the diamond brooch, consisted very largely, we might say almost entirely, of the testimony of the bankrupt against that of his divorced wife. The charge of the learned judge, which is printed in the record, shows that he regarded these statements as practically irreconcilable, so that the question was one of veracity. What we see of the record satisfies us that such was the fact. Under these circumstances, the credibility of the bankrupt was a matter of the highest importance; and, in our opinion, the method of cross-examination adopted was calculated to place him in a very unfortunate position before the jury, so far as the necessity of balancing his testimony was concerned; and, consequently, we think this was an error which requires that the judgment and the verdict on both counts should be set aside.

With reference to the numerous other alleged errors, it is only with very great difficulty that we could follow them up one by one, and explain our views in regard to each. Where there are so many assigned as we find here, it becomes physically necessary for us to protect our-

selves behind our rules. As we have said in other cases, we ordinarily do so unless we perceive something where serious injustice would be done unless we made a special investigation. In this connection we refer especially to the second subparagraph of paragraph 2 of our rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii), which requires, not only that the particular pages where questions arise on the introduction of evidence should be pointed out, but that the party complaining should put his finger on the very spot. In this case, for example, with regard to the question of using the examination before the referee, we were referred in gross to pages 59 to 75 of the record, with nothing to assist us as our rules require. The question involved was so serious a one, however, that, in accordance with what we have said as to our exceptional practice, we followed through those pages until we thought we comprehended the positions of the trial court and of the parties therein. Other instances of the kind, however, we pass by except with the most cursory examination. Again we are met by objections in gross to certain questions put by the prosecuting attorney, to the effect that they were leading questions, which, of course, is of no consequence in the Court of Appeals except in very extreme cases, that they were indefinite, that it was impossible to know what was meant by them, that they suggested to the witness an improper inference, and perhaps other subtopics. It cannot be expected that the court will take a consolidated group of objections like this and divide it up, and sift out the record applicable to each branch thereof.

An omission quite general, and not at all peculiar to this case, arises from the fact, to which we have referred, that parties seem to overlook that it is not sufficient to show that a certain ruling was technically erroneous, but that it must also be shown that it was prejudicial, or, at least, that there is a presumption that it was prejudicial within the liberal rules of the Supreme Court in this respect. With all the various matters brought to our attention, we do not recall that there was a single one as to which it was pointed out to us that the alleged error was prejudicial, or that there was any presumption that it was so. Other propositions were submitted without argument, with the mere statement that they were not waived. This does not require us to give any attention to them. Therefore, on the whole, we can only say, as to the various alleged errors which we have not specifically considered, that our impression is that the District Court was correct in its rulings. It may be that, if the same questions should be carefully presented to us again, we might be compelled to take a different view from that which now presents itself; but, on the whole, we feel justified in trusting to the probability, or, at least, to the possibility, that, on a new trial, they may all disappear.

The judgment and the verdict in the District Court are set aside, and the case is remanded to that court for further proceedings in accordance with law.

NICKELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,391.

1. CONSPIRACY—INDICTMENT.

Where an indictment for conspiracy to induce certain persons to commit perjury in the making of public land entries alleged that the acts were knowingly done, and that defendants knew that the entrymen were applying to purchase the lands on speculation, and not in good faith, to appropriate the same to their exclusive use and benefit, the indictment was not fatally defective for failure in terms to allege that such acts were "willfully" committed under Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that no indictment found or presented by a grand jury in any District or Circuit Court of the United States shall be deemed insufficient for any defect in matter of form not tending to defendant's prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 88; vol. 27, Indictment and Information, §§ 256-264.]

2. PERJURY—FALSE AFFIDAVITS.

Where an entryman on public lands signed and swore to an affidavit that he entered the land for his individual use and benefit, and not for speculation, when in fact, he intended to immediately transfer the land to another under a pre-existing contract, he thereby committed perjury as defined by Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3633].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 23.

For other definitions, see Words and Phrases, vol. 6, pp. 5305-5310; vol. 8, p. 7751.]

3. SAME—"SUBORNATION OF PERJURY."

Procuring entryman to make such false affidavits constituted subornation of perjury as defined by Rev. St. § 5393 [U. S. Comp. St. 1901, p. 3654].

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6720.]

4. SAME—VALIDITY OF CONTRACT.

Defendant and others conspired to defraud entrymen on public lands of the location fees, and, in order to induce them to enter the lands, M. represented to them that he was the agent of a fictitious corporation of whom a fictitious person was president, which corporation desired to purchase the land, and would do so from the entrymen, either for a specified amount, or in accordance with an estimate of timber thereon. Pursuant to such conspiracy, defendants induced the entrymen to sign and swear to entry affidavits declaring that the entrymen were purchasing the land for their own benefit, and not for speculation, and that they had no contract or agreement to transfer the same after they had contracted to convey the land to such corporation. *Held* that, since M. would have been personally liable on such contracts under the rule that one who holds himself out as an agent of a nonexisting principal is personally liable, the affidavits were in fact false and constituted perjury, though there was no intention on defendant's part at any time to carry them out or purchase the land.

5. SAME—AFFIDAVITS—STONE AND TIMBER ACT—LANDS AND TIMBER.

Under Stone and Timber Act (Act June 3, 1788, c. 151, § 1. 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), making such lands subject to entry as are available chiefly for timber but unfit for cultivation, an entryman having made an affidavit that he sought to purchase the land for his own benefit and not for speculation could not escape punishment for conspiracy on the ground that his pre-existing contract of sale related to the timber only.

In Error to the Circuit Court of the United States for the District of Oregon.

The plaintiff in error, Nickell, was indicted jointly with Henry W. Miller, Frank E. Kincart, and Martin G. Hoge in the Circuit Court for the District of Oregon for conspiracy under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676). That part of the indictment material to the present inquiry reads as follows: "The grand jurors for the United States of America, inquiring for the district of Oregon, upon their oath present that Henry W. Miller, Frank E. Kincart, Martin G. Hoge, and Charles Nickell, late of the city of Medford, in the district aforesaid, on the thirty-first day of August, in the year of our Lord nineteen hundred and four, at Medford aforesaid, in the said district, unlawfully did conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, to commit an offense against the said United States; that is to say, to unlawfully, willfully, and corruptly suborn, instigate, and procure a large number, to wit, one hundred, other persons to commit the offense of perjury in the said district by taking their oaths there, respectively, before competent tribunals, officers, and persons, in cases in which a law of the said United States should authorize an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that is to say, to suborn, instigate, and procure the said persons, respectively, to come in person before such tribunals, officers, and persons, and, after being duly sworn by and before such tribunals, officers, and persons, to state and subscribe under their oaths that certain public lands of the said United States open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as 'timber and stone lands,' which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they have not directly or indirectly made any agreement or contract in any way or manner with any other person or persons whomsoever by which the titles which they may acquire from the said United States in such lands shall inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they the said Henry W. Miller, Frank E. Kincart, Martin G. Hoge, and Charles Nickell would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with other persons by which the titles which they should acquire from the said United States in such lands would inure to the benefit of persons except themselves; the matters so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured would not believe to be true, and the said tribunals, officers and persons when administering such oaths to those persons, being tribunals, officers, and persons authorized by law of the said United States to administer the same oaths, and the said oaths administered in cases where a law of the said United States would then authorize an oath to be administered." The defendant Miller pleaded guilty, and became a witness for the prosecution. A trial resulted in the conviction of Nickell and Hoge. Nickell was sentenced, and brings the cause to this court upon writ of error.

The transaction disclosed by the bill of exceptions follows: Plaintiff in error was a United States commissioner residing at Medford, Or. Miller and Kincart entered into an agreement between themselves to locate stone and timber claims, and to induce persons to file upon the same. Kincart was to act, and did act, as cruiser, and Miller was to represent himself as the agent of a company to be known as the "Emmitsburg of New Zealand." For the purpose of inducing persons to make filings, Miller was to tell prospective entrymen that this company desired to secure timber lands in southern Oregon;

that, if they would file on claims, the company would at the time of final proof furnish the money required for entry, and would, upon the procurement of the receiver's receipt and the assignment of it, together with a quitclaim deed, pay the respective entrymen the difference between the amount which they had advanced and the aggregate value of the claims, to be arrived at upon the basis of 40 cents per 1,000 feet for timber standing upon such lands. It fully appeared that there was no such company; that the name was assumed; and that one Wilson, represented by Miller as the head of the concern, was a fictitious person, as nonexistent as the company itself. The location fee was fixed at \$125 per claim. Thus the matter stood when Miller and Kincart came to the plaintiff in error Nickell for the purpose of enlisting his aid in carrying on the enterprise. Miller explained that he and Kincart were there to locate persons on timber claims, and that he, Miller, was the representative of a company that would buy the lands after final proof had been made. At this point certain negotiations were had regarding the fees of Nickell as commissioner, and concerning the charge to be made for the publication of the necessary notices in a newspaper owned by him. It was agreed that the commissioner was to have \$1.50 as fees, and, of the \$10 fixed for the publication of notices, \$2.50 thereof in every case was to be paid to Miller and Kincart. At this period of the negotiations it was concluded, also, that it was impracticable to secure so large a location fee, and the amount was cut down to \$60 under the agreement that the balance was to be paid when final proof was made. Subsequently certain entrymen were charged only \$25. The location fees were divided between Miller and Kincart. These two brought with them a blank which was to be used in contracting with entrymen, of which the following is a copy:

"Emmitsburg of New Zealand Certificate.

"Know all men by these presents that we, the Emmitsburg, of New Zealand, desiring to acquire timber and stone lands in southern Oregon, and ——— desiring to exhaust his right and dispose of said land at the time of final proof:

"Now, therefore, the Emmitsburg of New Zealand, agrees with ——— as follows, to wit:

"That said ——— locate the ——— quarter of section ——— township ——— south, range ——— west, Willamette Meridian, and at day of final proof on said land, we, the Emmitsburg, of New Zealand, will furnish four hundred dollars and take said ——— note, and upon the receiver issuing a certificate for said land, and its being assigned to the Emmitsburg, of New Zealand, or its agent, together with a quitclaim deed, we, the Emmitsburg, of New Zealand, will pay said ——— eight hundred dollars in addition to money heretofore paid. This agreement to be signed by the ——— and countersigned by company's agent or representative and deposited in escrow with ——— until day of final proof.

"In witness whereof we hereunto set our hands this the ——— day of ———, A. D. 1902.

"—————, Locator.

"Emmitsburg of New Zealand,

"Per ———, Representative."

It was proposed by Miller to modify this contract, and for that purpose it was submitted to Nickell, who carried on a job printing office in connection with his newspaper. Accordingly blank forms were printed in his establishment which omitted these words in the first blank form, "Will pay said ——— eight hundred dollars in addition to money heretofore paid," and, in lieu thereof, these were inserted after the description: "Which is estimated at ——— million feet merchantable timber," and "will pay said ——— in all not to exceed forty cents per thousand, per estimate." Plaintiff in error expressed his doubts as to the feasibility of the project which had been devised by Kincart and Miller, and to which he had thus become a party, basing his doubts upon the fact, as he expressed it, that the same scheme had been worked in that community before. In order to arouse the cupidity of persons who had filings in contemplation, Miller informed them that no locations would be

made for those not desiring to dispose of the land, and the reason assigned by him at the trial for making this statement was that it would make them "bite a little better." He also testified: "As a matter of fact, we did not intend to buy the timber at final proof, or at all. We had no money to buy with." Numerous applications and affidavits were made pursuant to this arrangement before the plaintiff in error as commissioner, and forwarded by him to the land office, where they were duly filed and entered of record, and these contracts, either the original or as modified, were executed by the several entrymen immediately thereafter. They were retained by Miller, and at once destroyed by him, but none of the persons who filed ever made or offered to make final entry.

The trial court instructed the jury in part as follows: "I repeat, an agreement, as the word 'agreement' is used, need not be in writing. It need not be of sufficient formality or of a nature to be enforced in a court. It is enough if it is proved beyond a reasonable doubt that in some way the minds of the applicant and some other person have met definitely, understandingly, and that there is a mutual consent upon the point that, when the applicant may acquire title to the land from the United States, it shall inure to the benefit of such other person for a consideration; that is, that in truth and in fact, the applicant is really to acquire the land for the use and benefit of another. And any words or any acts and words manifesting this mutual consent of the minds of the parties are sufficient to constitute a contract or agreement. * * * If the agreement to convey exists and is understood between the parties, the law does not tolerate evasion by calling such an agreement a 'certificate' or 'option.' Nor, if the agreement actually exists, can the law be evaded by an endeavor to separate title to the timber upon the land from title to the land itself. On the other hand, a person qualified under the law has a right to enter lands under the provisions of the timber and stone act, even though he considers prior to the time of making his sworn statement and his final proof a sale of it as soon as he can after he makes his final proof, and obtains the usual receiver's receipt. * * * But the statute does denounce a prior agreement, the acting for another in the purchase from the government of the United States. * * * You, and you alone, must ascertain whether the evidence shows beyond a reasonable doubt that Hoge and Nickell, or either of them, knowingly and intentionally entered into an agreement, or knowingly formed a part of a combination with Kincart and Miller, or either of them, to induce or procure persons to apply to enter and purchase public lands as alleged, or some part of the public lands as charged in the indictment as lands subject to entry under the timber and stone act, after having come to an agreement or understanding with said persons that they would convey the title which they might acquire to Miller, or the Emmitsburg of New Zealand, or some one represented by Miller."

Thomas O'Day, for plaintiff in error.

William C. Bristol and Francis J. Heney, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WHITSON, District Judge.

WHITSON, District Judge (after stating the facts as above). While the plaintiff in error has made numerous assignments, they either directly present or incidentally involve two principal propositions: First. The sufficiency of the indictment. Second. The nature and character of the contract or agreement which is inhibited by the statute, and whether plaintiff in error was brought within its provisions.

First, then, as to the indictment: The argument is that the pleader has omitted to charge that the acts complained of were willfully done. This is based upon the assumption, rightly made, that it must so appear by appropriate averment. Assuming for the present discussion

without holding that the words "unlawfully, willfully, and corruptly" first appearing in the indictment cannot relate to the subsequent allegations in relation to the nature of the oaths taken for want of explicit reference, it does appear that the acts were knowingly done, for it is alleged:

"When, in truth and in fact, as each of the said persons would then well know, and as they, the said Henry W. Miller, Frank E. Kincart, Martin G. Hoge, and Charles Nickell, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with other persons by which the titles which they should acquire from the said United States in such lands would inure to the benefit of persons except themselves."

We think the distinction which counsel makes is a technical refinement which cannot prevail under the liberal provisions of section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720). If the defendants knew that these affidavits would be false, and knew that the entrymen would have made contracts for the conveyance of the lands to be acquired by them, and having this knowledge nevertheless procured the making of them, there can be but one conclusion, and that is that they willfully, which is but another name for intentionally, entered into the conspiracy charged. While matters of substance are as essential now as before the passage of the statute, and of necessity must always remain so, we take it that its enactment was intended to have substantially the same effect as those of many of the states, which provide that an indictment which will enable a person of common understanding to know what is intended is sufficient.

In *Van Gesner v. United States*, 153 Fed. 54, 82 C. C. A. 188, it was observed by this court:

"When the facts alleged necessarily import such willfulness, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law."

The indictment in this case falls within the rule there discussed.

The second point presents a question of more difficulty. Section 2 of the act of June 3, 1878 (20 Stat. 89, c. 151 [U. S. Comp. St. 1901, p. 1545]), requires the entryman at the time of making his application to make oath that he has not made any agreement or contract in any way or manner, directly or indirectly, with any person or persons, by which the title shall inure to the benefit of any person except himself. That it was intended to meet the evasions which would be resorted to from time to time is quite manifest. Schemes, devices, and subterfuges which ingenuity could invent, and of which this case furnishes a striking example, were in view equally with formal contracts. We are precluded from holding otherwise by the comprehensive language of the statute; and to sustain the contention of plaintiff in error in that regard would be equivalent to saying that its purpose can be entirely defeated by secret understandings and ingenious circumventions. *Boren v. United States*, 144 Fed. 801, 804, 75 C. C. A. 531. With this construction in mind, the particular scheme which was conceived in this case will be examined. The certificates,

so called, were, of course, devices. Miller objected to giving the name of the responsible head of his company to one of the prospective entrymen, but, on being pressed, he did give a name, concerning which he testified as follows:

"I gave him the name of J. D. Wilson, of Minneapolis, Minn., as the head man. That was the first name that happened to come to my mind. He had nothing to do with the company. I do not know that there was any such individual."

Again he testified:

"I represented no company at that time. The company was only on paper. It was a name assumed for the purpose of carrying out our scheme."

The case must therefore rest upon the undisputed fact that there was no such company as the Emmitsburg of New Zealand. That company was fictitious, and Wilson as its manager had no existence. There was, then, no contract or agreement with any person to convey, or whereby the land might inure in whole or in part to the benefit of such company. It was not the purpose to supply money with which to make the entries nor to acquire title. The scheme was to work the entrymen out of the location fees; to defraud them. Here the matter was to end, and did end. But the entrymen and the defendants, other than the plaintiff in error, and he, giving due effect to the verdict of the jury, thought there was a contract to convey, and therefore it is that in this regard the affidavits contained averments which the entrymen did not believe to be true. This was perjury. Section 5392, Rev. St. (U. S. Comp. St. 1901, p. 3653). Procuring the making of such affidavits was subornation of perjury. Section 5393, Rev. St. (U. S. Comp. St. 1901, p. 3654). The case was submitted to the jury upon the theory that it might find from the evidence agreements as charged in the indictment by which the lands to be acquired were to be conveyed, or might inure to the benefit of some person other than the entrymen. Miller, Kincart, and the plaintiff in error intended that the false affidavits should be made, and the plaintiff in error supposed that there were agreements in fact as well as in form that the lands were to be entered and conveyed to Miller's company. In addition to the certificates which were signed, there was evidence to establish that, at least as to some of the entrymen, there were oral agreements made with Miller to convey to this company; but, bearing in mind that the entrymen intended to defraud the government of these lands, and that the plaintiff in error intended to, and did give his aid to what he supposed was a deliberate attempt to do so, the case must turn upon whether there were agreements or such an arrangement as would result in the lands inuring to the benefit of some person other than the persons who were making entries of them. If these agreements had been made by Miller concerning lands which might properly be the subject of contract, he could have been held personally responsible. They would have been enforceable as against him under the rule that one who holds himself out as the agent of a principal who has no existence is personally liable. *Patrick v. Bowman*, 149 U. S. 421, 13 Sup. Ct. 866, 37 L. Ed. 790; *Paine v. Loeb*, 96 Fed. 167, 37 C. C. A. 434; *Second Kent's Commentaries*, 630;

Booth v. Wonderly, 36 N. J. Law, 250; Story on Agency, § 230, 280, 281.

Remembering, now, the comprehensive provisions of the statute as prohibiting all manner of devices, we find that the agreement was with Miller, and not with his company, and while he, as he says, did not intend to comply on his part, yet the vice prohibited is the making of it, and the conspiracy charged is having suborned these entrymen to swear falsely that no such agreement was made when in fact it was. The charge assumed that there might have been a contract to convey to the Emmitsburg of New Zealand, it is true, but the jury could not have been thereby misled, for, if an agreement with Miller would have bound him personally under such conditions, the lawful conditions of a contract being present, it would make no difference whether the contract was made with Miller's company or with him. There was nothing in the evidence which in any way could tend to confuse the jury. There was in this regard but one transaction, and the mere presentation of the case upon the theory that there may have been a contract made with the Emmitsburg of New Zealand was accompanied also by the assumption that the jury might from the evidence find that the contracts were with Miller, and, inasmuch as there was nothing else before the jury except this transaction, there could have been no prejudice.

The conclusion reached by the jury was correct, even though it may not have been told in so many words that Miller would be responsible if his company had no actual existence. This it appears the court assumed as a proposition of law without explaining it to the jury. It could not have in any way influenced the verdict. It was not like submitting two distinct transactions, from which different results might flow, for the consideration of the jury, leaving them to find the one or the other according to their judgment of the evidence.

The plaintiff in error relies upon the position that whatever arrangement was made related to the timber upon the land, and not to the land itself. Section 1 of the act makes such lands subject to entry as are "valuable chiefly for timber, but unfit for cultivation." It would be contrary to the spirit of this legislation to declare that an entryman may contract to sell that which gives the land its only value, and thereby escape punishment under so technical a contention. The timber is a part of the land, and one who thus seeks to avoid the plain spirit and even letter of the law cannot complain of penalties inflicted. Besides, the conspiracy here was to acquire the lands.

Finding no prejudicial error in the record, the judgment will be affirmed.

B. ROTH TOOL CO. v. NEW AMSTERDAM CASUALTY CO.*

(Circuit Court of Appeals, Eighth Circuit. March 31, 1908.)

No. 2,633.

1. INDEMNITY—RECOVERY OVER—CONCLUSIVENESS OF JUDGMENT—EXTENT OF ESTOPPEL—SCOPE OF ADJUDICATION.

When one who has a right to recover over is sued, the judgment regularly rendered against him is conclusive on the indemnitor, provided notice of the suit be given to the latter and full opportunity afforded him to defend, but, if the liability over is not as broad as the original liability, plaintiff, in the suit to recover over, if he relies on the adjudication made in the former case, must show that the very ground of liability against the indemnitor was found to exist and was necessarily adjudicated in the original suit, as the estoppel created by the first judgment cannot extend beyond the questions necessarily determined by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indemnity, § 41.]

2. INSURANCE—EMPLOYER'S LIABILITY—CONCLUSIVENESS AS AGAINST INSURED OF JUDGMENT AGAINST INSURED—NOTICE OF SUIT—REFUSAL TO DEFEND.

Where an employer's liability policy contained a stipulation requiring notice of suit against the assured to recover damages by an employé to be immediately given to the insurer, and the latter expressly agreed to defend or settle it or otherwise satisfy the assured, the insurer's refusal to make a defense, after notice, because it disclaimed any liability for damages occasioned to the plaintiff, did not relieve the insurer from the conclusiveness of the judgment rendered in such action.

3. SAME—CONCLUSIVENESS OF JUDGMENT AS AGAINST INSURED—MUTUALITY OF ESTOPPEL.

Where an employer, on being sued for injury to an employé, vouched in an insurer on an employer's liability policy, which refused to defend because of alleged nonliability, the estoppel of the judgment recovered against the employer in such action operated mutually against both parties.

4. JUDGMENT—PLEADING AND EVIDENCE AS ESTOPPEL—IDENTITY OF ISSUES—EVIDENCE.

On the question whether the issues in a prior action by a servant against his master for injuries, in which judgment was rendered for the servant, were the same as those in an action by the master against an employer's liability company, to recover over against the latter, in which the judgment against the master was claimed to be *res judicata*, the pleadings, instructions, and verdict in the prior action were admissible to determine what was actually tried therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1823, 1823½.]

5. INSURANCE—EMPLOYER'S LIABILITY—PROMISSORY WARRANTY IN POLICY—USE OF "EXPLOSIVE."

Where a large metal tube filled with various metals and materials of an explosive and dangerous nature was exposed to the heat of a furnace on plaintiff's premises and actually exploded and injured an employé, such tube and its contents constituted an "explosive," within a warranty in an employer's liability policy insuring plaintiff that no explosives should be used on the premises.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2600.]

6. SAME—CONCLUSIVENESS AGAINST INSURED OF JUDGMENT FOR EMPLOYÉ—GROUND OF RECOVERY.

Plaintiff permitted H. to use its heating furnace for experiments. H. filled a metal tube with other metals and explosive substances, sealed the

*Rehearing denied May 8, 1908.

tube, and placed the same in the furnace, where it was subjected to a hot fire. It exploded, injuring one of plaintiff's employes, who recovered a judgment against plaintiff on an allegation of negligence, in that plaintiff carelessly permitted such tube to be filled with metals of an explosive and dangerous nature and placed in a heating furnace, which caused it to explode, resulting in the injuries complained of. *Held*, that a judgment in favor of the servant on such issue was conclusive against plaintiff's right to recover over against an employer's liability company on a policy containing a warranty that plaintiff should not permit the use of explosives on the premises, which action the liability company defended on the ground of plaintiff's breach of such warranty.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Ford W. Thompson (W. B. Thompson and Edward L. Gottschalk, on the brief), for plaintiff in error.

Lon O. Hocker (C. P. Ellerbe, L. R. Brokaw, and Jones, Jones & Davis, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge. The casualty company issued its policy indemnifying the tool company against loss from common-law and statutory liability for damages on account of bodily injuries sustained by any of its employes while on duty. James M. Cameron, an employe, sued the tool company for damages sustained by him while in its employment and recovered a judgment for \$3,500, which the tool company was required to pay and did pay. Afterwards the tool company brought the present action against the casualty company on its policy to recover the amount so paid to Cameron. The casualty company filed its answer, alleging that the assured had failed to keep and observe a promissory warranty which formed a part of the contract of indemnity, in this: that it permitted to be used on its premises certain explosives in violation of a stipulation contained in the policy that no explosives should be used on the premises. In its answer it pleaded the following facts as a breach of the warranty: That the assured, while carrying on a machine and blacksmith shop, permitted one Howe to make use of its tools and furnaces for the purpose of carrying on dangerous and hazardous investigations and experiments, and particularly to place in one of plaintiff's furnaces a certain iron tube filled with substances which were highly explosive and dangerous to life and limb when brought into contact with heat; that an explosion followed which caused the injury to Cameron. Defendant for further answer alleged that in the suit which Cameron brought against the assured the question whether Cameron was injured by the use of explosives on the premises was adjudicated and conclusively settled against the assured. The contract of indemnity sued on required the assured upon the occasion of any accident to give immediate notice thereof to the casualty company, and, in case of suit against the assured, the latter was required to immediately deliver to the casualty company a copy of the petition and summons, and the latter agreed to make the defense to the suit at its own cost or settle the

same, provided it did not elect to pay the limit of liability fixed in the contract. Pursuant to the obligation of the contract, the assured gave the required notice, and delivered a copy of the petition and summons to the casualty company. The casualty company, disclaiming any liability for the damages occasioned to Cameron, refused to assume the defense of that suit.

To sustain the issue of *res adjudicata* joined in this suit the casualty company offered in evidence the amended petition, the answer, the instructions of the court to the jury, and the judgment rendered in that suit. From this testimony offered and received it appears that Cameron charged in his petition as the act of negligence which caused his injury that the tool company carelessly caused and permitted to be constructed a large metal tube "and caused, and permitted the same to be filled with various metals and materials of an explosive and dangerous nature," and, when so filled, to be placed in a heating furnace in the machine shop of the defendant, and that as a result thereof the tube and contents exploded and injured him; that the tool company joined issue on that allegation of negligence; that the trial court at the trial instructed the jury as follows:

"If they find and believe from the evidence that on or about April 7, 1903, the defendant company permitted and invited one Howe to enter upon its premises where the plaintiff [Cameron] was working as a blacksmith in the service of the defendant, and to place within its furnace thereon a certain tube closed and sealed and filled with materials of an explosive nature and that said furnace at the time contained a hot fire, and if the jury further believe that the defendant knew or by the exercise of ordinary care could and should have known that said tube so closed and sealed, and so filled was likely in the natural course of events to explode when so placed in said furnace containing a hot fire, and if the jury further believe that said Howe upon such permission and invitation did place said tube so closed and sealed and so filled in said furnace then containing a hot fire, and that in consequence thereof said tube did explode, and that plaintiff as a direct and immediate consequence of said explosion and without any fault or negligence on his part contributing thereto was injured—then the jury will find for the plaintiff."

—and that the converse of this proposition was given to the jury in favor of the defendant.

On these pleadings and instructions a verdict was found in favor of Cameron and against the tool company for \$3,500, upon which judgment was finally entered and satisfied by the tool company. It is this judgment which is pleaded as *res adjudicata* of the issue involved in the present case, whether the tool company, the assured, committed a breach of its warranty not to use explosives on its premises. The Circuit Court, on a view of the pleadings, instructions, verdict, and judgment in the former case held that that judgment was conclusive as an estoppel against the plaintiff in this case, and directed a verdict for the defendant. The present proceeding in error challenges that action.

It is a well-settled general rule that, when one who has a right to recover over is sued, the judgment regularly rendered against him is conclusive upon the person liable over, provided notice of the suit be given to the latter and full opportunity afforded him to make defense. But, when the liability over is not as broad as the original lia-

bility, the plaintiff in the suit to recover over if he relies on the adjudication made in the former case must show that the very ground of liability against the indemnitor was found to exist and was necessarily adjudicated in the original suit. The estoppel created by the first judgment cannot extend beyond the questions necessarily determined by it. *Washington Gas Co. v. Dist. of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712; *City of St. Joseph v. Union Ry. Co.*, 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626. The contract of indemnity sued on in this case contains an express stipulation requiring notice of suit against the assured to recover damages by an employé to be immediately given to the casualty company and the latter company expressly agreed to defend or settle it or otherwise satisfy the assured. The refusal by the casualty company to make the defense makes no difference in the conclusiveness of the judgment rendered in the case.

Mr. Justice White in *Washington Gas Co. v. Dist. of Columbia*, *supra*, quoted with approval the language of other judges:

"When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he had the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

The casualty company was therefore concluded by the judgment rendered in the original case, provided the issue upon which the judgment was rendered was the same as that tendered in this case. The estoppel of such a judgment operates mutually. If the assured by vouching in the insurer concluded the latter by the judgment rendered in *Cameron's case*, by the most obvious and natural justice it concluded itself likewise. We find ourselves, therefore, limited to a consideration of the identity of issues in the original case and the present one. If the issue upon which the original judgment was rendered was the same as that presented in this case, that judgment concludes the plaintiff in this case, and no error was committed in directing a verdict for the defendant.

The stress of the argument of learned counsel for the tool company is that it does not appear that the issues presented in the two cases are the same. After a careful consideration of the pleadings, instructions, verdict, and judgment in the former case in comparison with the single issue presented in this case, we entertain no doubt of the substantial identity of the issues presented in the cases. Brushing aside unnecessary verbiage, the issue in this case is whether the tool company committed a breach of its warranty that it would not use explosives on its premises. Whether it was using such an explosive at the time *Cameron* was injured was the very issue tendered, met, and tried in the former suit. This clearly appears by the pleadings, the instructions to the jury, and the verdict in that case. These were properly introduced in evidence to determine what was actually tried. *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *De Sollar v. Hanscome*, 158

U. S. 216, 221, 15 Sup. Ct. 816, 39 L. Ed. 956; Delaware, L. & W. R. Co. v. Kutter, 77 C. C. A. 315, 147 Fed. 51; City of St. Joseph v. Union Ry. Co., supra. This evidence disclosed that the issue tried was whether Howe was permitted to make use of the furnace and premises of the tool company at the time Cameron was injured to experiment with an explosive and whether he did so. The verdict and judgment rendered settled that issue between Cameron and the tool company in the affirmative, and that is the very issue involved in this case. It is futile to split hairs as to the technical meaning of the word "explosive." It was determined in the former case that the tool company had on its premises at the time Cameron was injured "a large metal tube filled with various metals and materials of an explosive and dangerous nature"; that the same was exposed to the heat of a furnace on the premises and actually exploded and injured Cameron. Without considering what else may be an explosive, the tube with its contents just described was clearly one within the obvious meaning of the policy in suit. It consisted of physical substances which were liable to explode and injure the employes of the tool company. This was the very agency for harm and damage which the casualty company did not insure against; and against which it exacted a warranty from the assured.

We find no occasion to dwell on the contention of the casualty company that Howe was not on the pay roll of the assured or that his agency in producing the injury to Cameron was such as exonerated the insurer from liability under the terms of its policy, or any of the other questions debated by counsel. The assured and insurer are both concluded by the judgment rendered in the first case on the vital issue involved in this case: Whether the assured committed a breach of its warranty.

We find no error in the proceedings in the Circuit Court, and its judgment is accordingly affirmed.

WOLLINGTON v. MISSOURI, K. & T. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 21, 1908.)

No. 2,666.

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—ASSUMED RISK.

Plaintiff, a servant, was injured by the fall of a derrick, the mast of which was insecurely bolted to the bedplate. Such defect was plainly observable, and plaintiff, who had worked with the derrick for two or three months, had actual knowledge thereof, and that the derrick had been condemned by defendant as unsafe, after which plaintiff had participated in its restoration to use in its defective condition and continued to work with it without objection until it fell. *Held*, that plaintiff assumed the risk of injury therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessy, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Western District of Missouri.

C. C. Lawson and Silver & Brown, for plaintiff in error.

Geo. P. B. Jackson, for defendant in error.

Before SANBORN and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action for damages occasioned by defendant's alleged negligence in furnishing a derrick for plaintiff and his co-employees to work with. It is charged that the mast of the derrick was insecurely bolted to the bedplate on which it rested, that in other respects the derrick was not sufficiently strong to handle the heavy weights required of it and that as a result it fell and injured the plaintiff. The evidence is clear and uncontradicted that the alleged defects were plainly observable by every one, and that plaintiff, who had worked with the derrick for two or three months, actually knew of them. He was aware that the derrick had been condemned by defendant at one time as unfit and unsafe for use, participated in its restoration to use in its defective condition, and afterwards continued to work with it without objection or complaint until it fell as a result of that condition and injured him. These facts present a clear case of assumption of risk by the servant. *Kirkpatrick v. St. Louis & San Francisco Railroad Co.* (C. C. A.) 159 Fed. 855, recently decided.

For the purpose of this opinion it is assumed that the negligence charged against the defendant was fully established. Accordingly, the exclusion of some expert testimony, offered by plaintiff to establish that negligence, which is assigned for error, whether right or wrong, was without prejudice to plaintiff. Conceding defendant's negligence as charged, plaintiff, with full knowledge thereof, assumed the risk of the danger resulting therefrom.

The judgment is affirmed.

SANBORN, Circuit Judge, concurs on the grounds that the plaintiff assumed the risk and that the expert testimony offered was rightly excluded.

BLOUNT v. AMERICAN LEAD & BARYTA CO.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1908.)

No. 2,670.

ATTACHMENT—VACATION—BOND.

Rev. St. Mo. 1899, § 413 (Ann. St. 1906, p. 501), provides that attachments may be dissolved on motion on defendant's behalf at any time before final judgment when defendant appears and pleads to the action and gives bond conditioned that the property, effects, and credits shall be forthcoming and abide the judgment rendered, or when the defendant shall appear and plead and give a bond conditioned that defendant will pay to plaintiff the amount which may be adjudged in plaintiff's favor on or before the first day of the next term after judgment; and section 414 declares that when any attachment shall be dissolved all proceedings touching the property and effects attached, and the garnishee summoned, shall be vacated, and the suit shall proceed as if commenced by summons only. *Held* that, where an attachment was dissolved on the

giving of a forthcoming bond, defendant could not thereafter join issue on and demand a trial of the grounds originally alleged for the attachment; and this, though plaintiff took leave to amend his grounds of attachment after the attachment had been dissolved.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Edward D'Arcy (E. M. Dearing, on the brief), for plaintiff in error.
Richard S. Culbreth (Carter, Collins & Jones, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge. Plaintiff, Blount, instituted his action at law against the Baryta Company to recover an amount of money due him on open account. Summons was duly issued, and the defendant appeared and pleaded to the action by filing a general denial of liability. Later plaintiff sued out a writ of attachment in aid of his suit and caused certain personal property to be seized thereunder. In due time defendant, having already appeared and pleaded to the action, executed and delivered to plaintiff a good and sufficient bond, approved by the court, in double the value of the property attached, conditioned that the property should be forthcoming to abide the judgment which might be rendered in the case, and thereupon moved that the attachment be dissolved. This motion was sustained by the court, and a formal order entered "that the attachment issued in said cause be, and is hereby, dissolved." The cause came on for trial, and the court, against the objection and exception of plaintiff ordered that the issue raised by the plea in abatement be first tried. This was done, and resulted in a verdict by direction of the court in favor of the defendant, whereupon another formal order was entered "that the attachment in this cause be, and the same is hereby, dissolved and vacated at the costs of said plaintiff." Immediately thereafter the cause went to trial on the merits, resulting in a verdict and general judgment for the plaintiff on his original cause of action. This writ of error challenges the correctness of the order below requiring plaintiff to proceed to a trial on the plea in abatement and the judgment pronounced thereon.

Sections 413 and 414 of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, p. 501) are as follows:

"Sec. 413. Attachments in courts of record or before justices of the peace may be dissolved on motion made in behalf of the defendant at any time before final judgment in the following cases: * * * Second. When the defendant shall appear and plead to the action and give bond to the plaintiff with good and sufficient security to be approved by the court in double the amount of the property, effects and credits attached, conditioned that such property, effects and credits shall be forthcoming and abide the judgment which shall be rendered in the cause when and where the court shall direct. Third. When the defendant shall appear and plead to the action and give like bond and security in a sum sufficient to satisfy the amount sworn to in behalf of the plaintiff with interest and costs of suit conditioned that the defendant shall pay to plaintiff the amount which may be adjudged in favor

of plaintiff, interest and all costs of suit on or before the first day of the next term after that at which judgment shall be rendered.

"Sec. 414. When any attachment shall be dissolved all proceedings touching the property and effects attached, and the garnishee summoned, shall be vacated, and the suit shall proceed as if it had been commenced by summons only."

These sections of the statute present two ways of securing a dissolution of an attachment without a trial of the issue raised by a plea in abatement. Both of them are concessions to a defendant whose property is attached, and are to be availed of by him at his option and on the conditions prescribed. If the property attached is of less value than the amount sued for, he can and probably would avail himself of the first-mentioned provision, and secure a dissolution of the attachment by giving a bond conditioned for the forthcoming of that property only to abide the judgment which might be ultimately rendered in the case. If, on the other hand, the property attached equals in value the amount sued for, he can and probably would secure the dissolution by resorting to the second-mentioned method, and give a bond conditioned for the payment of the entire judgment which might ultimately be rendered against him. Whether one bond or the other is given the result is the same. The attachment is dissolved, and all proceedings touching the property and effects attached are vacated. The legislative intent seems perfectly clear, namely, to enable a defendant in an attachment suit to secure a dissolution of the attachment and convert the extraordinary suit by attachment into a simple and usual one by summons only. This intent is expressed in three ways, by providing, first, for a direct judgment that the attachment be dissolved; second, that all proceedings touching the property and effects attached be vacated; and, third, that the suit shall thereafter proceed as if instituted by summons only.

Defendant secured the advantage of the possession and use of the property attached pending the litigation by accepting the conditions which the law imposed of entering a general appearance to the cause, permitting the same to proceed as if instituted by summons only, and subjecting itself to the possibility of a general judgment in favor of plaintiff. Manifestly defendant cannot now be permitted to join issue upon and demand a trial of the grounds originally alleged for the attachment. That would violate the condition imposed by law that the case should proceed as if instituted by summons only, and would subject plaintiff to the consequences of defeat on an abandoned issue. All proceedings in relation to the attachment were superseded by the giving of the bond and securing a dissolution of the attachment by the defendant. The Supreme Court and Court of Appeals of Missouri have in effect so held. *Payne v. Snell*, 3 Mo. 409; *State, to Use, v. Fargo*, 151 Mo. 280, 52 S. W. 199; *Haber v. Klauberg*, 3 Mo. App. 342, and cases cited.

The *Fargo Case* relates to the dissolution of an attachment by the giving of a bond under the third subdivision of section 413, conditioned for the payment of the judgment which might ultimately be recovered; but, as all the incidents of such a dissolution are by statute made equally applicable to a dissolution by giving a forthcoming

bond, we think the doctrine of that case is clearly applicable to this. The only order or judgment permissible when an attachment is dissolved as a result of a hearing upon the plea in abatement is that the attachment "be dissolved." The futility of such a hearing is apparent, when a judgment of exactly that kind has already been rendered.

Some point is made that plaintiff took leave to amend his grounds for attachment after the attachment itself had been dissolved. This does not impress us seriously. It is an instance of prudence which the result below rendered commendable. That act of abundant precaution cannot operate to reinstate an issue once definitely and finally disposed of. The jurisdiction of the court over that issue had been exhausted. The foregoing conclusion renders consideration of the other errors assigned unnecessary. It results that the learned trial court erred in compelling the plaintiff to go to trial on the issue tendered by the plea in abatement. The only issue for trial was on the merits of the cause.

The judgment below dissolving the attachment as a result of the hearing on the plea in abatement is therefore reversed, and the cause remanded to the court below, with directions to take proper proceedings to enforce the payment of the judgment rendered on the merits.

MILBURN v. FEDERAL SUGAR REFINING CO. OF YONKERS.

(Circuit Court of Appeals, Second Circuit. May 5, 1908.)

(No. 233.)

SHIPPING—DELAY IN DISCHARGING—FAULT OF VESSEL.

Delay in discharging through default of the vessel does not entitle the charterer or consignee to damages, in the absence of a contract for delivery by a particular day, but simply extends the time within which the discharge may be made without liability of the charterer or consignee for demurrage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 436.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 155 Fed. 368.

Convers & Kirlin (Charles R. Hickox and Russell T. Mount, of counsel), for appellant.

E. A. Bigelow, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a libel for unpaid freight to the amount of \$1,000, against which the respondents allege a set-off amounting to \$951.27, paying the balance into court. The respondents are the holders of the bill of lading of the entire cargo of sugar laden aboard the steamship *Heathdene*. The charter party, dated May 23, 1905, contains the following clause:

"Thirteen weather working days are to be allowed the said merchants for loading the said steamer at loading places and waiting for orders at the ports of call, and the cargo to be taken out according to custom of the place at the port of discharge, always afloat. * * * If required by charterers, 15 days on demurrage over and above the said laying days are to be allowed at four pence sterling per net register ton per running day. Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay days not to count, and time used for shifting ports not to be counted in demurrage."

The bill of lading contains the following clause:

"* * * to discharge at a port as per charter party dated London, 23d May, 1905. * * * To be delivered in like good order and condition at the ordered port of discharge unto order or to order's assigns; he or they paying freight for the said goods and all conditions as per charter party above referred to."

We read the charter as fixing no lay days or demurrage for discharging; the only provision as to the discharge relating to the method, viz.:

"* * * The cargo to be taken out according to custom of the place at the port of discharge, always afloat."

It will make no difference whether we are right or wrong about this, because no testimony has been offered as to any customary rate of discharge in this port. A vessel, having brought a cargo to destination with no stipulation as to lay days or demurrage, performs her contract by discharging it in a safe place, if no one appears to claim it after a reasonable time. If a charterer or a consignee claims the cargo, the duty lies upon him to receive it within a reasonable time, and for any detention thereafter for any cause except the vessel's fault he must pay damages in the nature of demurrage. The obligation as to the time of discharge has always been treated as entirely on the charterer or consignee, probably because a vessel is always supposed to be anxious to deliver as soon as possible, so as to get a new freight. If the charterer or consignee receives the cargo in a reasonable time, he will be liable for nothing more than the original freight. If he exceeds that time, he will be liable for an extended freight in the form of damages in the nature of demurrage. The consequence of a delay in discharging due to the vessel's fault is simply to extend the time pro tanto within which the charterer or consignee may receive it, paying only the original freight.

In this case the court below has found the vessel did delay the discharge by failing to give the winches a sufficient supply of steam. As a consequence of this default the court charged her with the amount of \$846.27 demurrage paid by the consignee to another vessel waiting for the berth occupied by the *Heathdene*, and the sum of \$105, representing time of consignee's stevedores wasted by the slow discharge. These were in our opinion not the natural and proximate results of the vessel's delay in discharging; whereas the extension of the consignee's time to receive the cargo without liability to pay demurrage was. That obligations to receive the cargo, expressed or implied, are obligations of the charterer or consignee may be seen from *Carver on Carriage by Sea*, §§ 608, 615; *Egan v. Barclay Fibre*

Co. (D. C.) 61 Fed. 527; *Empire Transportation Co. v. P. & R. Coal Co.*, 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; *Williscroft v. Cargo* (D. C.) 123 Fed. 169.

If the contract, as is generally the case, fixes the lay days and demurrage, failure of the vessel to discharge promptly results in exactly the same consequence, viz., an extension of the lay days. Of course, if a vessel, having agreed to load or discharge a cargo on a day certain, fails to do so, the usual consequences of a breach of contract may be recovered. The question was discussed in *Petrie v. Heller* (D. C.) 35 Fed. 310.

The cases relied on by the court below are not cases of a vessel's delay in loading or discharging. In *The Nadia* the claim was not against the carrying vessel or her owners, but by the consignee of the cargo against a lighterman employed to receive it, through whose delay the consignee had to pay demurrage to the carrying vessel. *Welsh v. Andersen*, 7 Asp. Mar. Cas. 177, was an action at law to recover damages for breach of contract. The vessel, which was a general ship, had agreed to receive the plaintiff's consignment of cargo on a day fixed. Her failure to do so resulted in the plaintiff's having to pay demurrage to the railroad company for the cars in which the consignment was kept waiting. A verdict for plaintiff was sustained. *The Giulio* (D. C.) 34 Fed. 909, did not involve a delay due to the vessel in loading or discharging of cargo, but a delay in performing the voyage.

The decree is reversed, with costs.

UNION PAC. R. CO. v. BRADY.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1908.)

No. 2,635.

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—RAILROAD COUPLERS—EVIDENCE.

In an action for injuries to the foreman of a switching crew by his hand being crushed between the parts of an automatic coupler, evidence held insufficient to show that the coupler was defective.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

2. SAME—DUTY OF SERVANT—NONPERFORMANCE—EXCUSE.

Where plaintiff, the foreman of a switching crew, discovered that the automatic couplers on the ends of two cars sought to be coupled would not work by means of the lever on the side of one of the cars, it was plaintiff's duty to cross over and use the lever on the other car to operate the coupler, instead of attempting to do so by hand, and it was no excuse for his failure so to do that it was dangerous to cross between the cars to the other side of the track; the cars being stationary and the switch engine attached to those which were to be moved up to make the coupling being subject to his orders.

3. SAME—FELLOW SERVANTS.

The act of a member of a railroad switching crew in giving a signal to the engineer to push a coal car forward while plaintiff, the foreman of the crew, was in a place of danger between the cars endeavoring to ad-

just the automatic coupler, was negligence of plaintiff's fellow servant, for which no recovery could be had under the laws of Wyoming.

[Ed. Note.—For cases in point, see Cent. Dig. vol 34, Master and Servant, §§ 493-514.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

R. W. Blair and F. L. Schofield (N. H. Loomis and H. A. Scandrett, on the brief), for plaintiff in error.

H. J. West and Thomas F. Gatts (T. M. Bresnahan, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and CARLAND, District Judge.

HOOK, Circuit Judge. Thomas J. Brady, who will be referred to as the plaintiff, recovered a judgment against the Union Pacific Railroad Company for personal injuries sustained while in its service at Laramie, Wyo. He was the foreman of a switching crew, consisting of himself, two other switchmen, and an engineer and fireman of a switch engine. A west-bound freight train had come into the yards at Laramie, the engine and caboose were detached, and plaintiff and his crew were engaged in transferring additional cars from another track to that upon which the train lay, preparatory to coupling them to the train and completing it for its westward interstate journey. With the switch engine and an attached caboose they picked up two stock cars from the other track, pulled them to the switch, and kicked them down the track in the direction of the standing train. They then went back and got six or seven coal and flat cars, pulled out again to the switch, and then pushed them in towards the two stock cars, intending to make a coupling and afterwards add them to the train. When the engine with the last lot of cars pulled down to the switch, plaintiff did not follow it, but crossed over the tracks and stood at the end of the stock cars a minute or two, awaiting the approach of the others, so that he could assist in making the coupling. He noticed the knuckle of the automatic coupler on the end of the stock car where he stood was closed, and that the lift lever was on the opposite side of the car, across the track. He did not then attempt to raise the pin and open the knuckle. As the other cars approached, being pushed by the switch engine, a steel coal car was at the fore, and plaintiff noticed that the knuckle of its automatic coupler was open and that the lift lever was on the side of the car nearest to him. It was thought a coupling could be effected without opening the knuckle on the stock car, but when it was attempted the cars did not couple and the stock car bounded away. This was probably because the stock car was on a slight curve in the track and the couplers were not sufficiently in line. When this is the case the better practice is to open both knuckles. Stop and caution signals were then given the engineer, and when the cars came to a standstill there was a space between their ends of $5\frac{1}{2}$ or 6 feet, and the drawbars were $2\frac{1}{2}$ or 3 feet apart. The plaintiff thereupon went between the cars and endeavored to lift the lug pin and open the knuckle of the coupler of the stock car with his hands; but, finding it resisted his efforts, he stepped out, took hold

of the lift lever on the coal car, and, as he says, "jerked it twice, maybe three times," to reopen the knuckle on that car; it having closed in the previous impact. Not succeeding in this, he went between the cars again, and, while attempting to lift the lug pin and open the knuckle on the coal car with his hands, the switch engine pushed the car forward in response to a signal from one of plaintiff's associates, and his right hand and wrist were caught between the couplers and crushed. Shortly afterwards, not exceeding an hour, the coupling appliances on the two cars were examined. Two or three jerks of the lift lever on the stock car raised the pin and opened the knuckle. There was nothing whatever the matter with this appliance, excepting that it was new and worked a little hard. The lever on the coal car operated perfectly with the first effort. The coupling appliances on the two cars were of different makes, but were of standard kinds in general use, and were so constructed as to work together and couple automatically. The one on the stock car was used more generally in the East. The plaintiff at no time tried the lever on the stock car.

Plaintiff's case rests upon a supposed defective condition of the coupling appliance on the coal car amounting to a violation of Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and upon the sufficiency of his reasons for failing to use the lever of the stock car. The assertion that the coal-car appliance was defective was largely guesswork. It was after dark, and when plaintiff tried the lever on that car he judged by the sound that the chain connecting it with the lug pin was too long. He said: "The lift lever chain seemed too long. It held. * * * I think that the lift lever chain was too long." The chain struck against something, but what it was he could not tell. He "guessed" and "thought" it was the end of the car. It is true he said that after leaving the lever he went between the cars, and just before the accident caught hold of the chain with one hand; but the inspection made shortly afterwards showed the lever operated perfectly at the first trial, and the connection consisted of but a single link such as was commonly used in couplers of that description. To meet this it was suggested that a repair might have been made between the times of injury and inspection, but there was not the slightest proof of one; also that if the single link was there when he was at work it might have been cramped in a horizontal position. This latter, however, was a condition that was not infrequent, and one that ordinarily could be corrected by several sharp jerks of the lever. We are of opinion there was no substantial evidence of a defective condition of this appliance. But, if this were not so, it was plaintiff's duty to use the lever on the other car. He said he considered it dangerous to cross between the cars to the other side of the track, although no engine was connected with the stock car, and the switch engine was subject to his orders and could have been quickly directed to pull the coal car further away. Similar and equally insufficient excuses were given for not adopting other obvious ways to get to the lever on the stock car. In this particular the case falls within the doctrine of *Suttle v. Railroad*, 75 C. C. A. 470, 144 Fed. 668, *American Linseed Co. v. Heins*, 72 C. C. A. 533, 141

Fed. 45, *Gilbert v. Railway*, 63 C. C. A. 27, 128 Fed. 529, Id. (C. C.) 123 Fed. 832, and *Morris v. Railway*, 47 C. C. A. 661, 108 Fed. 747.

Plaintiff was 37 years of age, had 12 years' experience as a brakeman, switchman, and yardmaster, and was thoroughly familiar with that branch of railroad service. He admitted it was a very common occurrence for the effective operation of a coupling appliance to require several forcible jerks of the lever—as many as three or four. This is naturally so, and it does not imply a defect in the condition of the mechanism if it is of an approved pattern. Exposure to weather and rust will cause the best of them to work hardly at times, and the connecting link or links will occasionally become cramped. Such things are unavoidable, and it is the duty of him who works with such appliances to give them a fair and reasonable trial before going into a place where life and limb are in jeopardy; otherwise, the well-known tendency, born of familiarity with danger, to do a thing the easier rather than the safer way will frustrate the beneficent purposes of the act of Congress and deprive it of much of its potency.

But one other matter remains: The act of plaintiff's associate in giving the signal to the engineer to push the coal car forward while plaintiff was in a place of danger was the act of a fellow servant, for which no recovery can be had under the Wyoming law. The trial court should have directed a verdict for defendant, as was requested at the conclusion of the evidence.

The judgment is reversed, and the cause remanded for a new trial.

WASSERMAN v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1908.)

No. 2,160.

1. CONTEMPT—ABATEMENT—PROCEEDINGS FOR CIVIL CONTEMPT NOT ABATED BY DEATH.

The defendant in a suit in equity was adjudged to pay a fine, and to be committed until he paid it, for contempt of court in violating a preliminary injunction. He sued out a writ of error and died before a hearing here. *Held*, the proceedings for the contempt were civil, and not criminal, and did not abate by his death.

2. CONTEMPT—CIVIL AND CRIMINAL DEFINED.

Proceedings for contempt are of two classes—criminal or punitive, and civil, remedial, or coercive. The former are conducted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders. The latter are instituted to protect, preserve, and enforce the rights of private parties and to compel obedience of the orders, judgments and decrees of the courts made to enforce the rights and remedies to which the courts have decided that such parties are lawfully entitled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 1-5.]
(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

See 128 Fed. 770.

David Goldsmith, for plaintiff in error.

George F. McNulty and J. R. Van Slyke, for the United States.

Before SANBORN and HOOK, Circuit Judges.

SANBORN, Circuit Judge. In a suit in equity brought in the court below by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against Bennett Wasserman and others, to prevent alleged irreparable injury to the complainant's business and property, and to recover damages for injuries already inflicted, a temporary injunction was issued against the defendants, by which they were forbidden to buy, deal in, or sell any signed contract, nontransferable, reduced rate ticket thereafter issued by the railway company. Wasserman disobeyed this injunction, and upon an order to show cause why he should not be attached for contempt of process of the court a judgment was rendered that he was guilty of the contempt charged, and "that, as a punishment therefor, the said Bennett Wasserman be fined in the sum of \$500 and the costs of this proceeding, and that in default of the payment of said sums that he be confined in the common jail of the city of St. Louis until the fine and costs are paid, or until the further order of the court." He sued out a writ of error to reverse this judgment. After this writ was issued and before the case was submitted to this court for a hearing, he died. His death has been suggested, and the defendants in error insist that this proceeding has been abated by his death. They cite in support of this position *Herrington v. State of Georgia*, 53 Ga. 552, *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143, *State v. Martin*, 30 Or. 108, 110, 47 Pac. 196, *March v. State*, 5 Tex. App. 450, 456, and *State v. Ellvin*, 51 Kan. 784, 33 Pac. 547, but these cases are all criminal actions in which judgments were rendered in original criminal proceedings for violations of statutes. They are met here by the contention that this is a civil proceeding, and that for this reason it survived the death. In the case *In re Nevitt*, 117 Fed. 448, 458, 54 C. C. A. 622, 632, this court said:

"Proceedings for contempts are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect and enforce. *Thompson v. Railroad Co.*, 48 N. J. Eq. 105, 108, 21 Atl. 182; *Hendryx v. Fitzpatrick (C. C.)* 19 Fed. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652; *People v. Court of Oyer and Terminer*, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; *Phillips v. Welch*, 11 Nev. 187, 190; *State v. Knight*, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; *People v. McKane*, 78 Hun, 154, 160, 28 N. Y. Supp. 981; 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law, 68."

This statement of the law has been quoted with approval by the Supreme Court in *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. Ed. 997, and by the Supreme Court of Mis-

souri in *State v. Bland*, 189 Mo. 197, 214, 88 S. W. 28. The judgment challenged by the writ of error in this case is in reality an interlocutory order in a suit in equity. The petition for an attachment which instituted the proceeding for contempt was entitled in the equity suit, and was made by the complainant therein. The order to show cause, the return of the defendant thereto, the judgment for fine and imprisonment, the assignment of errors, and the petition for the writ of error are all entitled in the equity suit. The offense on account of which the fine was imposed consisted in the doing by the deceased of an act which the court below, for the benefit of the complainant, had ordered him not to do, and the judgment for the fine and for the imprisonment until it was paid was in the nature of an execution to compel him to comply with the original order to refrain from selling the tickets there described.

Even if the adjudication had been made in a criminal case, the court below could have issued an execution and have levied it upon the property of the defendant for the purpose of collecting the fine. Rev. St. § 1041 (U. S. Comp. St. 1901, p. 724). But the proceeding in this case was clearly civil, and not criminal, and the judgment for the punishment a mere interlocutory order in a suit in equity (*Worden v. Searls*, 121 U. S. 14, 25, 7 Sup. Ct. 814, 30 L. Ed. 853; *Heinze v. Butte & B. Consol. Min. Co.*, 129 Fed. 274, 63 C. C. A. 388, 389, 401), and the court below still retained jurisdiction to enforce the collection of the fine by execution, or other process or order. The suit in equity in which this order was made was not an action for injury to the person, but for injury actual and threatened to the property and business of the complainant, and it did not abate with the death of the defendant Wasserman. The interlocutory order in that suit for the payment of the fine and the commitment of the defendant who has died was collectible out of his estate and property, both before and after his death, and his representatives after his decease were therefore interested in prosecuting the writ of error and reversing the judgment if possible. Even if this had been a criminal proceeding, the executors and administrators of the estate would have been liable to its extent to the payment of this fine. Rev. St. § 3468 (U. S. Comp. St. 1901, p. 2314) 3 *Williams on Executors* (7th Ed.) 240. Inasmuch as the liability of the estate and property of Wasserman to the payment of this judgment continued after that property passed to the hands of his executors or administrators, and inasmuch as that judgment was rendered in a civil and not in a criminal proceeding for a contempt of court, the cause of action survived and the representatives of the estate of the deceased are entitled to prosecute the writ of error in this court to the same extent as was the deceased. Neither the writ of error nor the proceedings for the contempt were abated by the death of Wasserman.

ST. LOUIS STREET FLUSHING MACH. CO. et al. v. SANITARY STREET FLUSHING MACH. CO.*

(Circuit Court of Appeals, Eighth Circuit. April 6, 1908.)

No. 2,652.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not be granted in a patent case, without a showing that the patent in suit has been adjudged valid by a court of competent jurisdiction, or that its validity has been generally acquiesced in by the public or has been admitted by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 474-477.

Grounds for denial of preliminary injunction in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A bill to compel specific performance of a contract to assign a patent and to restrain the alleged violation of a license contract under a patent states no ground for relief under the patent laws, and a federal court is without jurisdiction to grant relief thereon, unless there is diversity of citizenship between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 832.

Jurisdiction of federal courts in suits relating to patent rights, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

3. ESTOPPEL—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.

The fact that one of the assignors of a patent subsequently became associated with others, and with them is charged with infringement of such patent, does not estop them to deny its validity, where the relations between the defendants are not shown.

4. INJUNCTION—PRELIMINARY INJUNCTION—SUFFICIENCY OF GROUNDS.

A preliminary injunction should not be granted, where the right alleged to be invaded or threatened is doubtful and uncertain on the showing made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 309.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In 1904 the Sanitary Street Flushing Machine Company exhibited its bill against the St. Louis Street Flushing Machine Company, William Ratican, Stephen J. Ratican, and James C. Wilson, to secure an injunction and accounting for an infringement of letters patent of the United States Nos. 736,134 and 736,135, granted to Thomas M. Murphy as inventor, and William Ratican as assignee of some interest, and by them assigned to complainant, for improvements in nozzles and street washers respectively. The prayer of the bill was for an injunction, and for the recovery of profits earned and to be earned by the use of the improvements, which the complainants allege the defendants intended to continue using. An amended bill was afterwards filed; but the averments of threatened and continuing infringement remained practically as in the original bill. In May, 1907, a supplemental bill was filed, wherein it was averred that Murphy and Ratican, before the patents were granted to them in the year 1901, made an agreement with complainant or its promoters to convey to it any inventions or patents relating to the cleaning, sprinkling, or flushing of streets which either of them might thereafter make or acquire; that defendant Ratican, acting in the name of the defendant corporation, which, it is averred, he largely owned and controlled, afterwards acquired United States patent No. 777,953 for adjustable flushing nozzles from the defendant Wilson, the patentee thereof; and that complainant was entitled in equity to a conveyance of that patent in accordance with the terms of the agreement of 1901. The supplemental bill also showed that in 1901 Ratican and Mur-

*Rehearing denied June 29, 1908.

phy solicited a license from the complainant to permit them to build within the United States nine certain machines embodying the invention of complainant's patents for exportation and use abroad; that complainant conformed to their request and gave them a verbal license as solicited, with the condition, however, that the machines should not be used or sold within the United States; that the machines were built, exported to London, and afterwards brought back to this country, and in violation of the condition of the license put into use here by the defendants. The prayer of the supplemental bill was that the defendants be required to assign and convey to complainant letters patent No. 777,053, and that a preliminary and ultimately a final injunction restraining defendants from selling or using the nine machines in the United States in violation of the license agreement be awarded to complainant. A motion for a preliminary injunction as prayed for accompanied the supplemental bill. The motion was supported by affidavits tending to show the license as pleaded, and was resisted by affidavits tending to show that no such license was ever given to or accepted by defendants. The trial court sustained the motion and awarded a preliminary injunction, restraining defendants until further order of the court from using or selling all or any of the nine machines in question. From this order the present appeal was prosecuted.

Henry W. Allen and James A. Carr (John D. Johnson, on the brief), for appellants.

James L. Hopkins (John M. Holmes and Alfred A. Eicks, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). Neither the original nor the amended bill warranted a preliminary injunction. They contained no showing that the patents charged to have been infringed had ever been admitted to be valid by the defendant, or held valid by any court of competent jurisdiction, or that their validity had been generally acquiesced in by the public. Without a showing of one or the other of these facts, no preliminary injunction ought to be granted in a patent case. Recognizing this rule, no attempt was made to secure an injunction on the strength of the showing made in the bill or amended bill. It must therefore be justified, if at all, on the showing made by the supplemental bill; and if the fact that defendants threatened to use or sell the machines in question in violation of the condition of the license did not justify the injunctive order it was improvidently made.

By sections 629 and 711 of the Revised Statutes (U. S. Comp. St. 1901, pp. 503, 577) the courts of the United States are given exclusive jurisdiction of all cases at law or in equity arising under the patent or copyright laws of the United States, irrespective of the citizenship of the parties to the action. To constitute such a suit a complaint or bill must disclose that some right, title, or interest under the patent laws of the United States is asserted, or that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws. *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 259, 18 Sup. Ct. 62, 42 L. Ed. 458. A suit not involving such a right, title, or interest may be litigated in the federal courts if the requisite diversity of citizenship exists, but otherwise not. Such diversity of citizenship not appearing in this case, the ground

for relief must rest on the statute exclusively, and unless, and only so far as, a right thereunder is asserted can any relief be granted in this case. As is well known, a suit for injunctive relief against the infringement of a patent, and incidentally for the recovery of damages arising therefrom, is one arising under the patent laws of the United States, and may be maintained in the courts of the United States; but it is firmly settled that, in the absence of diversity of citizenship of the parties, a suit on a private contract between the parties fixing and governing their rights to use a patented device, or a suit for the specific performance or rescission of a contract for the use or sale of a patent, is not maintainable in those courts.

In *Wilson v. Sanford*, 10 How. 99, 13 L. Ed. 344, and *Brown v. Shannon*, 20 How. 55, 15 L. Ed. 826, it was held that the owners of letters patent of the United States could not maintain a bill in the federal courts to enforce a contract for the use of a patent, or to set aside such a contract on the ground that defendant had not complied with its terms. In *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683, it was held that an action upon an agreement in writing fixing the terms on which a licensee might sell the device of a patent, wherein the licensee acknowledged the validity of the patent and promised to pay certain royalties, was not a case arising under the patent laws of the United States. In *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295, in a suit instituted to recover moneys alleged to be due the plaintiff under a contract whereby letters patent granted to him were transferred to defendant, it was held that the suit was not one arising under the laws of the United States. In *Pratt v. Paris Gaslight & Coke Co.*, supra, Mr. Justice Brown, speaking for the Supreme Court, said:

"We have repeatedly held that the federal courts have no right, irrespective of citizenship, to entertain suits for the amount of an agreed license, or royalty, or for the specific execution of a contract for the use of a patent, or other suits where a subsisting contract is shown governing the rights of the party in the use of an invention, and that such suits not only may, but must, be brought in the state courts."

In the absence of the assertion of a right arising under the patent laws, or of the requisite diversity of citizenship, the Circuit Court was without jurisdiction to grant the relief sought by the supplemental bill in either of its aspects, either to award specific performance of the agreement to assign patent No. 777,053 or to restrain the violation of the license contract. The facts disclosed by that bill may, if true, show an infringement of complainant's patents within the rule laid down in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728, relied on by complainant's counsel; but they constitute only cumulative averments of such infringement. The bill and amended bill both alleged infringements in the past and a purpose to continue the same in the future. The extent of the infringement, or the time when practiced, as particularized in the supplemental bill, does not aid the complainant, for the reason, already stated, that there had been no prerequisite adjudication or admission of the validity of its patents or other equivalent demonstration thereof.

The contention that defendants are estopped from questioning their validity because of Ratican's relation to them is untenable. Whatever effect his original partial interest in them or his personal conduct with respect to them might have upon his present interests, as to which we express no opinion, the rights of others are now involved in this case, and their relation to Ratican is not so clearly shown as to warrant making any orders affecting their rights on the assumption of their identity with him.

For another reason, also, the preliminary injunction ought not to have been granted. It is a fundamental principle that injunctions ought not to issue unless the right alleged to be invaded or threatened is clear. As said in *Truly v. Wanzer*, 5 How. 141, 12 L. Ed. 88:

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction."

The affidavits in support of and against the motion for injunction leave the existence of the verbal license relied on by complainant in grave doubt and uncertainty, too doubtful and uncertain, at least, to warrant interference with the status quo until the right can be deliberately ascertained and declared at final hearing.

The order awarding the preliminary injunction was improvidently made. It must therefore be reversed, and the cause remanded, with directions to deny the motion. It is so ordered.

DRAPER CO. v. AMERICAN LOOM CO. et al.

(Circuit Court of Appeals, First Circuit. April 8, 1908.)

No. 731.

1. PATENTS—INVENTION AND INFRINGEMENT—LOOMS.

The Rhodes patent, No. 454,791, for an improvement in looms, was not anticipated, and, while a narrow one, discloses invention; also *held* infringed.

2. SAME—SUIT FOR INFRINGEMENT—NATURE OF RELIEF.

Where a patent, at the time of a decree adjudging its infringement, has but a short time to run and is for a minor part of a machine, by reason whereof the defendant is liable, if enjoined, to suffer a loss out of proportion to the value of the transaction, the court may, in its discretion, instead of granting an injunction, permit the defendant as an alternative to compensate the complainant or to secure such compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 561-563.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

William K. Richardson (J. Lewis Stackpole, on the brief), for appellant.

William A. Jenner, for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill brought against the American Loom Company and one of its officers, which, so far as we are concerned, alleges infringement of the fifth claim of letters patent No. 454,791, issued to Alonzo E. Rhoades on June 23, 1891, on an application filed on February 11, 1890, for an improvement in looms of the class in which the shuttle-box is supplied with a shuttle while the lay is in rapid motion. The bill prays, as usual, an injunction and an account against both the American Loom Company and the officer referred to. The Circuit Court dismissed the bill, and the complainant appealed to us. So far as the officer of the respondent corporation is concerned, the case is not brought within the rule established by us in *National Cash Register Co. v. Leland*, 94 Fed. 502, 509, 37 C. C. A. 372, et seq. Therefore, as to him, the final decree will provide that the bill be dismissed; and, as he has been brought in as one against whom substantial relief is asked, he will recover his costs in the Circuit Court.

The claim in issue is as follows:

"Claim 5. The lay, a rocker having arms provided with a front plate, a7, and a spring and devices between it and the said rocker, to actuate the latter at the proper time to close the front plate at the front of the lay, substantially as described."

The preliminary facts were correctly stated by the learned judge of the Circuit Court as follows:

"The Rhoades patent is concerned with the front or 'front plate' of a shuttle-box. Its application is limited to that sort of shuttle-box which is replenished automatically with a fresh shuttle and a full bobbin when the thread of the spent bobbin is exhausted. At the proper time, and when all the machinery of the loom is in rapid motion, the front plate is gotten out of the way so as to admit the shuttle to the box. After the entry of the shuttle, the front plate is returned to its former place. To secure accuracy of movement in the shuttle, it must fit the box as closely as is consistent with movement across the warp from the box on one side of the loom to that on the other side. Hence there is left no appreciable space between the front plate and the shuttle after the box has been closed by the return of the front plate to its place. The claim of the Rhoades patent here in suit is concerned with the elevation and subsequent lowering of the front plate for the above-described purpose. The result is accomplished by a rocker, whose means of actuation need not be considered here."

We must, however, add to the above that, although the claim in issue does not in terms point out that the rocker and arms are to have a solid construction, so as to be practically a unit, the fair interpretation involves that fact.

The Circuit Court referred to certain alleged anticipations relied on by the respondent corporation, two English patents, and one United States patent, which, according to the views of the respondent corporation, either wholly anticipated claim 5, or so far narrowed it that the respondent corporation could not be held to have infringed. We will hereafter refer to each of these patents again, but, for the present,

we only speak of them generally as showing the state of the art in explanation of the nature of the complainant's invention. We think that two of the patents referred to show that the entire improvement covered by claim 5 was in substituting the solid construction of the rocker and arms which we have named in lieu of the prior constructions, which were somewhat more complicated, and which might fail to register so accurately. In view of the general state of the art since the use of iron and steel has become universal, a mere substitution of solid construction does not presumably involve invention. Nevertheless, in exactly the same art as that at bar—that is, the art of constructing power looms—which, as everyone knows, must move with rapidity and require great accuracy, we sustained in *Houghton v. Whitin Machine Works*, 153 Fed. 740, 83 C. C. A. 84, decided by us on February 12, 1907, a patent regarding the construction of a thread-guide support, where exactly and only the same kind of improvement as that at issue here was the subject-matter thereof. Moreover, in the case at bar, we have not only the persistency of the respondent corporation in availing itself of the complainant's improvement, but also a mass of alleged anticipatory patents introduced by it, both of which indicate the desirability of something better than the prior art. On the whole, while the invention is a narrow one, and, in the absence of the circumstances to which we have referred, might lack patentability, we are compelled to give the complainant the benefit which the issuing of its patent implies. We will add that it is urged on us that the complainant made no commercial use of the patented device; but, utility and patentability being otherwise established, we are not required to investigate the excuse given by the complainant for non-user.

In regard to the three patents referred to, all of which are discussed by the learned judge of the Circuit Court, we think the complainant is correct in its explanation as to two of them, namely, the patents to Mayne and Brooks, that in each the front plate slides vertically in guide-ways, so that the solid construction of the rocker and arms is absent from them, and the lack of it lays them out of the case. The third patent referred to, the British patent issued to one Bullough in 1866, is apparently relied on as approximating most nearly to the claim in suit. The Circuit Court thought that this patent was so loosely drawn that it was unable to find in it a disclosure sufficiently clear to anticipate. So far as the feature involved here is concerned, the Bullough patent does not seem to have been tested practically. Of course, where mechanical improvements have moved so fast as they have in the last half century, great caution is required in investigating alleged anticipations which date back nearly the whole of that period; and, so far as they did not go into use, so that there was no practical exhibition of them, it is often difficult to determine whether they disclosed such full, clear, and exact terms as are necessary to anticipate. The respondent corporation has called our attention to the fact that the file wrapper shows that the Rhoades application contained originally two claims which were rejected by the Patent Office on a reference to Bullough, which claims were as follows:

"1. The lay having a shuttle-box composed in part of a front plate and arms extended across the lay above the level of its raceway, substantially as described.

"2. The lay, a rocker mounted on the rear side of the lay, and having arms to which is secured the front plate of the shuttle-box, substantially as described."

This fact, however, assists the view taken by the learned judge of the Circuit Court. The application at that time contained claim 5, as against which no reference was made by the Patent Office to Bullough, so that that claim was allowed to stand from the beginning just as we find it now. The claims rejected were of the broadest character, and would cover every combination in which was found a front plate made solid with the arms. Such a combination was shown by Bullough, and, therefore the broad claims were rejected; but there is no evidence that the Patent Office found in Bullough a combination of the front plate and arm made solid in connection with the exact elements and for the exact purpose of the combination of elements in claim 5. Claim 5 is limited by its letter to closing the shuttle-box at the end of the lay where the new shuttle is introduced, while the Bullough device was limited to a shuttle-box at the end of the lay where the old shuttle is ejected, and was described by him as merely an alternative method. At the other end, Bullough's shuttle was inserted downward from the hopper on the top of the lay, so that there was no question of a movable front plate. The inventive element in the claim in suit is of a minimum quantity, but that minimum quantity embraces the difference between a shuttle-box which requires to be closed in a simple manner with accurate registration and a shuttle-box to be opened by any method practicable for opening it. On the whole, construing claim 5 as we construe it, and limiting the inventive element therein as we limit it, we are satisfied there is no anticipation in any of the patents which have been brought to our attention.

This leaves only the question of infringement. As to this the respondent corporation relies on the words in claim 5, "and devices between it and said rocker." It says that all it uses is a stud on the end of the rocker arm to which the spring is attached, and in connection with which the spring operates to pull down the arm at the right instant. That anything which connects the spring directly or indirectly with the arm for the purpose of operating it in any way constitutes devices, in either the common or the mechanical sense of the word, is too plain to question. Therefore the only issue here is whether what thus appears in claim 5 is limited to any special devices. The specification does exhibit special devices, which may or may not be better than the arrangement used by the respondent corporation. The words at the close of the claim, "substantially as described," might or might not incorporate into the claim those special devices. These words are sometimes used to limit a claim, and sometimes to enlarge its operation, but seldom to practically defeat what was the real invention of the patentee. In the present case we have shown that that invention, so far as we are concerned, has no relation to these intervening arrangements for operating the arm in connection with the spring, but is limited to the solid construction of the rocker and the arm. Ap-

plying the ordinary rules of interpretation, the particular devices described in the specification are not a necessary element in this claim, because they are specifically described in other claims in the same patent. Some of those other claims also omit certain elements which appear in the fifth claim, including even the spring. In other words, we find here, what we find in many patents, claims stated in different ways for the purpose of preventing evasion by infringers. Consequently, looking at the entire patent and all the claims, it is apparent that any method which enables the spring to properly operate the arm is within claim 5; and this the respondent has.

Therefore we are compelled to find that the complainant should have relief against the respondent corporation, and to remand the case to the Circuit Court to enable it to grant that relief. There is, however, apparent difficulty as to the nature of the relief to which the complainant is entitled under equitable rules. This patent expires on the 23d day of next June. While, probably, the complainant cannot materially suffer by the continuance of the use of the device of claim 5 for the few remaining months until the expiration of the patent, for us to compel the respondent corporation to reorganize its looms in any essential particulars, or even to stop them for the minimum period of time in which such reorganization could be effected, might impose a penalty in excess of the probable value of the invention covered by the claim in suit. What we have already said is sufficient to show that the invention carries only a minimum of what is patentable. In this connection we refer to the practical rules applied by the Circuit Court in the District of Maine in *Westinghouse Co. v. Burton Co.* (C. C.) 70 Fed. 619, decided on September 30, 1895, affirmed by the Circuit Court of Appeals in *Westinghouse Co. v. Burton Co.*, 77 Fed. 301, 23 C. C. A. 174, decided on October 9, 1896. We also refer to the authorities relied on in the opinion of the Circuit Court in that litigation. It is true that *Westinghouse Co. v. Burton Co.* related to a preliminary injunction, as well as did the cases cited. Nevertheless the underlying substantial rule applies here as well as there. Injustice is not to be accomplished by equity either on an interlocutory proceeding or a final one. The complainant may, perhaps, be fully compensated if it is made sure that it will receive whatever damages it may have sustained, if any, or a reasonable royalty, or the equivalent thereof, representing the value of the patented improvement. Therefore it may be that the Circuit Court should make an alternative provision, so that the respondent corporation might at its option be relieved from an injunction if it compensates the complainant for profits, damages, and royalty, or the equivalent thereof, so far as the complainant may be justly entitled to all or any of them, or if it satisfies the court that it will so compensate the complainant by giving security therefor or otherwise.

The judgment of the Circuit Court is reversed, and the case is remanded to that court for proceedings in accordance with our opinion passed down on the 8th day of April, 1908; and the appellant recovers its costs of appeal against the American Loom Company.

D'ARCY v. STAPLES & HANFORD CO.

(Circuit Court of Appeals, Sixth Circuit. May 19, 1908.)

No. 1,739.

1. PATENTS—EFFECT OF PRIOR ADJUDICATION—PERSONS AND MATTERS CONCLUDED.

A decree adjudging the validity and infringement of a patent in a suit defended by the manufacturer of the infringing device, who, although not a party to the record, had complete charge and control of the defense, is conclusive upon him, in a subsequent suit brought against him by the same complainant, as to all matters of fact and law necessarily litigated and determined, which include the validity of the claims involved and infringement by the particular device in suit; but such decree is not conclusive on the question of infringement by other devices which may fairly be differentiated from the one in suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 622–625.]

Operation and effect of decision in equitable suit for infringement, see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

2. JUDGMENT—CONSTRUCTION—REFERENCE TO OPINION.

Where a decree is general in its terms, an opinion filed by the court may be taken into consideration for the purpose of determining definitely what questions were presented and decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 967–970.]

3. PATENTS—CONSTRUCTION OF CLAIMS—SUBSEQUENT PATENT TO SAME PATENTEE.

A second patent applied for by and granted to a patentee for a device for the same purpose, but different in form from one shown in an earlier patent, may be taken into consideration in construing the earlier patent, as affording a presumption that it did not broadly cover other forms than the one described.

4. SAME—INVENTION.

There is no invention in making two parts of one thing or one part of two, when by such change no different result is attained.

[Ed. Note.—For cases in point see Cent. Dig. vol. 38, Patents, §§ 15–29.]

5. SAME—INFRINGEMENT—SPRING SUPPORTS.

The Staples patent, No. 474,536, for spring supports for chair seats, etc., is not for a pioneer invention, but, in view of the prior art, is limited to the particular structure shown and described. Claims 1 and 3 held valid and infringed as to one device made by defendant, upon a prior decision binding on the parties, but not infringed by a second device in suit.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

See 148 Fed. 19, 78 C. C. A. 493.

The appellee, who was plaintiff in the court below, filed this bill, complaining of the infringement by the appellant of rights secured by letters patent No. 474,536, issued May 10, 1892, to J. A. Staples, for the invention of an improvement in supports for chair-seat springs, which rights the plaintiff claims to have acquired by assignment from the patentee. Three claims were made in the patent, of which the first and third only are involved in the present controversy. The case came here in 1906, upon an appeal of the defendant from an order granting a preliminary injunction. This court, without expressing any opinion upon the merits, but finding there was no such abuse of the discretion of the court below as would justify any modification

of the order granting the injunction, affirmed it. *D'Arcy v. Staples & Hanford Co.*, 148 Fed. 19, 78 C. C. A. 493. The report erroneously gives the names of the judges of the First Circuit as the judges sitting, instead of naming the judges of the Sixth Circuit, as it should have done. Thereupon further proceedings were taken in the court below, and at the final hearing upon pleadings and proofs a decree was entered sustaining the first and third claims of the patent, and declaring the infringement thereof by certain of the structures made and sold by the defendant, and noninfringement by others which are specified. The defendant has appealed from that decree. The plaintiff has not appealed.

F. L. Chappell, for appellant.

F. P. Warfield, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the nature and history of the case, delivered the opinion of the court.

It is alleged in the bill of complaint that prior to the commencement of this suit the complainant had filed a bill in equity in the Circuit Court of the United States for the District of Massachusetts against one Charles H. Lord, a citizen of that state, charging him with infringement of their said patent by the use and sale of spring supports manufactured and sold to him by D'Arcy, the defendant in the present suit, and that the constructions now complained of "are identical in all essential features with those in controversy in the said suit above mentioned against Charles H. Lord." It is further alleged that the suit was proceeded with and was brought to hearing upon pleadings and proofs; that thereupon the court rendered its opinion, sustaining the validity of the first and third claims of the patent, and finding the infringement thereof by the defendant, Lord; and that the court entered a decree in accordance with its said opinion. The bill then proceeds as follows:

"Your orator further avers that thereafter the said defendant, Charles H. Lord, who was defended in all respects by the defendant herein, Frank P. D'Arcy, who had assumed entire control of the said suit, filed a petition for a rehearing, which said petition, after due consideration thereof by the court, was denied."

The answer of the defendant admits the commencement of the suit in Massachusetts and the prosecution thereof to a final decree as alleged in the bill, and further, admits that one of the structures here in controversy is essentially the same as the one held to be an infringement in the former case, but avers "that the other structures here in controversy are essentially different from the structure there held to be an infringement." The answer makes no response to the allegations of the bill touching the participation of D'Arcy in the defense of the Lord suit.

It is urged by the complainant, now appellee, that D'Arcy, by having taken up the defense of his vendee, Lord, and conducted it as if it were his own, is estopped by the decree. This is the mainstay of the appellee's position in argument on this appeal. If this position depended upon the allegations of the bill, it would be difficult to support it. The bill does not allege, at least with any sufficient certainty, that

D'Arcy was given control of the defense at the beginning, when he could have employed his counsel, shaped the answer, and conducted the examination of the witnesses and the production of other proof, so as to fully exhibit the defendant's case, and, incidentally, his own. But in the course of taking the testimony in this case before the examiner the defendant's counsel made the following admission, which was taken down:

"Defendant admits by his counsel that Frank P. D'Arcy, defendant herein, took charge of the defense in the suit of Staples & Hanford Company v. Charles H. Lord, in the Circuit Court of the United States for the District of Massachusetts, and defrayed the expense thereof, but that said Frank P. D'Arcy made no move to become a party to the said suit, was never asked to become a party by the complainant or any one else, and did nothing more than to protect the interests of said defendant, Charles H. Lord, and hold him harmless as to any decree that might be or was entered against him."

And Lord himself testified:

"That after the bill was filed in that suit he (Lord) had nothing whatever to do with the conduct thereof, but the entire case was turned over to the D'Arcy Spring Company, which is the business name of the defendant D'Arcy, and that said D'Arcy had entire charge of the defense."

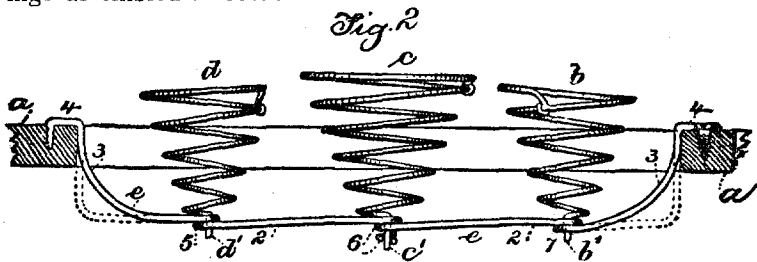
Lord's testimony further shows that:

"He did this in view of correspondence between D'Arcy and Lord and D'Arcy and Nelson, Lord's attorney, to the effect that D'Arcy would take charge of the suit against Lord, providing he should have 'complete control of the litigation.'"

The foregoing admission of counsel and the testimony of Lord were put into the case without any objection founded upon the pleadings. The allegations of the bill were defective in this regard. Nevertheless, it is not the case of an entire want of pleading, and there is some show of an attempt to plead that D'Arcy undertook and carried on the defense for Lord. In these circumstances we think it cannot be doubted that he is concluded by the decree in respect to all questions of law or fact which were necessarily litigated and determined in that suit. They are matters finally adjudged as between the parties to the present suit. *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528; *Penfield v. Potts & Co.*, 126 Fed. 475, 480, 61 C. C. A. 371.

We are next to inquire what questions were definitely settled in the former adjudication, and upon which the estoppel rests. The principles by which we are to be guided are clearly stated and defined by numerous decisions of the Supreme Court, from which we might select for a beginning the cases of *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, and *Russel v. Place*, 94 U. S. 606, 24 L. Ed. 214. Before referring to these and other cases we should premise that the infringement here complained of is another infringement than that which constituted the cause of action in the Lord Case, and the estoppel is not the same as that which arises where the identical cause of action is sought to be relitigated. The questions to which the estoppel relates are questions which were incident to and involved in the former suit. This distinction is clearly marked in the opinion of the court in *Cromwell v. Sac County*, *supra*. It is desirable, also, to state certain facts concerning the former suit, in order to ascertain the application of

the rules of law which govern the subject. The patent was for a support for springs in upholstery, such as chairs, sofas, bed bottoms, and the like. The spring support proposed by the patent, as shown in the drawings, comprised two forms, each consisting of a single wire, of sufficient strength to uphold the springs, and extending from the top of the frame of the chair, etc., on one side, down and under the bottom of the springs, and then up to the top of the frame on the opposite side. Along the nearly horizontal portion of this wire, in the first form shown, horizontal coils were formed of the wire at proper distances apart to receive the straight stem of a wire spring in the form of an inverted cone. This was the adaptation for supporting the spring. Fig. 2 of the patent illustrates this form of support and springs assembled thereon.



2, 2, and 3, 3, is the spring support which is the subject of the patent. *b'*, *c'*, and *d'* are the stems of the springs going down through the coil of the supporting wire. *c'* shows underneath a like coil in a cross supporting wire, in cases where a cross-wire is used. The dotted lines below at the right and left hand represent a conformation of the spring support to adapt it to different widths of bed bottoms. In another form of spring support the horizontal part is shown in vertical "corrugations," as they are called; that is, in short, abrupt bends, in which a hook formed of the stem of the spring turned upward, then outward, and then downward, rests. This latter corrugated form of the support is the subject of the second claim of the patent and is not here involved, except as it may aid in interpreting the first and third claims. It may be noted here that this scheme of a spring support contemplates a single wire centrally supporting the spring at its apex, and not two parallel supports for the same spring, though in the second form, where an hour glass form of spring may be used, the outer coils of the spring may be rested in the corrugations of the spring support. In the Lord Case the structure which was held to offend consisted of a wire spring support, otherwise like that of the patent, but at the connection with the spring the wire was bent upward in the form of a loop, and this loop was bent in the form of a hook over the outer coil of an hour glass spring. When the springs and their supports were assembled, these hooks, going over the wires, would hold the springs in their places. But the hooks were not closed over the coils of the springs, and it was therefore easily possible to engage and disengage the entire structure by mere manipulation. So the parts might be shipped to the retailer in packages put up more compactly, in the "knock-down" as it is called, and be by him assembled in the

proper relations for the ultimate purchaser, thus saving considerable expense in the cost of transportation.

After the decree was entered the complainant sought to reopen it and allow it (the complainant) to prove another infringement by the use and sale by defendant of another spring support which did not contain a bend in the wire, but was connected with the springs by independent wire fastenings. The court refused to reopen the case, holding at once that this was not an infringement. In the present case one of the alleged infringing spring supports is identical with that held to infringe in the Lord Case. The pleadings and decree in the Lord Case were general, declaring simply that the defendant had infringed. There is nothing, therefore, in them which indicates with precision what kind of a spring support was held to infringe. But the Circuit Court filed an opinion, and this opinion was adopted as its own by the Circuit Court of Appeals on appeal to that court. 148 Fed. 16, 78 C. C. A. 167. And we think that we may, and should, refer to the opinion to definitely ascertain what questions were presented to the court and decided by the decree. *Stearns v. Lawrence*, 83 Fed. 738, 28 C. C. A. 66; *Corcoran v. Canal Co.*, 94 U. S. 741, 24 L. Ed. 190; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 690, 15 Sup. Ct. 733, 39 L. Ed. 859. From that we learn that a certain specific structure was held to infringe, and no other. That structure is identified as being one of the structures alleged to infringe in the present case. Upon these facts we think the court below rightly held that the defendant was precluded by the former decree from denying the validity of the patent, and was also precluded from denying that the use and sale of the particular spring support involved in the adjudication was an infringement of the patent in suit.

But the court below in the present case went on to hold and decree that another form of spring supports used by the defendant was also an infringement and that certain others were not. And the appellee here contends that this one of the other forms was rightly held to be an infringement by force of the former decree. We say "this one," because it was the only other form which the complainant assailed, and it complains that the others were pressed into the case by the defendant in the shape of structures patented to the defendant by later patents. As the complainant was entitled to dominate the litigation so far as its own case was concerned, we think it might justly complain of any attempt to make an issue of other matters than those which the complainant had put in issue by its proof. It may be, however, that the defendant might introduce his later patents for the benefit of the presumption arising from the grant of them that these additional forms were not regarded in the Patent Office as covered by the former patent to Staples. This might depend upon the question whether they were patents for original inventions, or mere improvements on others. The court below, however, seems to have regarded all the defendant's spring supports as before it for direct adjudication. But the complainant did not appeal. This limits our review to the one which was the subject of the controversy in the Lord Case, and the other form of spring support which the complainant assails as an infringement. And to this latter form we shall now direct our attention.

It is contended by the appellee that the form we now purpose to consider is plainly an equivalent to, if not the same thing as, the spring support which was held to infringe in the former suit. To lay the foundation for this contention it is urged, and we are warned in the brief to observe, that the Staples invention is a pioneer in this art, and dominates all similar forms of spring supports, of which this of defendant's is one, and that the effect of giving this character to the spring support is to broaden the estoppel of the former decree. *Prima facie* we should hardly expect this claim to be well founded, in view of the fact that, as appears, more than 150 patents have been granted in this country for chair, sofa, and bed bottoms composed of wire springs and various forms of supports. And when we come to examine such of them as are presented by this record, we find that the art was so full of such structures as to utterly preclude the possibility of attributing to the Staples invention the broad character claimed for it. At most, and so much we are bound by the decree in the Lord Case to concede to it, it stands for the particular forms of spring supports which are shown in the description of his invention in the specifications, illustrated by the drawings of the patent. *Duff v. Sterling Pump Co.*, 107 U. S. 636, 639, 2 Sup. Ct. 487, 27 L. Ed. 517. The claims must be restricted to the particular spring support described, as, if construed more broadly, they would be void because anticipated. The court in the Massachusetts case expressed a doubt of the presence of invention, in which we share. With regard to the scope of the estoppel of the former decree, we think it extends no further than to establish that the particular form of spring support which was the subject of the controversy is an infringement of the complainant's patent. It cannot be extended to other forms by inference or argument, as, for instance, that another form should be regarded as an equivalent, for at once the question arises for debate whether it is so. We do not mean to say that the burden of an estoppel may be escaped by pointing to wholly unimportant differences, as of the color of things, minute variations of form, or other characteristics, which nevertheless leave no question of identity. It is axiomatic that an estoppel must be certain, and "it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment." *De Sollar v. Hanscome*, 158 U. S. 216, 221, 15 Sup. Ct. 816, 818, 39 L. Ed. 956. It was not necessary to determine in the former suit whether this form of support was an infringement. In fact, no issue was made upon it or decided.

The defendant's spring support, with which we are now dealing, though not in other respects materially differing from that which was held in the Lord Case to infringe, contains a bend in the wire which connects with the spring, not by an open hook, but by a rigid engagement with a coil of the spring, which prevents freedom of action between them, and also prevents disengagement by mere manipulation, and requires a mechanical change of form before the spring and its support can be disengaged. This might be thought to be a small matter of difference from the form having an open hook in the spring support. But the whole field of the art, as shown by the numerous prior patents, was filled with trifling differences, and the advance

made by the Staples invention was not greater than the difference between this spring support of the defendant and his own. What is apparently a matter of small difference proves to be of much importance in the organization of the springs and their supports. The history of the art, shown to some extent later on, indicates that inventors and manufacturers esteemed it a great advantage to secure the spring at its base in a rigid upright position, for thereby the necessity of cross-wires in the upper part of the spring was obviated either wholly or in large part. When cross-wires are depended upon for staying the springs, they are much subject to derangement and breakage from the strains put upon them in varying directions when in use. So small a difference in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, as the turning of a link from an upright to a horizontal and partly suspended position was held to give validity to a patent because of the advantage thereby secured. And see a case relating to bed bottoms in *Simmons Mfg. Co. v. Southern Spring Bed Co.*, 140 Fed. 606, 72 C. C. A. 174, decided by the Sixth Circuit Court of Appeals. We have some difficulty in finding how the court reached the conclusion in the Lord Case that a spring support engaging by a hook with a coil of the spring was the equivalent of the device of the Staples patent, and are led to suppose that the progress which had been made in the art at the date of this invention was not so fully disclosed by the evidence in that case as it is by the proof in this. This is not said, however, with any purpose to derogate from the binding force of the judgment there rendered. But, giving due effect to that decision, we do not think it extends to a device which can be differentiated from the spring support held to infringe in that case. Assuming this to be so, we proceed to state our views upon the question whether this other form of spring support which the appellee complains of should be held to be an infringement. As already intimated, we think it clear that the appellee's patent can only be sustained for the particular forms of spring supports therein described, and that the claims must be narrowed accordingly in order to save them.

There was nothing new in a spring support suspended in the frame of chairs, sofas, beds, or other like structures, nor in making it of wire instead of other material, nor in the mode of its attachment to the top of the frame, nor in making bends in the wire for securing and supporting the springs at the properly spaced places, and thereby preventing them from moving laterally on their supports. Staples in his application gave credit to the former art to the extent of saying that it had been common to use crossed bands of webbing nailed to the frame of the seat for the purpose of supporting the springs, and also to use bands of metal secured to the seat frame for the same purpose. These forms of spring supports he gives reasons for discrediting. But he stops there, and thereupon proceeds to describe his own invention as of a spring support made of wire suspended in the frame, having a horizontal portion under the springs and having the ends secured upon the top of the frame by turning the end at a right angle, drawing it to a point, and driving it into the frame, or making an eye at the end of the wire and driving in a nail or screw. To adapt the wire to receive the springs he made coils in it, or corrugated it, as already ex-

plained. In the form covered by claims 1 and 3, here involved, it is obvious that there is nothing to prevent the springs from sagging or tipping over in any direction, for he only has the one wire for a row of springs. Other means must be employed to maintain the upright position of the springs, as by cross-wires or cords, which would have to bear the stress and strain of the use of the bed, sofa, or chair, etc. Perceiving this defect pending his application for the patent, he filed another application for a patent for a spring support in which he used intersecting or crossing corrugated wires meshing at the crossings, so that the upper bends in one should lie in the lower bends of the other. By turning the lower end of an inverted conical spring under the corrugations of one wire and over those in the other, the spring became fixed in a rigid, upright position. He gives in stating his object in making this invention, that in other forms, some having two parallel wires, and some one, the springs were liable to displacement by turning sidewise or rotating upon the supporting wires; and a patent was granted to him on that application. We refer to this patent for two purposes: First, to show that Staples did not then conceive that his other application would cover all forms of spring supports suspended in a frame and having bends in the wire adapted to secure the springs; and, second, because in this he confesses his familiarity with wire supports, both in the forms of a single wire, and of two parallel wires; and, third, because the granting of this patent affords a presumption that the patent in suit did not cover other forms of spring supports having bends in the wire than the one described in this, his former patent. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121.

In making a statement of several previous forms of supports for springs in similar structures we shall pass by old forms of band webbing and flat strips of metal attached to the frame and suspended therein, noting merely that in a patent to Ingersoll, granted in 1870 for a chair bottom, there is shown a metallic strip suspended in the frame, having the ends attached to the top of the frame and supporting an inverted cone-shaped spring "centering in and resting at its lower end on the metal strip." This was the only means for supporting the spring in the chair bottom.

A patent granted to Smith in 1882 for a bed bottom shows the spring supports, called "ties," made of wire, attached at each end of the frame, and loops or bends in the wire, called "hooks," at fixed distances apart, and adapted to receive the coil of the spring at the end thereof, and, bending over it, secure it in its place. The patentee says these cross-ties are "crimped to form loops * * * which are made to engage with the springs by passing the loops partly around the upper coils, b, of the springs," and further says that "this system of ties and hooks is used at the top and at the bottom of the bed bottom." The ties form the only support for the springs, and the engagement of the spring support with the coil of the spring holds the spring from slipping upon the wire.

In a patent granted to Purefoy in 1883 two parallel spring supports run under each row of the springs from end to end of the bed bottom. They have vertical loops to receive the lower coil of the

spring, but, instead of being bent over it, are secured thereto by passing a short piece of wire under the loops and over the coil of the spring. These base pieces, says the patentee, "may be made of wood or metal in any suitable form; but it is deemed most advantageous to construct them of wire, and such construction itself forms part of the invention." And he says that his base pieces may be made integral with the springs, a form which the defendant employs by rigidly attaching them together. In this instance the spring supports did not carry the weight of the bed bottoms, as in some earlier structures, but rested upon slats extending underneath.

In figure 3 of a patent issued to Platt in 1884 is shown a bed bottom in which the apex of the spring is straightened out into a stem, precisely as in the figure of the Staples patent above shown. This stem is carried down into a hole in a wooden slat, which is attached at its ends to the frame and forms the spring support. The association of the spring and its support is precisely the same as that shown in the Staples patent in suit, only that the coil in the one provides the hole for the stem of the spring which is provided in the wooden support of the other.

A patent to Heller granted in 1885 shows a similar mode of supporting the springs. The apex of the spring is formed into a stem, and this is driven down into a hole in the spring support, which is here also of wood. Heller reinforced this construction by cross-links or rods tying the springs together at their lower coil, and extending from one side to the other of the frame, thus securing the springs in an upright position. Fig. 3 of this patent shows the ends of these cross-rods bent down and driven into the frame, and, in another figure, secured by a staple on the frame; and he explains how all the parts can be readily folded and compacted for storage or transportation.

In a patent to Mellon of December 1, 1885, the spring supports are of wire, extending from side to side or end to end of the frame, and secured thereto by coiling the ends around the frame. Bends or loops are formed in the wire at the place where the springs are to be set on, and these bends are carried over the lower coil of the spring and secured there by a stem extending laterally from an adjacent spring. The stem passes over the loop and under the coil of the spring. It is obvious that this engagement securely holds the spring from slipping on the wires. It is not liable to displacement in use; but the patentee says that the parts may be readily disengaged by forcing the joint inwardly, so that the stem of the adjacent coil will be withdrawn from the bend in the supporting wire. This is a self-supporting bed bottom, as they are in all of the patents we are noting, except where we specially note that they rest on another support, and hangs upon the frame. The spring support of this patent fills all the requirements of the first and third claims of the Staples patent, except that in the third claim the specific mode of attachment to the frame is by driving down into the frame a bent portion of the end of the wire, and bending the wires out or in to a different angle, and so making them longer or shorter to accommodate the differing widths of beds. There could be no invention in either of these provisions. The mode of attachment to the frame was no problem for even the commonest mechanic, and the

various modes, whether by a nail or screw put through an eye of the rod, which was one of his own forms, or by making the nail on the end of the rod, as in his other form, were old and common equivalents. There is no invention in making two parts of one thing, or one of two, when by such change no different result is attained. *Bundy Mfg. Co. v. Detroit Time Reg. Co.*, 94 Fed. 524, 36 C. C. A. 375; *Eames v. Worcester Pol. Institute*, 127 Fed. 67, 73, 60 C. C. A. 37; *Standard Caster & Wheel Co. v. Caster Socket Co.*, 113 Fed. 162, 51 C. C. A. 109; *General Electric Co. v. Yost Electric Co.*, 139 Fed. 568, 71 C. C. A. 552; *Howard v. Detroit Stove Works*, 150 U. S. 164, 170, 14 Sup. Ct. 68, 37 L. Ed. 1039.

This particular form was used in the Platt patent for securing the ends of the cross-rods to the top of the frame. These cross-rods held the upper ends of the springs in place; but they also served in part to carry the weight of the bed and of the user. And the patent to Heller, Fig. 3, shows the ends of the cross-rods "bent to form a point which is driven into the slat." This "slat" is a cleat secured to the inner side of the bed frame or rail. And so of the accommodating the length of the spring supports to the width of the bed. It was a mere question of construction in every bed bottom suspended in the frame, of which there were many. And it would be perfectly obvious that a wire could be made shorter or longer by bending or straightening it.

Another patent to Mellon, No. 331,523, granted December 1, 1885, shows wire spring supports secured to the ends of the frame and having bends in the wire to engage the spring by bending the loop or bend over the lower coil of the spring, which prevented the spring from slipping on the wire and held the spring upright in its place. Like wire spring supports bent to receive the springs were used in two other patents issued to the same patentee on December 8, 1885, respectively.

A patent to Ames in 1886 shows wire "suspension supports upon which the vertical springs are seated." These wire supports are attached at the end to the upper side of the frame of the bed. How they are to be attached is left to the builder's preference among such attachments.

A patent to Huber in 1888 shows a spring support suspended inside the frame. It consists of a metal strip "bent upward at an angle near either end outside the outer springs to form inclined hangers, and at their extreme outer ends outward and downward to form hooks adapted to engage the upper edges of the respective side bars."

A patent to Leggett, granted in 1890, shows spring supports consisting of "stout or thick wires" attached to the frame at their outer ends and having vertical bends in the wire at the seat of the springs, which prevent the springs from moving on their supports. The supporting wires are crossed and engage the lower coil of the spring.

In a patent to Bone in 1890 is shown a wire spring support attached to the frame by a hook at either end and having bends or loops in the wire to engage the lower coil of the spring by being bent down over it and thus "prevent the tie rod (as the spring support is called) from slipping on said coil and hold the spring in its proper position."

A patent to Rose, applied for in July, 1891, and issued December 31,

1891, also shows wire supports attached to the frame and having "vertical shoulders or offsets around which the end coil of the springs are seated and secured."

We have given this somewhat tedious description of some of the former patents to verify the statement that there was no new feature in the first and third claims of the Staples invention, except it be in making a complete coil in the spring support adapted to receive the stem on the apex of the spring. All else was old and common. The patentability of Staples' invention seems to us to rest on fragile grounds, when we come to impose the necessary limitations upon it. The characteristic part of the defendant's spring support, which is supposed to be a reproduction of that of the plaintiff, is found in many specimens of the earlier art, except that the defendant hammers down the bend in the spring support upon the coil of the wire to an extent that it forms a rigid attachment not detachable by mere manipulation.

It is urged that the Staples device has gone into extensive use and has revolutionized the business, and the proof shows that the early forms of spring supports of webbing or flat strips of metal have been discarded. But we are convinced that this is not because of the utility of the limited invention found in the Staples patent, but has come about from the advantages of modern forms of construction, which made use of wire for supports and formed bends in them for locking the foot of the spring upon them, an advantage which could not be attained by the use of webbing, or as well by flat metallic strips.

The decree of the court below will be affirmed, in so far as it declares the first and third claims of the complainant's patent No. 474,536 to be valid, and in so far as it declares that the making, using, or selling of the spring support, styled therein as "Complainant's Exhibit, Defendant's Model Seat Spring," is an infringement thereof, and also in so far as it awards to complainant damages and profits arising from that infringement, and directs the ascertainment thereof, and enjoins further infringement of that character. The said decree will be reversed in so far as it declares the manufacture, sale, or use of the spring support styled "Defendant's Exhibit No. 7B, Sample of Spring Manufactured by D'Arcy No. 5B," to be an infringement, and awards damages and profits and an injunction thereon. The costs of the appeal will be divided.

WILLCOX & GIBBS SEWING MACH. CO. v. INDUSTRIAL MFG. CO. et al.

(Circuit Court, D. New Jersey. May 28, 1908.)

PATENTS—INFRINGEMENT—SEWING MACHINE.

The Willcox & Borton patent, No. 472,094, for improvements in sewing machines, claim 1, construed in the light of the specification and drawings as required by its closing words, "substantially as described," has as one element of the combination therein claimed a single-implement, double-jawed, looper, and is not infringed by a machine having a two-implement looper; the two parts being separately operated.

In Equity. On final hearing.

Howson & Howson, for complainant.
Briesen & Knauth, for defendants.

LANNING, District Judge. By its bill, the complainant alleges that the defendants are infringing patents Nos. 472,094 and 472,095, both for new and useful improvements in sewing machines, and both granted April 5, 1892, to the complainant as assignee of Charles H. Willcox and Stockton Borton. It is alleged that the inventions described in the two patents are capable of conjoint use in one and the same machine, that the complainant has so used them, and that the defendants are making and selling sewing machines each having and containing conjointly the improvements described in the two patents. At the close of the complainant's principal proofs, it appeared that infringement of claims 1, 9, and 14 of patent No. 472,094, and of claims 11 and 17 of patent No. 472,095, was insisted upon. After the defendant's main proofs had been taken, and the complainant had taken a part of its rebuttal proofs, the complainant's counsel announced that, as he was then advised, he would rely only on claim 1 of patent No. 472,094. That is the only claim now relied on. The defendants insist that the proofs fail to show infringement.

The claim relied on is as follows:

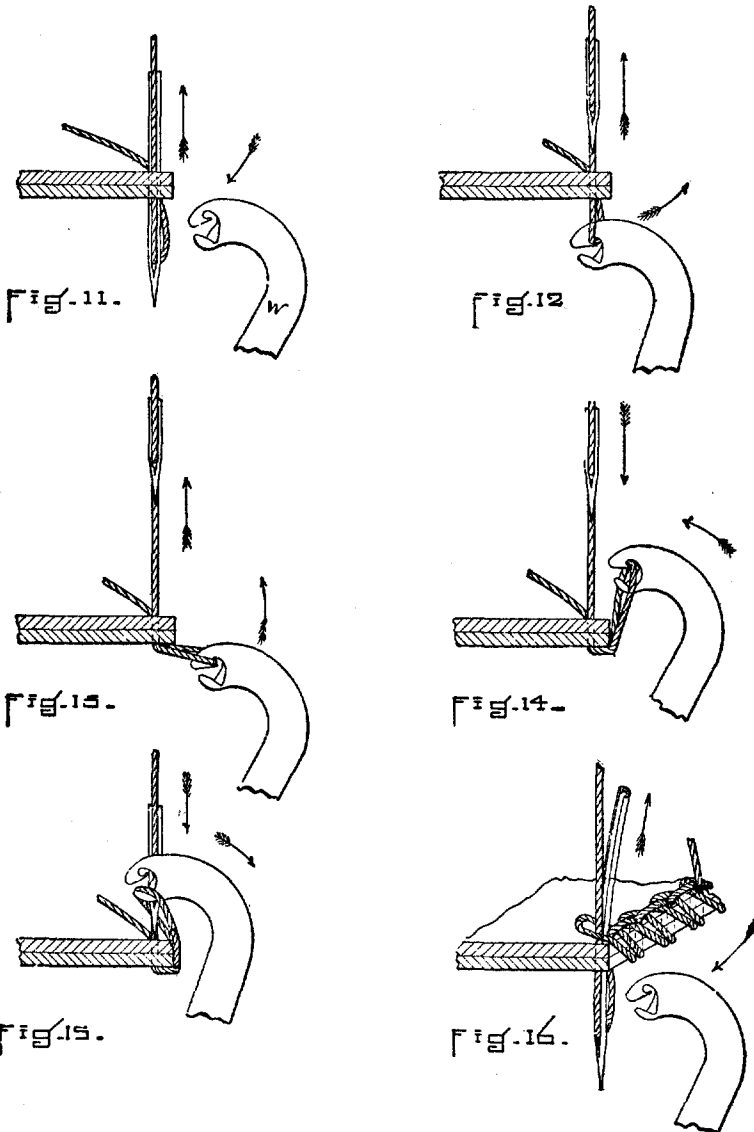
"The combination, with the needle, the looper, the feed mechanism, and the trimming mechanism, of the main shaft extending sidewise across the machine beneath the bed-plate, eccentrics carried by said shaft for operating the trimmer, needle, looper and feed, and the needle-carrying and shear-carrying arms or levers extending in directions from the rear to the front of the machine, substantially as described."

The contest hinges on the nature of the looper used by the defendants and the nature of the looper covered by claim 1 of the patent in suit. The looper particularly described in the complainant's patent is a single-implement looper. The specification of the complainant's patent, in referring to the movement of the needle and the looper, says:

"The novel and important feature of this part of the invention consists in the relative arrangement of the needle and the double-jawed looper, so that the line of the needle's motion is oblique to the plane in which the looper moves. In the practical embodiment of this principle it is immaterial which of these devices is made to move obliquely with reference to the plane of the cloth-plate, and any arrangement in which a double-jawed looper having its movement all in one plane co-operates with a needle so moving with reference thereto that it lies on one side of the looper when both are above the cloth and on the other when both are beneath the cloth would be within the invention."

While the application for the patent was pending in the Patent Office the paragraph last above quoted, as it then stood, was objected to on the ground that the statement of the invention therein contained was too broad in view of the state of the art. The applicants thereupon amended the paragraph by inserting the word "double-jawed" where it now appears for the second time in the paragraph.

Figures 11 to 16 of the patent, which are here reproduced, show the various positions of the looper.



The specification of the patent also says:

"The looper must have two jaws, the upper one to seize the loop below the cloth and the other and lower one to distend the loop and hold it distended above the cloth, so that the needle may pass through the loop. The loop releases itself from the upper jaw and falls on the lower one just after the work has passed the position shown in Fig. 14. * * * The looper must move inward below the cloth and seize a loop, then outward after it has seized

a loop, next upward above the cloth, and, finally, inward to hold the loop, so that it may be entered by the needle, and it must return again in reverse motion."

This language of the specification clearly describes, and the figures illustrate, the movements of the needle and the single-implement looper in the process of forming a stitch. The specific form of looper described is a single-implement, and not a double-implement, one. Moreover, it is declared that the looper "must have" two jaws, and that it "must move inward below the cloth and seize a loop, then outward after it has seized a loop, next upward above the cloth, and, finally, inward to hold the loop, so that it may be entered by the needle," and that it "must return again in reverse motion." Now, the defendant's looper is not a "double-jawed," single-implement looper. It does not have "its movement all in one plane." It does not operate as the complainant's single-implement looper does. It is a two-implement looper. The two implements are separately operated. Mr. Livermore, one of the complainant's experts, admits that the motion of the defendant's looper is not all in one plane; that it does not have two jaws, the upper one to seize the loop below the cloth and the other and lower one to distend the loop and hold it distended above the cloth; that it does not move inward below the cloth and seize a loop; and that he recognizes and is willing to state that certain features or characteristics described as essential to the looper mechanism of the patent in suit are not found in the defendant's looper mechanism.

But the complainant argues that the claim now sued on is not limited to a double-jawed, single-implement looper, and that the language of the specification above quoted is descriptive merely of the particular type of looper shown in the drawings of the patent, and that the invention, as disclosed by a fair reading of all parts of the patent, covers the defendant's looper. This argument is based largely upon the following statement in the specification of the patent:

"The machine represented in the drawings is one which makes an overseam, and is intended specially for sewing knit goods; and our improvements are chiefly applicable to machines making some variety of overseam. The special kind of overseam made by the machine shown in the drawings is formed of a single thread and by means of an eye-pointed piercing-needle and a looper which seizes a loop of thread below the cloth, then carries that loop above the cloth, holds it in the path of the needle until the needle enters this loop, and finally drops the loop after it has been entered by the needle in its descent."

It is true that this language, read alone, leaves one to infer that the patentees might claim their invention to cover improvements other than those specifically shown in the drawings, and that the drawings were designed, not to limit the invention to the particular improvements shown by them, but to illustrate the general character of the invention. The patent law, however, provides that, when the nature of the case admits of drawings, the applicant shall furnish them and file them in the Patent Office, and that a copy of the drawings so furnished and filed shall be attached to the patent as a part of the specification. Rev. St. § 4889 (U. S. Comp. St. 1901, p. 3383).

The proofs in the present case do not satisfy me that a man skilled in the art, with the patent in suit and its drawings before him, could construct the defendants' looper. Besides, the patentees have declared in the specification, with so much emphasis, that the looper must have two jaws and must move in a particular manner, that the defendants' looper seems to be wholly outside of the scope of the invention described. Claim 1, now sued on, by the use of the words "substantially as described," expressly refers to the specification for the description of the combination referred to in the claim. In the combination is the looper. That looper is a single-implement looper, a double-jawed looper, a looper whose movement is inward and outward, and upward and inward again, with a reverse motion, all in one plane. The patent says it must be exactly so. The claim, therefore, cannot have the liberal construction contended for.

The case of *Willcox & Gibbs Sewing Machine Co. v. Merrow Machine Co.*, 93 Fed. 206, 35 C. C. A. 269, has not been overlooked. In that case the defendant's looper was a single-implement one, and the court held it to be "double-jawed." It is clear, too, that the movements of the defendant's looper were all in one plane. The defendant's machine was therefore found to be an infringement of claims 2 and 5 of the patent now in suit. That case was very different from the one now before this court. The specification of the patent in suit declares that "the machine has been contrived with reference to running it at a very high rate of speed." The record of the case shows that in the *Merrow Case* the complainant contended that a double-implement looper was necessarily slower in operation than a single implement looper, and the Circuit Court of Appeals said:

"The two-implement looper is one which performs the operation of seizing the loop of needle thread below the cloth, and presenting it in proper position above the cloth, by the aid of two separate pieces of mechanism. These have to be separately operated, and the operating mechanism becomes more complicated. Not only is the improvement of the patent meritorious as tending towards simplicity, but complainant's expert testifies—and no one contradicts him—that, the more complicated the mechanism involved, the more difficult it becomes to run at a high speed, while the multiplication of relatively moving implements, which co-operate in their action upon one thread, increases liability to skip stitches. Certainly the device of the patent in suit is simpler, dispensing with one independently operated part. It is susceptible of high speed (apparently by reason of its greater simplicity), while the earlier two-implement machines were slow, and apparently were not susceptible of being made faster."

What the patent in suit did was to disclose an invention by which a high rate of speed could be had with a single-implement looper. What the defendants in the present case have done is to make a machine which can be operated at a high rate of speed with a two-implement looper. The defendants have done what the Circuit Court of Appeals in the *Merrow Case* said, in the light of the facts presented to them, it was apparently impossible to do.

I think the complainant has failed to show infringement, and that the bill of complaint should be dismissed, with costs.

UNION SPECIAL MACH. CO. v. MAIMIN.

(Circuit Court, E. D. Pennsylvania. May 12, 1908.)

No. 26, October Sessions, 1904.

1. PATENTS—CONTRIBUTORY INFRINGER—REPAIR OF INFRINGING DEVICE.

A repairer who supplies an essential part of the patented combination for an infringing machine thereby becomes a contributory infringer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 400–402.

For other definitions, see Words and Phrases, vol. 2, p. 1540.]

2. SAME.

The infringement of a patent initially by one person gives no sanction to another to repeat or continue. No doubt within certain bounds a patented article may be repaired without making the repairer an infringer; but not where it is done for one who is. It is only where the device in patented form has come lawfully into the hands of the person for or by whom it is repaired that this is the case. In other words, if one without right constructs or disposes of an infringing machine, it affords no protection to another to have merely repaired it; the repairer, by supplying an essential part of the patented combination, contributing by so much to the perpetuation of the infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 399–402.

3. SAME—SECONDHAND SEWING MACHINES.

Complainant was the owner of a patent for a thread-controlling device for sewing machines, and manufactured and sold machines both with and without such device. Certain machines sold by it without the device were bought at secondhand by defendant, equipped by him with the device, and resold an additional eyelet necessary for such equipment having been purchased from an agent of complainant. Similar eyelets were of common use on sewing machines for a different purpose, and the use for which those bought by defendant were intended was not stated. Whether such machines had previously been equipped with the patented device by another than defendant did not clearly appear. *Held*, that whether they had or had not been so equipped was immaterial, and that in either case defendant was an infringer, as no license to make or use the patented device could be implied from the sale of the part by complainant under the circumstances.

4. SAME—INVENTION—THREAD-CONTROLLING DEVICE FOR SEWING MACHINES.

The Woodward patent No. 493,461, for a thread-controlling device for sewing machines, the purpose of which is to prevent the breaking of the thread when sewing material of uneven thickness, and at the same time secure a uniform tension of the thread when the stitch is completed, was not anticipated, and discloses patentable invention.

In Equity. Suit for infringement of letters patent No. 493,461 for a thread-controlling device for sewing machines, granted to Russell G. Woodward, assignor, March 14, 1893. On final hearing.

Joseph C. Fraley and C. L. Sturtevant, for complainants.

Hector T. Fenton, for defendant.

ARCHBALD, District Judge.¹ The patent which the defendant is charged with infringing is for a thread-controlling device for sewing machines, designed to better regulate the feeding of the thread,

¹Specially assigned.

and particularly to prevent its breaking when an extra thickness of material is encountered by reason of seams or otherwise. "Heretofore," says the inventor, "in the use of such devices, in machines employing a looper in connection with the needles, when sewing more than a certain predetermined thickness of leather or other material the strain upon the thread, as the looper backs out over the point, becomes too great, and the stitch either becomes too tight, or the thread breaks. Furthermore, with devices such as heretofore used, the thread may have too much slack at a certain portion of the movement of the machine, and not enough at another." To obviate these difficulties, instead of a single thread eyelet on the needle arm, which by experience has been found particularly open to objection, two such eyelets are employed, one located at the point of the arm which rises highest in the upward movement of it, and the other at a point in front or advance of this, towards the needle bar, both being in between a stationary eyelet on the frame, which receives the thread as it comes from the tension device, and the customary eyelet on the top of the needle bar. The operation is this: In rising to the highest position above the frame, the rear of the two eyelets produces an angle or crook in the thread between the eyelet on the frame and the forward eyelet on the needle arm, and thus pulls off an extra quantity of thread, thereby giving a sufficient length to let the looper back out of the loop in the descending movement of the needle, the slack which would otherwise be left undisposed of being taken up in turn by the forward eyelet after the point of the looper is freed from the loop, the loop at the same time being drawn up against the material so as to make a tight stitch, all this being accomplished without any breaking strain. Or, in other words, if I may venture a somewhat free description, the extra thread is first pulled off by an angle or crook formed by the rear eyelet in the upward movement of the needle arm, which by an ingenious adjustment is taken up by the forward eyelet in the downward movement, the crook or slack being transferred from the one to the other, the thread from the eyelet on the frame, through the rear eyelet on the needle arm, to the forward eyelet at its lowest position, in the end forming a straight line. This arrangement is especially useful in double or twin needle machines for which the complainants formerly held a patent which has now expired.

The defendant is a dealer in secondhand machines which he buys in the market, and, after making any needed repairs, sells again. He so bought and disposed of the two machines as to which infringement is charged, supplying and putting on them the rear eyelet which was lacking in each, which he purchased for 10 cents from the complainants' Philadelphia agent. Eyelets of this general character are found on almost every style of machine, and, except as it was understood that they were to be used to repair one of the complainants' machines, nothing was said by the defendant at the time of purchasing those in question to indicate the use to which they were to be put. It is contended by the complainants that, in equipping these machines in the way he did, the defendant was guilty of infringement; the machines being thereby effectively supplied with the thread-

controlling device of the patent which they otherwise lacked. To this two answers are made: (1) While the defendant put on the second eyelet by which this was brought about, he did not do it initially, but simply by way of repair; and (2) that, even if he did, the complainants themselves, by their agent, supplied the means for doing so, thus impliedly licensing it. The records kept by the complainants show that, when the machines in question left the company's hands, they were single-needle machines, on which a needle controller is not put because there is no particular necessity for it. Some one since that time has therefore changed them to two-needle machines, and put on thread controllers to match. And whether this in the first instance was done by the defendant or some one else is not material; the infringement of a patent initially by one person giving no sanction to another to repeat or continue it. No doubt, within certain bounds, a patented article may be repaired without making the repairer an infringer (*Morrin v. Robert White Engineering Works* [C. C.] 138 Fed. 68), but not where it is done for one who is. It is only where the device in patented form has come lawfully into the hands of the person for or by whom it is repaired that this is the case. In other words, if one without right constructs or disposes of an infringing machine, it affords no protection to another to have merely repaired it; the repairer, by supplying an essential part of the patented combination, contributing by so much to the perpetuation of the infringement. The evidence here is that the defendant merely put on the rear eyelet of the thread controller; the screw hole in the needle arm where it is attached having already been drilled for it when he got the machine. These holes in the opinion of Mr. Straub, who has charge of the defendant's shop, were drilled in each case before the arms were japanned and tapped out afterwards to clean them out; the intimation being that this was therefore done when the machines were originally built. But this is a mere opinion from an examination of the hole, and the reasons given for it are not strong. It is not at all likely that the holes would be drilled through the gilt lettering as they are, if this was the case; this lettering being necessarily put on after the japan. It is not to be accepted, moreover, in the face of the positive evidence, already alluded to, that the machines were not in this condition when they left the complainant's hands. The eyelets were therefore put on by some one without right, and as so equipped the machines were infringements, of which the defendant in repairing them took the risk. It is said, however, that the evidence as to the original condition of the machines from the books of the company was not competent, but to this I cannot agree; also, that it should have been introduced in chief, and was not admissible in rebuttal, but that merely goes to the order of proof, which it is at the discretion of the court to allow.

It is further urged that the complainants, by supplying the eyelets put on by the defendant, impliedly sanctioned their use. This would be true if there was but one purpose for which they could be employed. But eyelets of this character are common on sewing machines, and the complainants in supplying them to buyers, unless there is something at the time to indicate to what use they are to be

put, do not commit themselves to anything in particular thereby. In their catalogue two such eyelets are shown, somewhat alike in appearance, but having certain differences, as it is claimed, the one being designated as a needle lever thread-eyelet, and the other as a thread-eyelet for the thread controller. The latter is the one which forms a part of the patented device, while the former, according to the evidence, was the one called for and sold, which entirely relieves the complainants from any implication of a license. But, even if this were not so, and simply an eyelet for an unspecified purpose was called for, being capable of an innocent as well as an infringing use, no authority to employ it in a way that would infringe is to be made out from parting with it as they did. *Roosevelt v. Western Electric Co.* (C. C.) 20 Fed. 724; *United Nickel Co. v. California Electrical Works* (C. C.) 25 Fed. 475; *American Graphophone Co. v. Amet* (C. C.) 74 Fed. 789; *National Phonograph Co. v. Fletcher* (C. C.) 117 Fed. 149; *National Cash Register Co. v. Grobet*, 153 Fed. 905, 82 C. C. A. 651.

It is contended, however, that the patent is invalid, the device having no utility, and involving nothing either novel or inventive. There is no occasion to stop long over the question of utility. Notwithstanding the denial of the defendant's witnesses, not only does it apparently perform the work claimed for it, but, if that is not so, it is difficult to see why the defendant has been at such pains to copy it. The question whether there is anything inventive is not so easily disposed of. The Muther (1886) patent, mentioned in the specifications, which is the closest reference, shows a stationary eyelet on the frame, and another on the needle arm at the same place as the forward eyelet of the patent, the present invention differing from it simply in the insertion of another on the needle arm between the two. It must be confessed that this seems a small thing on which to claim a patent, but I am not prepared to say that it is not sufficient. The simplicity of the device is not necessarily against it, particularly when it is contrasted with the cumbersome and complicated arrangements found in others which are dispensed with. It is the function to be performed and the end to be attained that have to be looked to. The feed and control of the thread is an important matter in the running of a sewing machine, and the ingenuity of different inventors has been directed to it and variously exercised. Nor is the invention here to be characterized as merely putting on another eyelet, but consists in attaching it at such a place that it shall operate to a certain end, in a certain way. Not only by producing a crook or bend in the thread between the tension device and the needle arm does the relative arrangement of the several eyelets pull off just so much more thread, thus supplying a needed slack in case of encountering an extra thickness of material such as the ridge of a seam; but this slackness is, in turn, taken up by the action of the forward eyelet as the needle arm descends, keeping the thread taut and securing a tight stitch. And all this is so timed as to co-operate with the action of the looper or under-thread carrier, as it is shot back and forth, into and out of the looper, at incredible speed, below the bedplate. That the ingenuity, which has accomplished this, by the simple de-

vice employed, is beyond the ordinary mechanic to provide, is clearly shown by the contrary views expressed with regard to it by the two skilled workmen called by the defendant, one of whom is in charge of the defendant's shop and the other has served as a sewing machine adjuster for a number of years; the one declaring that no useful purpose is served by the rear eyelet on the needle arm, for the reason that no more thread is taken off when it is used than when it is not, and the other coinciding in this condemning view, because in his opinion too much thread is taken off, causing it to break. With the problem all worked out before their eyes, they thus are not able either to appreciate the advantage of the contrivance or to agree upon how it works, most effectively disposing of the contention that it was within the range of the ordinary workman, familiar with the art, to see the necessity for it and supply the means. No doubt nothing broadly new is to be expected with regard to sewing machines. But it does not follow that the whole inventive field has been exhausted as to the different parts and appliances which make for greater efficiency, of which the present device is one. Unquestionably, also, the invention is not large, but, as already stated, it has so commended itself to the public that the defendant feels called upon to see that his machines are equipped with it, and, if so, it may well be accepted as having contributed something both new and useful to the art.

Let a decree be drawn in favor of the complainants in the usual form, with costs.

POOLE BROS. v. MARSHALL-JACKSON CO.

(Circuit Court, N. D. Illinois, E. D. April 22, 1908.)

No. 27,780.

PATENTS—INFRINGEMENT—MEMORANDUM CALENDAR.

The Wilson patent, No. 585,944, for a memorandum calendar, narrowly construed as required by the prior art, *held* not infringed.

In Equity. On final hearing.

Offield, Towle & Linthicum and Albert H. Graves, for complainant.
Louis K. Gillson, for defendant.

KOHLSAAT, Circuit Judge. The bill herein was filed to restrain infringement of patent No. 585,944, granted to J. R. Wilson, July 6, 1897, for improvements in memorandum calendars, known as handy calendars. The claims of the patent read as follows, viz.:

"1. A holder for desk-calendars, comprising a base for resting on the desk, and two seats for the calendar-leaves, one seat being upon the base and upwardly facing, and the other being carried by and elevated above the base and rearwardly facing, and means for guiding the leaves when moved between their two seats.

"2. A holder for pad-calendars comprising a base, parallel filing-wires rising above said base, downwardly and forwardly extending projections at the upper end of said filing-wires and a traverse back support at the forward end of said projections.

"3. A holder for pad-calendars, comprising a base, a leaf-file rising above the base and projecting forward for the upper end of its initial portion,

and a transverse leaf-supporting back rising from the forward-projecting portion.

"4. The combination with the perforated leaves, of a holder comprising a base, filing-wires rising from said base, said filing-wires being formed of a single piece extending upwardly through the perforations in the leaves, thence forwardly, and thence upwardly again to a juncture, to form an elevated leaf-support above the base.

"5. A holder for pad-calendars comprising a base and two seats for the calendar-leaves, one seat being upon the base and upwardly facing, and the other seat being elevated above the base and rearwardly facing, means for guiding the leaves when moved between their two seats and means for retaining the leaves upon their upper seat."

The application was filed March 15, 1899, and contained eight claims. Of these all except claim 7 were rejected by the examiner. This claim was renumbered 2, as the patent now stands. Afterwards, patentee canceled all claims except 7 and 8, and attempted to save 8 by amending it. He also added a new claim 1. Afterwards, this new claim and amended claim 8 were canceled without further action thereon by the examiner, and four new claims were presented. After certain corrections suggested by the examiner to claims 1 and 5 were made by the applicant, the five present claims were allowed. The specifications do not appear to have been amended, except by addition a clause to the effect that the operation of the leaves might be reversed, i. e., by moving them from the elevated seat to the base seat. All that part of the specification which refers to date pads, as a part of the invention, is eliminated by the cancellation.

It appears from the record that defendant and its predecessor, the George E. Marshall Co., were formerly extensive customers of complainant, handling several thousand handy calendars per year for several years; that in 1895 defendant closed dealing with complainant and proceeded to supply its customers with the alleged infringing device. As suggested by complainant, if there is any actionable infringement, defendant is in no position to claim that it acted innocently. There is little to be drawn from the action of the patentee in the Patent Office. The claims are undoubtedly good for what they express, so far as that office is concerned. They must, however, be read and construed with reference to what was canceled, and may not be broadened to cover what was rejected. Defendant's contention, that by withdrawing the claim of amendment A the substance of that claim was abandoned, cannot be sustained as to so much thereof as was afterwards embodied in the claim as allowed. *Hubbell v. United States*, 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; *Syracuse R. T. Co. v. Haywood Bros. & Wakefield Co.* (C. C.) 152 Fed. 454.

The main features claimed for the patent in suit, over the prior art, are: (1) The short base, thereby economizing room; and (2) the elevated base for carrying and exhibiting the date-leaf. As will be noted, the transfer wires consist of one piece in Figs. 1 and 2, not including the clamping nuts. In Fig. 3 a separate back piece for supporting the sheets on the upper seat is employed. Claims 2 and 3 do not in terms call for a leaf or elevated seat, rising above the base at an angle

thereto. Claims 1, 4, and 5, call for a leaf-seat elevated above the base in a plane different from that of the base. The prior art in evidence seems rather limited. This condition may arise from what would seem to be a fact, i. e., that the art is such a simple one and capable of being supplied in so many simple and readily conceivable ways that possible patentable novelty would not suggest itself. The Smith patent, No. 417,106, granted December 10, 1889, for a holder for calendars and memoranda combined, is perhaps the most important as an article of commerce of the prior art. It differs from the patent in suit, in that: (1) Its base length is double that of one of the calendar bases; and (2) it slants from the middle in both directions, so that the leaf turned over is not easily readable by one located so as to read it before it is turned. The rear leaf is depressed, instead of elevated. It resembles the device in suit, in that: (1) It adapts itself to the use of two leaves at once, and also stores up the turned leaf; and (2) it transfers the leaves to its rear seat by wires arranged as in the patent in suit. It resembles the alleged infringing device, in that its beds are made in one integral piece. When turned bottom up, it is practically the same as the defendant's calendar, lacking, of course, the necessary attachments. If its rear or down slanting face were lifted to stand at an angle to its front bed or base, it would be complainant's device.

Defendant has introduced in evidence the patent granted to Brown, August 24, 1897, and numbered 588,631 for a holder for calendars and similar articles. Some question has arisen regarding the priority of this patent over that in suit. The application was filed November 30, 1896. That in suit was filed March 15, 1897, and granted July 6, 1897. It thus appears that they were pending at the same time in the Patent Office. No interference was declared. Defendant traces its invention back to July, 1896, and shows that the device was on the market prior to the filing of the application. This is not denied and must result in placing the Brown device in the prior art. This patent seems to anticipate every material feature of the patent in suit except: (1) The elevation of the elevated leaf-seat at an angle to the base-seat, and (2) the short base. In Brown's patent, the case or pad seat rises at one angle from the table to its further end. The leaves of the pad are carried over from the front to the back of the holder on wire transfers just as in the Wilson patent; and deposited upon the upper half of the gradually ascending plane or floor of the holder aforesaid, where they are plainly readable. The holder is stamped out of sheet metal, and in the same way a tongue is cut in the floor which can be drawn out at an angle and constituted the leg by means of which the upper end of the holder is elevated. This is placed near the end of the holder, and, consequently, requires the latter to be as long as the two leaves of the pad.

There are in evidence a number of other patents of the prior art, as, for instance, patent No. 276,643, granted to Switzler, May 1, 1883, for a calendar. Here the calendar and pad are arranged in an upright position for hanging on a wall or desk. The leaves are carried from an upper to a lower position upon transfer wires, or vice versa.

In this way both sides of each leaf are in full sight. It is not so convenient as Wilson's device, in that memoranda must be written upon the sheet while it is in a perpendicular position. Defendant's device differs from the patent in suit, in that: (1) Its two seats are cast in one piece; (2) the rear or elevated seat is integral with, and therefore not carried by, the base; (3) it is not elevated above the base in the sense that it is separate therefrom, as suggested by the language of complainant's claims and by the drawings, specifications, and models of the patent; and (4) there would seem to be nothing in the wire-seat arrangement of the patent in suit to suggest the solid continuous bed of defendant's calendar.

Considering the prior art and the doubtful novelty of complainant's improvements thereon, it seems plain that a construction of the patent in suit so as to hold defendant's device to be an infringement would invalidate it.

It is therefore held that infringement is not shown, and the bill is dismissed for want of equity.

In re WARD.

(District Court, D. New Jersey. April 10, 1908.)

1. **BANKRUPTCY—INVOLUNTARY PROCEEDINGS—DEFENSE OF INSANITY.**

It is a defense to a petition in involuntary bankruptcy, which alleges as an act of bankruptcy that defendant conveyed property with intent to hinder, delay, and defraud his creditors, that the alleged bankrupt was insane at the time of such conveyance and incapable of forming such intent.

2. **SAME—EFFECT OF ADJUDICATION OF INSANITY AFTER PETITION FILED.**

A court of bankruptcy is not deprived of jurisdiction in an involuntary proceeding by an adjudication by a state court, in proceedings instituted after the filing of the petition, that the alleged bankrupt is insane, and has been insane since a time prior to the alleged act of bankruptcy set out in the petition, nor is such adjudication conclusive on the bankruptcy court; but the issue of insanity may be tried under the defense that the defendant did not commit the alleged act of bankruptcy.

3. **SAME—EXAMINATION OF DEFENDANT BEFORE TRIAL.**

The proceedings on the trial to a jury of the issues joined on a petition in involuntary bankruptcy are the same in form as in the trial of an action at law, and the court is without authority to require the alleged bankrupt to submit himself to an examination as to his sanity before trial.

In Bankruptcy. On motion to strike out part of answer and for an order for examination of the alleged bankrupt, before trial.

Edward A. Day, Robert R. Howard, and Arthur K. Kuhn, for the motion.

Vredenburg, Wall & Carey, opposed.

LANNING, District Judge. Three creditors of William R. Ward have filed their petition to have him adjudged an involuntary bankrupt. The only act of bankruptcy charged is that:

"William R. Ward is insolvent, and that within four months preceding the date of this petition the said William R. Ward committed an act of bank-

ruptcy, in that he did heretofore, while insolvent, and on the 27th day of November, 1907, and the 5th day of December, 1907, convey to one Benjamin Treacy, of the city of Jersey City, county of Hudson, and state of New Jersey, 11 distinct and separate parcels of land, with the buildings thereon, situated in the cities of Newark and East Orange, county of Essex, and state of New Jersey, including the place of residence of said William R. Ward, with intent to hinder, delay, and defraud the creditors of said William R. Ward, including your petitioners."

An answer was promptly filed by Ward's guardian ad litem, appointed on ex parte proofs of his insanity, setting up, as defenses: (1) That Ward, at the time of committing the alleged act of bankruptcy mentioned in the petition, was so unsound of mind as to be wholly incapable of managing his affairs or of committing the act of bankruptcy charged; (2) that he did not commit the act of bankruptcy charged; and (3) that he is not insolvent. Later, another answer was filed, under an order of leave granted by the court, by Anna Day Ward and Henry L. Poinier, as guardians of the person and estate of Ward, setting up that on December 28, 1907, which was 10 days after the petition in bankruptcy was filed, proceedings under a writ de lunatico inquirendo were instituted against Ward in the Court of Chancery of New Jersey, which resulted in a decree of that court, dated March 2, 1908, confirming the proceedings and the finding of the jury "that the said William R. Ward of East Orange, N. J., was, at the time of taking that inquisition a lunatic of unsound mind and did not enjoy lucid intervals, so that he was not sufficient or capable of the government of himself, his lands, tenements, goods, and chattels, and that he had been in the same state of lunacy and unsoundness of mind from at least the 1st day of May, 1904," and that on March 28, 1908, the orphans' court of Essex county duly appointed Anna Day Ward and Henry L. Poinier as guardians of Ward's person and estate. In this answer there are also set up the same defenses made by the answer of the guardian ad litem. In each of the answers there is a demand that the issues be tried by a jury.

The motions are to strike out the defense of insanity, to limit the issues to be tried by the jury to the second and third defenses, and, if these motions be denied, for an order for the examination of Ward by the petitioning creditors and their experts before trial. The first of these motions is based on the theory that the insanity of an alleged bankrupt is not a good defense, where no adjudication of lunacy has been made prior to the filing of the petition in bankruptcy.

The federal Constitution confers upon Congress the power to establish "uniform laws on the subject of bankruptcies, throughout the United States." The extent to which Congress has exercised that power determines the scope of the power of the federal courts in bankruptcy cases. Section 8 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]) is as follows:

"The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane; provided that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

This section clearly provides that, if the jurisdiction of the bankruptcy court in a given case has once rightfully attached, it cannot be defeated by the subsequent death of the alleged bankrupt, or if he subsequently become insane. Whether jurisdiction exists to administer the estate of an insolvent debtor in bankruptcy, where the alleged bankrupt has been adjudged, after the petition in bankruptcy has been filed, to have been, from a time antedating the alleged act of bankruptcy, a lunatic wholly incapable of managing himself or his estate, must be determined by comparing other provisions of the bankruptcy act with section 8. The creditors in the present case contend that jurisdiction attaches in the present case because section 4b (30 Stat. 547) declares that "any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil," may be adjudged an involuntary bankrupt. But no natural person can be so adjudged, in an involuntary proceeding, unless he committed one of the acts of bankruptcy described in section 3a (30 Stat. 546) within four months next before the filing of the petition in bankruptcy. The first subdivision of that section declares that any person shall be held to have committed an act of bankruptcy if he has "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay or defraud his creditors, or any of them." That is the act of bankruptcy charged against Ward. But if he has been a lunatic and so unsound of mind as to have been wholly incapable of managing himself or his estate ever since May 1, 1904, he could not have conveyed his lands in November and December, 1907, "with intent to hinder, delay and defraud his creditors." "An intent to hinder or delay creditors," says Judge Bradford, in the *Wilmington Hosiery Company's Case* (D. C.) 120 Fed. 185, "involves a purpose wrongfully and unjustifiably to prevent, obstruct, embarrass, or postpone them (creditors) in the collection or enforcement of their claims." Without undertaking to determine the exact boundaries of the jurisdiction of our bankruptcy courts in cases against lunatic bankrupts, it is sufficient to say that, in the present case, the defense of insanity cannot be stricken out of the answer.

But is the adjudication in the Court of Chancery of New Jersey conclusive on this court in this proceeding? It would not be so in an action at law against the alleged bankrupt. In such a case, "when an inquisition is admitted in evidence, the party against whom it is used may introduce proof that the alleged lunatic was of sound mind at any period of the time covered by the inquisition." *Den v. Clark*, 10 N. J. Law, 217, 18 Am. Dec. 417. The same rule applies in equity. *Hunt v. Hunt*, 13 N. J. Eq. 161; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; 16 Am. & Eng. Ency. Law, 606. I think it is equally applicable to a bankruptcy case where the adjudication of lunacy is made upon proceedings instituted after the petition in bankruptcy has been filed. The *Funk Case* (D. C.) 101 Fed. 244, is distinguishable from this because there the adjudication of lunacy was made, and the property of the lunatic put into possession of his guardian, before the petition in bankruptcy was filed. In the *Kehler Case* (D. C.) 153 Fed. 235, where a petition in involuntary proceedings was filed before the alleged bankrupt had been adjudged

a lunatic, Judge Hazel denied the motion to dismiss the petition because the jurisdiction of the bankruptcy court attached before the alleged bankrupt was adjudged insane; and because of the presumption of the alleged bankrupt's sanity at the time the acts of bankruptcy were committed. It is not necessary to decide, in the present case, what may be the effect of an adjudication of lunacy and the appointment of a guardian or committee for the lunatic under a writ de lunatico inquirendo before a petition in bankruptcy is filed against the lunatic. It may be that in such a case the bankruptcy court acquires no jurisdiction; but, where a person is adjudged a lunatic under proceedings instituted after a petition in bankruptcy has been filed against him, the jurisdiction of the bankruptcy court to try the issues involved in the bankruptcy proceeding seems to me clear. In such a case, its jurisdiction attaches upon the filing of the petition in bankruptcy. If the alleged bankrupt was, at the time of committing the alleged act of bankruptcy charged in the petition filed against him, so insane that he did not understand the nature of the act, its commission should be denied on the ground that, being insane, he could not commit it. On the trial of such an issue, the adjudication of lunacy may, perhaps, be offered as *prima facie* evidence of insanity, provided it shows lunacy at the time of the commission of the alleged act of bankruptcy.

It will be observed, from what has been said, that, in such a case as the present one, the defense that the alleged bankrupt did not commit the act of bankruptcy charged against him involves the question of his insanity. As already stated, the only act of bankruptcy charged here, is that the alleged bankrupt conveyed certain of his lands with intent to hinder, delay, or defraud his creditors. Evil intent is an essential element of the act charged. Section 19 (30 Stat. 551) of the bankruptcy act gives to an alleged bankrupt the right to a trial by jury of the question of his insolvency and of the question concerning his commission of an act of bankruptcy, provided a written application for such trial be made. Such application has been made. The question of the alleged bankrupt's insanity will therefore be submitted to the jury as an essential part of the defense that he did not commit the act of bankruptcy charged.

Although it is alleged in the petition that Ward was insolvent at the time of executing the deeds of conveyance, that allegation is immaterial, and will not be involved in the issues to be tried. There is also an allegation that he was insolvent at the time of the filing of the petition. That is a proper, if not a necessary, allegation, since section 3c of the bankruptcy act makes the defense of solvency at the time of filing the petition, in a case like the present one, a good defense. *West Company v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; *Elliott v. Toepfner*, 187 U. S. 330, 23 Sup. Ct. 133, 47 L. Ed. 200.

The issues to be tried by the jury are therefore: (1) Whether the alleged bankrupt was insolvent at the time of the filing of the petition in bankruptcy, and (2) whether the particular act of bankruptcy charged was committed by him. The latter issue will necessarily involve the question of his insanity.

One more point remains to be considered, and that is whether the petitioning creditors may have an order permitting them and their experts to examine the alleged bankrupt before trial. Counsel for the alleged bankrupt's guardians object to the allowance of such an order. In my judgment it cannot be allowed. In *Union Pacific Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, Mr. Justice Gray said:

"In the English common-law procedure act of 1854, enlarging the powers which the courts had before, and authorizing them, on the application of either party, to make an order 'for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute,' the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. * * * The only power of discovery or inspection, conferred by Congress, is to 'require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. St. § 724 (U. S. Comp. St. 1901, p. 583). And the provision of section 914 (U. S. Comp. St. 1901, p. 684) by which the practice, pleadings, and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court."

That case, it is true, was one in which an action at law was brought for the recovery of personal injuries sustained by the plaintiff; but its principle is applicable here. Where there is a state statute, not in conflict with any act of Congress authorizing an order for the physical examination of a plaintiff before the trial of an action brought to recover damages for injury to the person—like the New Jersey act on that subject—a federal court may make the order. *Camden & Suburban Railway Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721. But if a state statute provides that the physical examination before trial can only "be procured in the same way and as part of the examination of the party before trial"—as the New York statute does—it is doubtful if it can be enforced in a federal court. *Hanks Dental Ass'n v. Tooth Crown Co.*, 194 U. S. 303, 310, 24 Sup. Ct. 700, 48 L. Ed. 989.

The proceedings on the trial of the present issue will be the same, in form, as in the trial of an action at law. The judgment entered on the verdict of the jury can be reviewed only on a writ of error. If either party feels aggrieved by the rulings of the court in the course of the trial, exceptions must be taken and sealed as the basis on which to prosecute a writ of error. *Elliott v. Toeppner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

It follows that, as there is no statutory authority for an order to require an alleged bankrupt to submit himself to an examination before trial, the application for such an order must be denied.

The motions of the petitioning creditors will all be denied. They may file their replication and bring the case to trial in the usual course of procedure.

THE GEORGE W. ANDERSON.

(District Court, E. D. Virginia. April 22, 1908.)

MARITIME LIENS—ADVANCES TO MASTER OF DOMESTIC VESSEL—RIGHT TO LIEN.

There is no lien on a domestic vessel for money advanced to the master upon his bare statement that he needed it to pay off the crew, where the lender knew the owners, that they lived in the same state and were entirely responsible, and that they had an agent in the same port, but made no inquiry of either owners or agent, and where the money was not in fact needed nor used for the benefit of the vessel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, §§ 29-31, 41-45.]

In Admiralty. Suit to enforce maritime lien.

This libel was filed to recover the sum of \$200 advanced by the libelants to the master of the George W. Anderson, while in the port of Norfolk, Va., in the month of February, 1905; the same being secured, as claimed by the master, to pay the wages of seamen on the schooner. The respondents, the owners of the schooner, insist that the advance was a personal one to the master, and that their vessel, under the circumstances of this case, should not be held responsible therefor, as there was no necessity for the making of such advance, which proper inquiry by the libelants would have shown them. The following is a brief summary of the facts in the case: That the captain of the schooner went to libelants' office, and said he had to have money to pay his crew off, as they were going to give him trouble; that the crew had back pay owing to them; that the money was paid to the captain, who promised to pay it back as soon as he could, he stating to libelants that he had advanced considerable money to get his vessel away from New York, and that Mr. Currie, one of the owners, would not advance any more; also that the captain of the schooner claimed to be part owner of the vessel, and that credit was given to the vessel; that libelants made only the "usual inquiry" as to whether the vessel needed money—that is, "the captain's word"; that they knew the owners of the schooner had an agent in Norfolk, but they did not go to him to make inquiry as to the needs of the vessel; that they knew that Mr. Currie lived in Richmond, although they did not know he was managing owner, but relied on the captain to pay them back, as agent of the vessel; that they had been doing business with the captain of the schooner for 18 or 20 years, and knew who the owner was; that they made no inquiry as to whether there was any freight money due, and that it is usual for towboat men to make advances to vessels that deal with them; that when they towed the vessel here she was leaking, and they put her on the mud to stop the leak. The respondent proved that if the libelants had applied to them for the money, if the vessel needed it, they would have gotten it; that they had credit and the slightest inquiry would have revealed that it was not proper to advance the captain of the schooner money; that this inquiry could have been made of the owner in Richmond, without libelants' going out of their office, by 'phone or telegram; and that libelants' office was next door to the office of the broker or agent of respondent in Norfolk. Respondent also proved that the freight on the cargo of soft coal from Perth Amboy to Norfolk, amounting to \$217, was collected by the captain of the schooner; that after receiving this advance from the libelants the captain of the schooner proceeded to New York with the vessel, and after her arrival there the captain telegraphed, in the latter part of March, to the owners of the schooner to send and take charge of the vessel and pay

off the crew, which was done, by paying about the sum of \$400—the captain not having accounted for the freight on the coal to Norfolk, nor the cargo to New York, and having disappeared.

Hughes & Little, for libelants.

J. W. Willcox, for respondent.

WADDILL, District Judge. The law governing this case is aptly stated by the Supreme Court of the United States to be that, in case of a lien asserted against a vessel for advances made the master for supplies or repairs in a foreign port, necessity for credit must be presumed, where it appears that the same were ordered by the master, and that they were necessary for the ship when lying in port, unless it be shown that the master had funds, or that the owners had sufficient credit, and that the lender knew those facts, or one of them, or that such facts and circumstances were known to the lender as were sufficient to put him on inquiry, and to show that if he had used due diligence he would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel. *The Lulu*, 10 Wall. 192, 19 L. Ed. 906. "The power of the master to raise money while abroad for the necessities of his ship is the most dangerous form in which his authority can be exercised." *Henry's Adm.* 137, note 1. "The master does not have the power of binding the ship to the payment of maritime interest, if the owner can be consulted, whether he be in the same or a neighboring state, or in another country." 1 *Pars. on Ship. & Adm.* 142. "The master, for the same reason, has no such power, if he have funds of the owner within his reach, or if he can borrow the money on the personal credit of the owner, or if a consignee be there with funds of the owner, or any agent of the owner." 1 *Pars. on Ship. & Adm.* 143, 144. "As to domestic vessels, the general rule as to the master's power to bind domestic vessels under state statutes is based on and assimilated to his powers in relation to foreign vessels, although a lesser necessity for credit exists. If the owner is not in the port where the vessel is at the time, his powers are about as discussed above in relation to foreign vessels." *Hughes on Maritime Liens*; 26 *Cyc.* 776.

This authority of a master to secure money upon the faith and credit of his vessel is an important one, full of danger, however, to the shipowner, and in the exercise of which, as well on the part of the master as those making the advance to him, good faith and diligence is required. It is easy for a master to perpetrate fraud on his owner, and the facts and circumstances of this case strikingly illustrate the necessity for those doing business with him to show the utmost diligence on their own part, with a view of protecting the rights of the owners and others to be thereby affected. It is true the inference is that credit given to a master is on the faith of the vessel; but if it can be inferred that the master had funds, or the owner had credit, or that those advancing know of these, or knew such facts as should have put them upon inquiry, then such inference does not exist, and the vessel will not be liable for the advance. Here there was the greater reason for the libelants to make full inquiry, the *Anderson* being a domestic vessel, and in a nearby port to that of

her home, and that of her owners, in the same state. The owners resided at the city of Richmond, were well known and entirely responsible, with a local agent or broker at Norfolk, all of which was known to the libelants; and the libelants, having made the advance in question without proper inquiry, should not be allowed, some two years afterwards, to hold the respondent ship therefor, notwithstanding the fact that they notified the owners of the advance some three months after making the same, after it was discovered that the captain of the schooner had defaulted largely to his owners, not only collecting the freight due on the particular trip to Norfolk, when the advance was made, which to a considerable extent showed there was no necessity for this advance, but also a large amount of freight money for a return voyage to New York, which would have been ample to pay all of the ship's liabilities, if any.

A decree may therefore be entered dismissing the libel.

In re PECK.

(District Court, N. D. New York. May 26, 1908.)

BANKRUPTCY—LIMITATION OF TIME FOR FILING CLAIMS—EXCEPTIONS.

While Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), providing that, with certain exceptions therein, named claims against a bankrupt estate shall not be proved subsequent to one year after the adjudication, is not to be strictly and literally construed in all cases, yet creditors having provable claims and notice of the bankruptcy and an opportunity to examine the bankrupt, who fail to prove their claims merely because of a statement in his schedules that his assets there listed and described are of no value, are not entitled to prove after the expiration of the year when it has been ascertained that such assets are of value; there being no claim of actual fraud or willful misrepresentation by the bankrupt.

In Bankruptcy. Application by creditors to be allowed to come in and prove and file claims after the expiration of one year from the adjudication.

Lee & Brewster (H. M. Mott, of counsel), for petitioners.
Edgar F. Brown, for bankrupt.

RAY, District Judge. The petitioners, creditors of Horace D. Peck, the above-named bankrupt, having claims properly provable but for section 57n of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), apply for leave to prove, file, and have allowed their claims against the estate of the bankrupt more than one year after the adjudication, on the ground that by the fraud and concealment of the bankrupt they were induced not to file and prove their claims within the year.

It is not asserted that there was any active fraud or conduct on the part of the bankrupt perpetrated or done for the express purpose of preventing these creditors from properly proving their claims within the year, or for the purpose of inducing them not to do so, but that his conduct and statements in making and filing his schedules, etc., were such as to mislead and deceive these creditors and induce them not to file

or prove their claims; that the bankrupt represented in such schedules that his interest in the estate of Frank A. Peck, deceased, was worthless, when, in fact, it was of the value of some \$4,165.57, and proved so to be. I do not understand it is claimed that the bankrupt knowingly and willfully concealed or misrepresented the value of this interest. In regard to this interest he stated in his schedules as follows:

"The annual income of \$5,000 held in trust by the executors of Frank A. Peck, deceased, and to continue during the natural life of petitioner; also an undivided one-fourth interest in the residuum estate of the said Frank A. Peck to be paid to said bankrupt when he arrives at the age of 25 years."

The petition in voluntary bankruptcy was filed November 10, 1903, and the adjudication made November 30, 1903, and the matter was thereupon referred to Chas. L. Stone, one of the referees in bankruptcy. The first meeting of creditors was called and held on the 31st day of October, 1904, nearly a year after the filing of the petition and adjudication, at which meeting one Geo. W. Gray was appointed trustee. Claims aggregating about \$1,219.85 were duly filed within the year. The trustee filed his inventory April 8, 1907, showing assets of the estimated value of \$5,873.93, and April 9, 1908, the trustee filed his account showing assets on hand \$4,296.48. At about the time of the first meeting of creditors the attorney for the bankrupt filed his affidavit, stating, in substance, that the bankrupt had been unable to pay his attorney and incidental expenses, and hence the delay in the first meeting. This bankrupt arrived at the age of 25 years on the 28th day of January, 1906. October 5, 1905, the bankrupt executed and delivered to the trustee a written assignment of his interest in the estate of said Frank A. Peck. March 1, 1905, the bankrupt filed his application for a discharge, and he was discharged October 15, 1905. The petitioners here seem to have relied on the statement in the schedules that this interest in the Peck estate was of no value. It was open to all creditors at the first meeting to examine the bankrupt, and to have called and examined the executors, etc., of the Peck estate. Without availing themselves of these remedies, the petitioners here relied on the schedules, did not go to the trouble and slight expense of proving their claims, but now come in and assert that as the statement of no value in the interest of the bankrupt in the Peck estate has been shown untrue in fact, and without showing a fraudulent intent or purpose on the part of the bankrupt, they were misled, and that there was sufficient fraud in equity to justify this court in holding that there was a fraudulent concealment which misled the petitioners, and that in the exercise of its equitable powers it should permit the filing and proof of these claims.

This court has heretofore directed the payment of all proved and allowed claims and all expenses, commissions, etc. This has been done, and a balance of assets in cash to the amount of \$1,820.78 is now in the hands of the trustee available to the payment of the claims of these petitioners if proved and allowed. It may seem unjust and inequitable to impose a short statute of limitations on the creditors of a bankrupt, who, having notice of the proceedings, fail to prove their claims within the year after adjudication. The section referred to, section 57n of the act, reads as follows:

"(n) Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

The purpose of the law is to give to each and every creditor one year after adjudication in which to prove and file his claim. It is optional with him to do so or not. In case he does, he may fully examine the bankrupt and other persons so as to ascertain the truth of the petition and schedules and the value of the estate. Section 7, subd. 9, and section 21a. If the bankrupt files his petition for a discharge in due time, and has fully complied with the law, he may be discharged from all provable debts. In this case that has been done. No creditor opposed. Can these claims of these creditors who did not prove their claims be now revived against this bankrupt already discharged therefrom, so as to share in or hold the balance of the estate in bankruptcy?

It is contended that there is no power in this court to allow this to be done. But, suppose the bankrupt by active fraud or personal force should prevent a creditor from proving and filing his claim within the year; in such case would the creditor be without remedy? Suppose the proof is made, the claim with proofs dispatched by a messenger to the referee on the last day, but the messenger is killed or disabled by an accident from actually filing it in time; is the creditor without remedy? The section quoted says:

"Or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

The words, "such time," refer to the one year after or following adjudication. Suppose the parties are diligent, free from laches, the claim is tried before a court or judge, and he dies or fails to render his decision, so that a year and 30 days and more elapse after the adjudication before a judgment can be rendered; is the creditor without remedy? Clearly not as is held in *Re Noel*, 18 Am. Bankr. Rep. 10, 150 Fed. 89 (C. C. A. First Circuit), and as is indicated by the Supreme Court of the United States in *Keppel v. Tiffin Savings Bank*, 13 Am. Bankr. Rep. 552, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790. I have examined the cases bearing on this question, but am of the opinion that the clause of the section quoted is not to be read and construed literally and strictly. There may be cases where the creditor should and would be permitted to file his proofs of claim after the expiration of the year mentioned *nunc pro tunc*. The section was intended primarily for the benefit of the creditors who file their proofs of claim promptly, and to give them the benefit of diligence. It was also intended to facilitate the administration and settlements of the estates of bankrupts. The provision was not intended primarily as a short statute of limitations. There may be exceptions to the general rule as suggested. But is this such a case? May creditors having provable claims and notice of the bankruptcy and first meeting and an opportunity to file and prove their claims and fully examine the bank-

rupt as to his affairs and property lie still for the simple reason he has stated in his schedules that his assets there listed and described are of no value? I think not. Such is this case in all essentials. The section of the law providing for an examination of the bankrupt and his books and papers and other persons is for the purpose of affording the creditors ample opportunity to ascertain the value of the assets, and whether or not property has been concealed or otherwise improperly disposed of. As these creditors were neither deprived of this opportunity nor prevented from filing their claims in time, I do not think this a case justifying an order allowing the filing and proof of claims after the expiration of the year following adjudication. It does not appear that this bankrupt knew the value of his interest in the estate referred to, or that he purposely concealed or misrepresented it. Entertaining these views, the application must be denied.

TEAGUE v. ANDERSON HARDWARE CO. et al.

(District Court, N. D. Georgia. April 10, 1908.)

No. 7.

1. BANKRUPTCY—COURTS—JURISDICTION—FRAUDULENT TRANSFERS—VACATION.

A federal District Court of another district than that in which a bankruptcy proceeding is pending may entertain a suit by the bankrupt's trustee to set aside an alleged fraudulent transfer by the bankrupt to parties residing in the district where the suit was brought.

2. SAME—BILL—REQUISITES.

On an issue in bankruptcy as to the priority of a mortgage lien, the bill should allege the names of all the creditors of the bankrupt other than the mortgagee, the amounts of their debts, the character of the same, and when created.

In Equity.

Fred S. Ball and King, Spalding & Little, for complainant.
McDaniel, Alston & Black, for defendants.

NEWMAN, District Judge. This is a plenary suit in equity, brought by a trustee in bankruptcy appointed in a case pending in the United States District Court for the Middle District of Alabama. He sues to recover on a bond which was to stand in lieu of certain property in controversy in the bankruptcy court in Alabama, and the case is now before this court on demurrer.

The question at the threshold of the case is whether or not the court in this district has jurisdiction. While I was very doubtful on this question during the argument, the more I have considered it and the more I have examined it, the better I am satisfied that the court in this district has jurisdiction of the case. The only direct authority on this question is the case, decided by Judge Archbald in the District Court for the Middle District of Pennsylvania, of *Lawrence v. Lowrie et al.*, 133 Fed. 995. The second headnote of the case states the conclusion there reached favorable to the jurisdiction of the District Court of another district as follows:

"Under Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 (U. S. Comp. St. Supp. 1907, p. 1032), amending Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), and conferring jurisdiction on courts of bankruptcy to set aside fraudulent transfers of the bankrupt, the District Court of another district than that in which the bankruptcy proceedings are pending may entertain a suit to set aside a fraudulent transfer by the bankrupt to parties residing in such other district."

I do not think that *Hull v. Burr*, 153 Fed. 945, 83 C. C. A. 61, decided by the Circuit Court of Appeals for this circuit, is authority either way on this question.

Retaining jurisdiction of the case, the next question presented is whether or not the mortgage lien claimed by the defendant company was lost by reason of the bankruptcy of W. S. Street. The mortgage was executed on May 13, 1904, by Street to the Anderson Hardware Company for an existing debt. The mortgage was not recorded until December 22, 1904. On December 26, 1904, Street filed a voluntary petition in bankruptcy. One ground of demurrer on which the bill is now being heard is as follows:

"That the said trustee under said bond has no right to file suit, except on behalf of the creditors of the said Street other than the said Anderson Hardware Company. And in order to file said suit the said trustee can maintain the same, if at all, only by showing what is the amount due to each creditor, and the amount realized from the sale of the said stock of goods, or the value of the same, and the amount of all of the debts due by said W. S. Street."

It is impossible to determine satisfactorily whether the lien of this mortgage was effective and operative before its record, under the law of Alabama or under the general law so far as applicable, without knowing the dates when the debts of general creditors other than the Anderson Hardware Company were created, and probably, also, the character and amount of the debts. The allegation in the bill on this subject is as follows:

"Orator further shows that a large part of the indebtedness of said Street to creditors who have proven their said claims was created subsequent to the date of said mortgage, and all of said indebtedness was created prior to the filing of said mortgage for record."

On this question, under all the authorities, the rights, if any, of general creditors, as against the holder of an unrecorded mortgage, which would be good against the mortgagor, are different in this respect. Debts created after the mortgage was given, and upon the faith of the mortgagor's property being unincumbered, have greater rights than debts in existence at the time the mortgage was made. I think the defendant is entitled to have, and also the court, that it may intelligently pass upon the questions involved, as a part of this bill, the names of all creditors of the bankrupt other than the Anderson Hardware Company, the amounts of their debts, the character of same, and when created.

As this ground of demurrer is good, it is unnecessary to pass upon the other questions in the case until this defect is cured. If the complainant desires to amend in this respect, he may do so in 20 days from this date, and on failure to do so the demurrer on the ground stated will be sustained, and the bill dismissed.

PERKINS v. NEWARK BOARD OF EDUCATION.

(Circuit Court, D. New Jersey. January 17, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS—BOARD OF EDUCATION—POWERS—SCHOOL BUILDINGS.

Since the powers of a board of education are statutory only, and it can make no valid contract for the building of a schoolhouse or the expenditure of public moneys for any object connected with the proposed building of the schoolhouse, except as that contract is supported by statutory authority, it has no power to employ an architect to prepare plans for a building that would not exceed in cost for general construction, excavation, and rough grading \$400,000, when only \$200,000 has been appropriated for the purchase of high school sites, procuring plans and specifications, and for high school construction.

2. SAME—SUBSEQUENT APPROPRIATIONS.

It could not be assumed by the court, in determining the validity of such contract, that the authorities expected to make subsequent additional appropriations.

At Law.

E. A. & W. T. Day, for plaintiff.

Francis Child, Jr., and Herbert Boggs, for defendant.

LANNING, District Judge. I have reached the conclusion in this case that judgment must be entered on the special verdict in favor of the defendant. I think the defendant had no power to enter into a contract with the plaintiff to prepare plans for a building that would cost \$400,000, or more, when only \$200,000 had been appropriated "for the purchase of high school sites, the procuring of plans and specifications, and for high school construction purposes." The powers of the defendant are statutory only. It can make no valid contract for the building of a schoolhouse, or for the expenditure of public moneys for any object connected with the proposed building of a schoolhouse, except as that contract is supported by statutory authority. The plaintiff, before doing work at the request of the defendant, was bound to inquire as to the nature of the defendant's power to enter into a contract with him. Had he done so, he would have found that, while he was asked by section 20 of the "programme" issued by the defendant to prepare plans for a building that would not exceed in cost for general construction, excavation, and rough grading the sum of \$400,000, exclusive of heating and ventilating plant, gas fitting, electrical work, and furniture, the authorities of the city had provided only \$200,000 "for the purchase of high school sites, the procuring of plans and specifications, and for high school construction purposes."

It is argued by the plaintiff's counsel that the authorities expected to make future supplemental appropriations. The court, however, can base its judicial act on no such assumption. Upon the evidence, as we have it, the defendant had no authority to ask for plans for a building that would exceed, with the cost of site and plans, the sum of \$200,000.

It is unnecessary to consider the other questions argued by counsel. Judgment will be entered for the defendant, with costs.

NEW JERSEY & N. C. LAND & LUMBER CO. v. GARDNER LACY LUMBER CO. et al.

(Circuit Court, E. D. North Carolina. January 22, 1908.)

EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill in equity cannot be maintained to establish title to and recover possession of lands against a number of defendants, each in possession of and claiming title to a different part of such lands, on the ground of avoiding a multiplicity of suits, or because an accounting for timber cut is prayed for; the remedy at law by ejectment being adequate.

In Equity. On motion by defendants to dismiss.

Iredell Meares, for complainant.

J. D. Bellamy and Geo. Rountree, for defendants.

PURNELL, District Judge. The complainant filed a bill claiming to be the owner in fee and entitled to the immediate possession of a large tract or tracts of land lying in Brunswick and Columbus counties, of which the defendants, over 100 in number, wrongfully withhold possession. Attention being directed to the possibility that this was more properly an action of ejectment, which should be on the law side of the docket, complainant insists a court of equity has jurisdiction on three grounds: First, to avoid a multiplicity of suits; second, because an account is asked of timber cut; and, third, to remove trespassers. Defendants now move, after many years, to dismiss the bill for want of jurisdiction in this court. An opinion was filed (113 Fed. 395), dated February 11, 1902, and since then the case has not been before the court in a shape or upon a motion to be disposed of. The directions and suggestions in the opinion referred to have not been complied with. The issues of fact arising out of chancery have not been submitted to a jury, and no effort has been made in this behalf, save at one term of the court, when complainant preferred not to try these issues of fact and defeated such efforts. Now, after six years, a motion to dismiss the bill is entered and argued.

The principal object of the bill is to recover land from defendants, as said in the opinion referred to. Two of the principal defendants set up adverse claim of title, and in the case of Mrs. Schulkin a consent decree has been entered adjudging her the owner in fee and entitled to the possession of the land claimed by her. As to her this was simply an action of ejectment, which has resulted in a judgment or decree by consent in her favor. If the answer setting up title in behalf of the Gardner Lacy Company be true, it is the same as to this defendant. There can be no multiplicity of suits, no right to an accounting, no cloud on title to be removed, no want of an adequate legal remedy, and nothing in the bill that could or would give a court of equity jurisdiction.

The jurisdiction of the courts of the United States is derived alone from the Constitution and laws of the United States, and cannot be enlarged, diminished, or affected by state laws or regulations. The local laws of a state can only furnish rules of property to ascertain the rights of the parties, and thus assist in the administration of the

proper remedies where the jurisdiction is vested by the laws of the United States. This jurisdiction is strictly statutory. Rev. St. § 629 (U. S. Comp. St. 1901, p. 503), as amended March 3, 1887, and corrected August 13, 1888. Unless it affirmatively appears on the face of the record, the bill should be dismissed *ex mero motu*, if necessary. In the suit at bar the substance is an action of ejectment to recover land, and the other remedies or relief asked for is subsidiary—ancillary to the main purpose. Title should be established first before complainant is entitled to an accounting, etc. It seems there is an adequate and complete remedy at law, and the jurisdiction of a court of equity should not have been invoked.

It is therefore considered, ordered, and decreed that the bill herein be dismissed and complainant take nothing. Defendants go without day and recover their costs. It is so ordered.

MERCANTILE TRUST CO. OF NEW YORK v. CITY OF DENVER et al.

(Circuit Court, D. Colorado. February 13, 1908.)

No. 3,904.

1. STREET RAILROADS—GRANT OF FRANCHISE BY MUNICIPALITY—TERM.

A grant by a city to a street railroad company of the right to construct and operate tracks in its streets, without any limitation as to time, is one at least for the term of the corporate life of the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 42.]

2. SAME—RIGHT OF REPEAL—EFFECT OF USER.

Where a city granted to a street railroad company the right to construct and maintain tracks "along and across the streets of the city," and the company has constructed and put in operation lines in conformity to a system which contemplates their extension, and the building of branch lines as public needs may require or justify, the city cannot arbitrarily, and without cause, repeal the grant except as to tracks at the time constructed and in operation, and an ordinance attempting such repeal is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 50.]

In Equity.

Charles J. Hughes, Jr., for complainant.

N. Walter Dixon, for defendants.

LEWIS, District Judge. On February 5, 1885, the Denver Electric & Cable Railway Company was incorporated for a term of 50 years, under Colorado laws, for the purpose of constructing and operating a street railway in the city of Denver. On the same day the city council of said city, by ordinance, gave it a franchise to carry out the purpose of its organization. The first section of said ordinance is as follows:

"Section 1. That the right of way be, and the same is hereby granted, to the Denver Electric and Cable Railway Company, its successors and assigns, to build, operate and maintain a single or double track railway, with switches, turn-outs, side tracks and other appliances necessary for the operation of the same, in, along and across the streets of the city of Denver, said railway to be operated by power transmitted by use of electricity or by cable."

By assignment, all rights under the ordinance passed to the Denver Consolidated Tramway Company, which executed a mortgage on October 11, 1893, conveying all its property, rights, and franchises to the complainant, in trust, to secure payment of \$4,000,000, evidenced by its five per cent. gold bonds, a large amount of which have been issued for value, and are now outstanding.

By a subsequent assignment, all property of said cable company and all rights under the ordinance, passed to the Denver City Tramway Company, a corporation under the laws of Colorado, which latter company assumed and agreed to pay the above-mentioned and other large mortgage indebtedness on its property and franchise rights under said ordinance. The bill was filed on May 24, 1899, to protect the alleged rights of the holders of said bonds. The relief sought was injunction against the city council, restraining it from passing an ordinance repealing said ordinance of February 5, 1885. At the time the bill was filed street car lines had been constructed under said ordinance on some of the streets of said city, and were then in operation, but the proof does not show the exact length of said lines at that time. A temporary writ issued restraining the repeal of the ordinance in so far as it might attempt to affect the rights of the street car company in any streets in which it had, at that time, constructed its lines under said ordinance, but was denied as to all unoccupied streets.

Thereafter, on July 15, 1899, said city council passed the following repealing ordinance:

"That Ordinance No. 3, Series of 1885, entitled 'An ordinance granting a right of way to the Denver Electric and Cable Railway,' and Ordinance No. 9, Series of 1885, entitled 'An ordinance to amend an ordinance entitled "An ordinance granting a right of way to the Denver Electric and Cable Railway Company,"' and Ordinance No. 28, Series of 1888, entitled 'A bill for an ordinance to amend section eight (8) of Ordinance No. 3 of 1885,' be, and the same are hereby, repealed; provided, however, that this ordinance shall not apply to or in any manner affect any rights which the Denver Electric and Cable Railway Company, its successors and assigns, may now have in relation to any electric street railway lines at present constructed, and now in actual operation in said city of Denver."

At the time the granting ordinance of 1885 was passed the population of Denver was less than 100,000. It is now estimated at about 200,000, and the city does not deny that new lines have been constructed and prior ones extended to meet public necessities as population increased and extensions in new territory were needed; nor does it complain in any manner of the service rendered by the street car company. In other words, the city asserts no cause or reason as justification for the repealing ordinance of 1899, other than mere power. There are no conflicting rights of another grantee claiming similar privileges, here involved.

Since the repealing ordinance of 1899 was passed the city has denied the right of the street car company to construct new lines or extend old ones under the ordinance of 1885, and has passed other ordinances limited in time to 20 years, for such extensions and new lines, whereas the street car company has at all times claimed the right to make such extensions and construct new lines under the ordinance of 1885. It

further asserts and shows that it has expended vast sums in way of paving and other improvements under ordinances passed requiring it to do so wherein its rights under ordinance of 1885 were recognized; and while it concedes that it formally accepted the new ordinances, or most of them, for extensions and new lines, it did so under protest and because the city would not permit such extensions and new lines in any other way.

1. At the outset it may be seriously inquired whether the bill and proof entitle the complainant to any relief.

If the purpose of the bill seeks a control by the court over, or interference with, the legislative discretion or power of the city council, such relief could not be granted and the bill would have been dismissed on demurrer. *Mo. & K. I. Ry. Co. v. City of Olathe* (C. C.) 156 Fed. 624, and cases cited; *Tebbetts v. People*, 31 Colo. 461, 73 Pac. 869, and cases cited.

But inasmuch as the defendants ask that the matter be determined on its merits, and more especially because the case was taken to the Court of Appeals on the issuance of the temporary writ and was remanded without suggestion on this point, we proceed to further consideration.

2. A large part of the argument was directed to the question as to the length of term of the easement—the complainant contending that it is in perpetuity. The ordinance does not, in express words, fix the term of the easement granted. And while the defendants made some claim that the ordinance gave a mere revocable license, that position cannot be sustained. The defendants also cited authorities to the effect that in such a case as this the easement should be construed to extend during the term of the life of the grantee. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334; *Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651; *Toll Roads Co. v. People*, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711.

The defendant's insistence on the doctrine of these cases appeared as a concession that the rights of the street car company under the ordinance of 1885, whatever they may be, will not expire until February 5, 1935; and if such concession be not made, the rights granted to it must extend, under the authorities, at least to that time. This being true it becomes immaterial, for the purposes of this case, to determine whether the easement is in perpetuity. Until that time in 1935 has been reached it is a moot question whether its rights under the ordinance extend beyond February 5, 1935.

3. It is lastly urged by the city that the ordinance of 1885 is void as to any rights which it attempted to give the street car company on any streets not built upon prior to the repealing ordinance; because, it says, such a grant in attempting to give an easement over all the streets is an unauthorized delegation of power by the city council to the street car company, in that it assumes to give the company the right to select the streets on which it will build and at such times as it may choose, and on all of them if it so desires; and that thus the ordinance violates every principle of public policy, when we bear in mind the purposes for which such grants are made. In support of this contention it cites, particularly: *Mayor of Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252, *Citi-*

zens' Ry. Co. v. Jones (C. C.) 34 Fed. 579, and Logansport Ry. Co. v. Logansport (C. C.) 114 Fed. 688.

The conclusion in the Knoxville Case may be considered as largely justified and reached on the provisions of the Tennessee statute there under consideration, which are not found here. The Jones Case was an exclusive grant, and the facts there, aside from the ordinance, amply supported the conclusions of the court. The grantee would neither construct the line itself, nor consent that others might do so.

It will be noticed that the ordinance of 1885 does not give, expressly by terms, an easement on all the streets. Neither is it shown or claimed that an attempt has ever been made by the street car company to build on any street where public necessities did not require a new line or an extension, nor has it failed to build or extend its lines when and wherever needed, nor has there ever been dispute between the council and street car company in this regard. The interests of the company would necessarily dictate the building of new lines and extensions when and where public demands required it; and if for that purpose there were sufficient reasons why one street rather than another should be occupied, I doubt not that the police power, which cannot be surrendered and may be invoked at all times by the council, is amply sufficient to control the company in that respect. In fact, ordinances of the city, in force at the time of the repeal, provided that no excavation should be made in any street, and no railway of any kind should be constructed in any street or avenue, until a permit had been issued for that purpose. In addition to this, an act of the Colorado Legislature approved April 4, 1877 (Gen. Laws 1877, § 2655, subd. 60), and still in force, requires the written consent of the owners of land representing more than one-half of the frontage on the street before such street can be occupied by a street railway. So, the asserted fear that the public may be annoyed by street cars operated on the four sides of every city block does not appear to be a possibility, either in fact or in law.

The repealing ordinance was passed without any reason assigned or now claimed. It was and is, professedly, the mere exercise of a naked power, which the city asserts the street car company and the complainant have no right to challenge. The company appears to have planned, almost in the inception of its efforts, a system radiating from a central point in the business section of the city from which its cars start, extending in different directions, and to which they return. From its main lines in the central part branches have been, and from time to time as public demand requires, necessarily will be taken off, and lines have been, and will be, as it was intended, extended to meet the city's growth. Can it be said, that after this system was partly built, under large expenditures, extending but a few blocks in either direction, and branches taken off here and there but a short distance, the other party to the contract may then terminate it without cause? Is not this a violation of the whole purpose and intent of the agreement? Is not the exercise of the power to repeal the ordinance of 1885 nothing short of an attempt to destroy the company's property? If such repeal is a valid exercise of power, the company could not thereafter make extensions in any direction. Its whole purpose and plan is thereby thwarted.

The foundation of its system has been laid, but it cannot proceed. It is left with a useless trunk covering but a few blocks in the central part of the city. Its usefulness, both to the public and the company, has been destroyed without cause and without its being heard. A just and salutary rule covering the situation here, is announced in *Elliott on Roads and Streets* (2d Ed.) § 752:

"While it is, we believe, true that some act must be done vesting the inchoate right conferred by general grant, still, we do not regard it as essential that manual possession should be taken of all of the streets or roads embraced in the general grant or license. If the company having the prior right enters upon the work of constructing a system, and with reasonable diligence, and in good faith, does actually construct a considerable part of the system, it ought not to lose its rights unless it has failed to comply with a proper demand to complete the system, or has unreasonably delayed its completion."

This text is quoted with approval in *Indianapolis Cable S. R. Co. v. Citizens' Street R. Co.*, 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539, and that court then adds:

"Where a company has entered upon the construction of a particular system of street railroads, and has expended its money in the prosecution of the work, it would be manifestly unjust to permit some other person or company, after the commencement of the work, to jump in and appropriate any portion of the streets involved in such system, while the former was diligently prosecuting the work, and thus destroy the system, to the ruin of the company engaged in its construction. If this could be done no person or company would undertake the construction of a system of street railroads; but to hold the right to such system, money should be expended in its construction, and the work, with a view of its completion, should be diligently prosecuted without intermission, unless stopped by circumstances over which the projector has no control."

The street car company had, at the time of the attempted repeal, a prior, though inchoate, right under the ordinance of 1885, to extend its lines and complete its system as public necessity might demand in keeping with the growth of the city; and the city was without power to terminate its rights in that regard except for cause. It does not claim that any such cause existed at the time of the passage of the repealing ordinance. Said repealing ordinance having been passed without right, and in violation of the rights of the street car company and of those whom the complainant represents, the same is void.

A decree to that effect will be entered, with costs against the defendants.

PORTER v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Idaho, N. D. May 25, 1908.)

1. REMOVAL OF CAUSES—PETITION FOR REMOVAL—VERIFICATION.

While it is the better practice to verify a petition for removal, there is no law requiring it, and no particular form of verification is essential. A verification by the attorney for the defendant, made on belief, is sufficient, especially where the defendant is a corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 177.]

2. SAME—AMOUNT OR VALUE IN DISPUTE.

Where a plaintiff in a state court alleges title to real estate and a trespass thereon by defendant, and prays for damages and for general

relief, as may be done under the state practice, and his title is put in issue by the answer, it is a part of the matter in dispute, the value of which is to be taken into account in determining the right of removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 132.]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

On Motion to Remand to State Court.

Geo. W. Tannahill, for plaintiff.

James E. Babb, for defendant.

DIETRICH, District Judge. The first ground of the motion to remand is that the petition for removal is not verified by the defendant, but by its attorney, and that the verification is not in the form prescribed by the statutes of Idaho for the verification of pleadings. There is no law requiring that a petition for removal be verified; but verification is almost universal, and it is doubtless the better practice. There is, however, no reason why the petition should not be verified on behalf of the defendant by its attorney, especially where, as in this case, the petitioner is a corporation and must act through its officers and agents, and where, as here appears, the attorney is acquainted with the facts, and the petitioner has no officer resident in this state, where the suit is pending. It is stated by affiant "that he has read the foregoing petition and believes the same to be true." This is considered to be sufficient.

The other and more serious contention is that the record does not disclose that the value of the matter in controversy is in excess of \$2,000. Plaintiff's view is that the action is one to recover damages for trespass, and that the relief sought is a money judgment in the sum of \$1,500, and that therefore the amount of money judgment prayed for is the measure of the value of the matter in issue. In his complaint plaintiff alleges that he is "the owner in fee of the following described real property, situate in the city of Lewiston, Nez Perce county, state of Idaho," a particular description of which real estate is set forth. He further alleges that the defendant is engaged in grading a roadbed and in piling dirt upon said land, and that he "has been injured and damaged by the unlawful trespass and wrongful acts of the defendant in grading and piling dirt upon the plaintiff's land" in the sum of \$1,500. He prays for damages in the sum of \$1,500 for the unlawful trespass, and "that the plaintiff have all other and further proper relief." In its petition for removal the defendant denies title of the plaintiff to any part of the premises described, and denies any acts of trespass.

Plaintiff does not rely upon mere possession for his right to recover; but he relies exclusively upon title, and title is thus tendered as an issue, and if his allegation in that respect is denied he cannot recover, unless he makes proof of title and such fact is found in his favor. In *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688, the court says:

"It is the actual matter in dispute as shown by the record, and not the *ad damnum*, alone, which must be looked to."

In *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895, the court says:

"By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment."

Suppose the cause remained in the state court and a jury were waived. It would be necessary for the court to find upon the issue of title. And under the prayer for general relief, that court not being bound by the distinction between legal and equitable relief, the judgment might in terms conclusively adjudicate title to the tract of land described. In *New Jersey Zinc Co. v. Trotter*, 108 U. S. 564, 2 Sup. Ct. 875, 27 L. Ed. 828, the plaintiff made a claim similar to that asserted by the plaintiff here; that is, Trotter sought therein to recover damages of the zinc company for entering on his lands and digging up and carrying away a quantity of ore. But neither party set up title. The court, after stating its conclusion that the only matter involved was the amount of damages claimed, uses the following language:

"Had the zinc company pleaded title to the land from which the ore was taken, and issue had been joined on that plea, a different question would have been presented. In that way the land might have been made the matter for adjudication, and thus the matter in dispute on the record; but as this case stands only the possession of Trotter and his right to the ore are involved."

Here the plaintiff himself tenders as an essential issue the question of title, and in addition to the money judgment prays for general relief proper under the state practice. See, also, *Stinson v. Dousman*, 61 U. S. 461, 15 L. Ed. 966; *Shappirio v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; *Nemo v. Farrington* (Cal. App.) 94 Pac. 874.

I have examined, but it would serve no useful purpose to distinguish in detail, the cases cited by plaintiff in support of his position. No one of them involves a record similar to that here presented. *Cameron v. U. S.*, 146 U. S. 533, 13 Sup. Ct. 184, 36 L. Ed. 1077, which, upon the argument, I thought to be in point, appears upon examination not to decide the question here presented. Moreover, upon a somewhat different showing, the court later entertained jurisdiction of the case. See *Id.*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459.

While the question is not entirely free from doubt, I have concluded that upon the pleadings the title of the real estate described is a part of "the matter in dispute." If this conclusion is correct, it is not denied, as I understand, that the value of the entire matter in dispute exceeds \$2,000.

The motion will therefore be denied.

ADAMS v. WESTERN MARYLAND R. CO.

BUSH v. ADAMS.

(Circuit Court, S. D. New York. May 18, 1908.)

INJUNCTION—ADEQUATE REMEDY AT LAW.

In an action on promissory notes to recover a balance due after crediting thereon the proceeds of collateral sold by the plaintiff, the validity of such sale may be contested, and a bill in equity cannot be maintained to enjoin the prosecution of such action on the ground that the sale was unauthorized, where no fraud or other ground of equitable jurisdiction is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 28-49.]

In Equity. On motion for preliminary injunction.

Bangs & Van Sinderen, for plaintiff.

Pierce & Greer, for defendant.

WARD, Circuit Judge. The complainant, as receiver of the Western Maryland Railway Company, moves for a preliminary injunction restraining the prosecution of an action at law against that company in this court to recover a balance of \$916,000 claimed to be due on 40 notes of the company, of \$75,000 each, secured, respectively, by 100 bonds, of \$1,000 each, after crediting the proceeds of the sale of the bonds, until the validity of the sale is determined in this court. Each collateral note authorizes the holder, in the case of the insolvency of the maker, "to sell the whole or any part thereof at any brokers' board or at public or private sale, at the option of the holder thereof, * * * and without notice of intention to sell, or of the time or place of sale, and without demand of payment of this note," and the holder was given the right to purchase at the sale "absolutely free from any claim" of the maker.

The insolvency of the maker is proved by the appointment of the receiver March 16, 1908. The plaintiff notified the company March 10, 1908, that he would sell the collateral on March 11th at 12:30 p. m. The sale, "for account of whom it may concern, of \$4,000,000 Western Maryland Railroad Company's first mortgage 4 per cent. bonds, due 1952," was advertised in the New York Times on the morning of March 11th and by distribution of the auctioneer's handbills among brokers on the morning of the same date. The bonds were offered with the announcement that one block of 100 bonds would be sold, with the privilege to the purchaser to take the entire \$4,000,000 at the same price. The plaintiff became the purchaser of the entire lot at 53 per cent. of the face value. This is not a bill to redeem the pledge, nor does it charge fraud, which, at the hearing of the motion, the complainant's attorney entirely disclaimed. I see no ground for equitable jurisdiction, and think that the company's remedy at law is entirely adequate. If the sale made was unauthorized, the complainant could tender the amount due and sustain an action of trover (Nelson v. Owen, 113 Ala. 372, 21 South. 75), or he could treat the bailment as still existing and sue in contractu (Maryland Insurance Company v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779).

Because the plaintiff can contest the validity of the sale in the action at law, the prosecution of which he seeks to enjoin, the motion is denied.

ADAMS v. WESTERN MARYLAND R. CO.

BUSH v. ADAMS.

(Circuit Court, S. D. New York. May 18, 1908.)

PLEADING—SHAM ANSWER.

A verified answer, even if false, cannot be struck out as sham, when it amounts to a general denial of the complaint, or a denial of any material averment therein, and the issues raised thereby must be tried as questions of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1120-1128.]

In Equity. On motion by defendant for order for trial.

Bangs & Van Sinderen, for plaintiff.

Pierce & Greer, for defendant.

WARD, Circuit Judge. The defendant moves for an order *nunc pro tunc* permitting the issues to be tried in accordance with section 1778 of the New York Code of Civil Procedure. The complaint avers that the plaintiff is the owner and holder of the notes sued upon. Section 90 of the negotiable instruments law of New York enables the holder to sue in his own name, but the averment that he is the holder is a material one, which he must prove in order to make out his case. The verified answer of the defendant, denying this averment on information and belief, presents an issue which the defendant is entitled to have brought before a jury. A verified answer, even if false, cannot be struck out as sham, when it amounts to a general denial of the complaint (*Wayland v. Tyson*, 45 N. Y. 281), or of any material averment of the complaint (*Thompson v. Erie Railway Company*, 45 N. Y. 468).

Another material issue is raised by the denial of the sale of the collateral, because the sale made did not conform to the terms of the power of sale. If there were in point of law no sale, the plaintiff at the time of the trial should be treated as still the holder of the collateral and bound to account for its value, either by way of credit on the notes or in another action to be brought by the defendant.

Motion granted.

In re ISAACSON.

(District Court, S. D. New York. April 13, 1908.)

BANKRUPTCY—PROCEEDINGS IN DIFFERENT DISTRICTS—FIRST HEARING.

Under General Orders in Bankruptcy No. 6 (32 C. C. A. v), which provides that "in case two or more petitions shall be filed against the same individual in different districts the first hearing shall be had in the district in which the debtor has his domicile," the first hearing should be had in the district in which he has had his domicile during the greater

part of the preceding six months, and which has jurisdiction on the ground of domicile, rather than in a district to which he subsequently removed and in which he was domiciled at the time of the filing of the petitions.

In Bankruptcy. On motion for reargument.

H. & J. J. Lesser, for petitioning creditors and receiver.

Hyman & Campbell, for answering creditors.

James, Schell & Elkus (Robert P. Levis, of counsel), for intervening creditors.

HOLT, District Judge. This is a motion for a reargument. Two petitions in involuntary bankruptcy have been filed against the alleged bankrupt, one in this court and one in the United States District Court for the Eastern District of New York. Section 2 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]) provides that courts of bankruptcy may "adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof." Rule 6 of General Orders in Bankruptcy provides that:

"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile."

In this case, during the greater portion of the six months preceding the filing of the petitions the alleged bankrupt resided and had his domicile in Brooklyn, in the Eastern district, and did business in this district; but a few days before the filing of the petitions he removed his domicile to this district. The evidence satisfies me that this was a bona fide removal, for the purpose of making his residence and domicile in the city of New York, and that at the time the petitions were filed he had his domicile in this district. Under these circumstances, the question is in which district the first hearing shall be had.

It is argued that the correct test of jurisdiction under rule 6 is where the bankrupt had his domicile when the petition was filed, and that view is supported by a strict grammatical construction of the language of the rule. But, in my opinion, the true meaning of rule 6 is that, when petitions are filed in different districts, the court whose ground of jurisdiction is that the bankrupt's domicile has been in that district during the greater portion of six months is the court in which the first hearing shall be had. This court would have no jurisdiction to render an adjudication against the alleged bankrupt on the ground of domicile, because he has not been domiciled in this district for the greater portion of the preceding six months. Its ground of jurisdiction is the fact that the alleged bankrupt did business here. The removal of the alleged bankrupt from Brooklyn to New York did not divest the Brooklyn court of jurisdiction on the ground of domicile. As its jurisdiction still exists on that ground, I think the court in the Eastern district is the court which is intended in rule 6 when it pro-

vides that the first hearing shall be had in the district in which the debtor has his domicile.

The motion for a reargument is denied.

IN RE ISAACSON.

(District Court, E. D. New York. April 29, 1908.)

1. BANKRUPTCY—PROCEEDINGS IN DIFFERENT DISTRICTS—TRANSFER AND CONSOLIDATION.

General Orders in Bankruptcy No. 6 (32 C. C. A. v), which provides that in case two or more petitions shall be filed against the same individual in different districts the first hearing shall be had in the district in which the debtor had his domicile, and that the court which makes the first adjudication shall retain jurisdiction over all proceedings until the same shall be closed, is subject to the provisions of Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), which in such case authorizes a transfer and consolidation of the proceedings in the court which can proceed therein with greatest convenience to the parties in interest.

2. SAME—"DISTRICT OF HIS DOMICILE."

Where two petitions in bankruptcy have been filed against the same individual, one in the district in which the alleged bankrupt has resided during the greater part of the preceding six months and the other in a district into which he has recently removed and established his residence, the former is the "district of his domicile," within the meaning of General Orders No. 6 (32 C. C. A. v), in which the first hearing should be had unless the case is transferred for convenience of parties under the provisions of Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434).

In Bankruptcy. On motion to transfer proceedings.

H. & J. J. Lesser, for receiver.

James, Schell & Elkus (Robert P. Levis, of counsel), for creditors.

Hyman & Campbell, for creditors' committee.

Jacob M. Guedalia, for bankrupt.

CHATFIELD, District Judge. The alleged bankrupt, Samuel D. Isaacson, has resided and had a domicile in the borough of Brooklyn for a number of years, as is shown by his testimony in this proceeding. He has had as well for six or seven years a place of business at No. 22 Manhattan avenue, in that borough, and in the Eastern district of New York. At some time in the month of June, 1907, he opened an office at 565 Broadway, in the borough of Manhattan, in the Southern district of New York, at which he carried on a wholesale business in the same line of goods, silks, woolens, dress goods, etc., as the business conducted in his retail store in Brooklyn. The Brooklyn property consisted of the ground floor of four buildings and the second floor of one of the buildings. The books and general records of the entire business seem to have been kept at the Brooklyn store, and the New York establishment consisted of two office rooms, in one of which certain piece goods were kept for use in the wholesale business. The transactions conducted in the New York office were transferred to the Brooklyn office for record, and the stock

of goods in the Brooklyn store was much greater in value than that in New York. The alleged bankrupt also owned some of the buildings at the Brooklyn address.

The alleged bankrupt testified, upon a hearing held upon March 4, 1908, that he had lived in New York for a period of about 10 days (prior to that time having lived in Brooklyn). Six days before this examination, viz., upon the 27th day of February, 1908, three creditors of Samuel D. Isaacson, the alleged bankrupt, filed an involuntary petition in bankruptcy in the Southern district of New York, and a receiver was appointed. Upon the 4th day of March, 1908, certain creditors filed an answer in the proceeding in the Southern district of New York, denying that the alleged bankrupt had a principal place of business and residence or domicile in the Southern district of New York. The alleged bankrupt, however, appeared by attorney upon the 28th day of February, 1908, and upon the 4th day of March this attorney consented that the bankrupt be adjudicated, and adjudication was thereupon had before the expiration of the period within which creditors might have answered. Motion was subsequently made to vacate the adjudication, and, the motion being granted, a reargument was had. Upon the reargument the court has passed upon the status of the proceeding in the Southern district, and reference will be made to this decision later.

In the Eastern district of New York three creditors, one of whom had been a petitioning creditor in the Southern district, filed an involuntary petition against Isaacson upon the 2d day of March, 1908; and, this petition having been brought to the court's attention, it was deemed unnecessary to appoint a receiver in the Eastern district, inasmuch as the receiver who had already been appointed in the Southern district had taken possession of the bankrupt's property and was presumed to be doing all that should be done to protect the estate. The alleged bankrupt did not consent to the adjudication in the Eastern district of New York, but, through the same attorney who appeared for him in the Southern district, filed an answer denying the allegation of residence and the commission of acts of bankruptcy, and further setting up as a defense the proceedings in the Southern district of New York, in which an adjudication was stated to have been had. The bankrupt verified this answer on the 18th day of March, 1908, before a notary public, and the answer was filed in this court upon that day. Examinations of the bankrupt and of third parties have been had in the Southern district, while an examination of certain third parties has been begun in the Eastern district and is now unfinished, having been stayed pending the hearing of this motion. Several creditors have intervened in each district, and have appeared and been heard upon the motions; but their intervention does not alter the questions which must be considered as to the jurisdiction of the court. The amount and number of these creditors' claims will be considered later with respect to the question of the convenience of parties and witnesses in subsequent hearings.

The bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]) in subchapter 2, § 2, provides:

"That the courts of bankruptcy * * * are hereby invested * * * with such jurisdiction * * * as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof," and "(19) transfer cases to other courts of bankruptcy."

Section 32 provides that:

"In the event petitions are filed against the same person, * * * in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest."

Under authority of section 30 of the same act the Supreme Court of the United States has issued certain general orders, of which General Order 6 applies to the present situation and to the provisions of section 32 above stated. General Order 6 (32 C. C. A. v) is substantially as follows:

"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, * * * and the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed."

It may be assumed that General Order No. 6 is subject to the provisions of section 32 of the bankruptcy law, and that the case may be transferred and consolidated for the convenience of the parties, if brought within the provisions of section 32, in spite of the direction in the general order that the court first adjudicating shall retain jurisdiction until the proceedings are closed. But, before considering the question of consolidation, it is necessary to refer to the decision of the District Court of the Southern District upon the application to vacate the adjudication had there, and to consider as well the effect of General Order No. 6, as interpreted by that decision, upon the proceedings in both districts, and now before this court on this motion.

The question before the court in the Southern district seems to have been twofold. The first phase of the question was raised by the answer interposed in that district on behalf of the creditors who filed the petition in the Eastern district. In this answer the jurisdiction of the District Court of the Southern District was questioned, and, adjudication having been entered before this issue was determined, the court (assuming that the adjudication should be set aside) took up the second phase of the question, viz., whether the proceedings in the Southern district should be stayed, and a hearing had upon the issues of insolvency raised in the Eastern district, in order that the provisions of rule 6 might be respected. Judge Holt in his decision says that the word "domicile" in rule 6, while grammatically fitting the ten days' habitation of the bankrupt in the Southern district, should, when rival petitions are under consideration, be held to mean the domicile which has existed during the greater portion of the preceding six months. Judge Holt goes on to say that, if the Southern district had no jurisdiction to adjudicate upon the ground of domi-

cile, then the provisions of rule 6, directing a hearing first in the district where domicile existed, require the hearing of the issues in this the Eastern district before other action can be taken. The result of such an application of rule 6 is apparent, and a strict compliance with the later provisions of that rule, to the effect that the court making the first adjudication shall retain jurisdiction until proceedings are closed, would prevent the Southern district of New York from again taking up the proceeding in that district. In fact, an order has been entered upon Judge Holt's decision staying proceedings in the Southern district until a hearing of the issues in this district, and it is impossible to see how the Southern district can reacquire a right to proceed, unless the proceedings in this district are dismissed or the motion to consolidate is granted.

The present motion is in effect for such consolidation, under section 32, which, as has been said, must be held, can be enforced in spite of the apparent prohibition contained in rule 6. While such a motion might be considered premature, in view of the stay and the order vacating the adjudication in the Southern district, it is evident that this court must hear the issues raised by the answer filed in this district, and then proceed to consider the present application, unless for the sake of brevity we consider the application at once. If section 32 can supersede the language of rule 6, this can be done at any time, and the decision of immaterial questions should not be unnecessarily undertaken. But, if the proceedings are to be consolidated, no trial of the issues in this district would be of any service, if it were not that the answer interposed in the Southern district and a change of residence on the part of the bankrupt might entirely defeat the jurisdiction of that court, and it is doubtful whether jurisdiction could be conferred upon the Southern district by the consolidation of a valid proceeding with one subsequently held invalid. This court is, therefore, inclined to agree with Judge Holt that the issues in this district must be determined at once, unless this court should differ with Judge Holt on the points raised. There are, therefore, two matters to be considered. In the first place, was the Eastern district, on February 27, 1908, the place of domicile of the bankrupt, and on that account the proper place for a first hearing of the petition in bankruptcy? Second, does the convenience of witnesses and the interest of the parties require the case to be sent to the Southern district for hearing?

Section 2 of the bankruptcy law has given three grounds for the acquisition of jurisdiction: First, a principal place of business; second, a residence; and, third, a domicile within the district. As has been pointed out by this court in the case of *In re Alice Lee Tully*, 156 Fed. 634, a court of bankruptcy may acquire jurisdiction over the person of the bankrupt and over the subject-matter of a proceeding, and, if no proceeding be started in a district having a superior right, an adjudication may ultimately be had, even though the bankrupt at the time of filing the petition had not been a resident or had a domicile within the district where the petition is filed for the requisite greater portion of the six months immediately preceding. But, if under those circumstances a petition should be filed in the district where the bankrupt had had such a residence or domicile for more

than three months, it is considered that the district in which the residence was sufficient would have the superior right. In other words, both districts would have jurisdiction, but only the district in which the residence was sufficient could adjudicate. Rule 6, in the case of a conflict of that sort, should apply to both cases, and there would seem to be no doubt that the interpretation given to that rule by Judge Holt would prevail. If the bankrupt filed a petition in the district in which he had a principal place of business, and another petition should be filed in a district in which he had a residence or domicile, rule 6, again, would require adjudication in the district of the domicile, unless section 32 should be invoked.

In the present case issue has been raised in the Southern district as to whether the place of business in that district is such as was intended by the statute when the phrase "principal place of business" was used. The Southern district, nevertheless, had jurisdiction of the proceeding and of the person of the alleged bankrupt, and ultimately could have adjudicated, unless a superior jurisdiction were acquired in the Eastern district. The Eastern district of New York had jurisdiction upon the filing of the petition, because of the residence and domicile of the alleged bankrupt in this district for the greater portion of the immediately preceding six months, and can adjudicate after a determination of the issue of insolvency. It would, therefore, seem necessary to proceed in this district, unless because of the convenience of the parties the case is to be sent back under section 32. The decision of Judge Holt and of this court will dispose of the issue that the Southern district has a prior proceeding pending, raised by the answer in this district. The consent on the part of the bankrupt to an adjudication in the Southern district will be material evidence in determining his denials of acts of bankruptcy in the proceeding in this district, and the testimony taken in the examinations in the Southern district of New York is on file and available to the creditors.

The largest creditors have asked that jurisdiction be retained in this district. The books of the bankrupt, and the witnesses who were engaged as clerks of the bankrupt in the keeping of those books, are presumably in the Eastern district. The real estate of the bankrupt is located here. His retail business is much greater in extent, so far as its physical aspects are concerned, than the wholesale business conducted in the Broadway office. The convenience of attorneys will not be greatly different in one district than in the other. No prejudice to the interests of the creditors or the bankrupt can be gathered from the affidavits, if the hearings should be held in the Eastern district and the estate administered there, and no sufficient reason is shown why the case should be transferred, under the provisions of section 32.

It may be assumed that this court is reluctant to take up the administration of a case which has apparently been well conducted in the neighboring district, and if the Southern district had been in a position to retain jurisdiction, or to proceed to an adjudication, and if the court in the Southern district had not decided that a hearing should be had here, the logic of the situation itself might have been sufficient to cause the sending of the case to that district for consolida-

tion. But under the form of order entered in the Southern district, whereby the jurisdiction of that district is left undetermined, and whereby a hearing in this district is deemed proper, no course seems to be open, which will not be dangerous as a precedent, than to proceed with the matter in the Eastern district of New York, and to direct that the issues raised by the answer here be immediately brought on for trial.

The motion for consolidation will therefore be denied, without prejudice to a renewal thereof, if the Southern district ever adjudicates, and the necessary showing under section 32 can be made.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. March 4, 1908.)

RECEIVERS—ALLOWANCE AND PAYMENT OF CLAIMS—PROCEEDINGS.

In order to expedite proceedings in insolvency against street railroad companies, where a large number of claims for torts are presented, they may properly be divided into groups, and a special master appointed to liquidate each group, in so far as the claims have not been liquidated by suit.

See 160 Fed. 221, 222, 224.

Byrne & Cutcheon, for complainant.

James L. Quackenbush, for defendants.

Masten & Nichols, for receivers.

LACOMBE, Circuit Judge. Several thousand claims (other than those on contract) have been filed with the special master, and from the statements contained in receivers' petition filed herewith it seems desirable that something should be done to facilitate their liquidation. A proceeding such as this, as the United States Supreme Court intimated in its recent decision in *Re Konrad*, 28 Sup. Ct. 219, 52 L. Ed. —, should be expedited. It is essential to such expedition that the total amount of provable claims against the property in the hands of receivers should be determined promptly. This may be most conveniently done by dividing them into groups and appointing additional special masters to undertake the work of liquidating such of them as may not have been already liquidated by trial and verdict before they are called for hearing.

One of these groups comprises claims and actions thereon against the New York City Railway Company to recover statutory penalties for failure to give transfers to passengers. Of these there are 4,203, distributed as follows:

1904	1
1905	758
1906	3,124
1907	320
	<hr/>
	4,203

During the four months which have elapsed since the appointment of special master none of these actions have been tried. Among them

there are, no doubt, very many causes where transfers were refused to bona fide passengers; but from such information as the receivers have been able to obtain by far the larger number are claims by persons who engaged in the occupation of being refused transfers as a novel and lucrative industry—a circumstance which the Appellate Division of the Supreme Court in this Department has held to be fatal to recovery. When the wheat shall be separated from the chaff, it would seem that those having meritorious claims may be afforded an opportunity for speedy liquidation before a special master, who can give exclusive attention to their cases. He will, of course, follow the decisions of the higher state courts on all questions touching the construction of the state statute under which the claim arises, and in all instances where a claim shall have been adjudicated in a state court before it is taken up for consideration by him will liquidate in conformity to the decision of the state court, except in cases where newly discovered evidence may show that such court was imposed upon.

There are also many claims filed for damages, based on negligence and other torts, on which claims actions were brought as follows, for accidents:

In 1902	45
" 1903	172
" 1904	387
" 1905	647
" 1906	852
" 1907	716
	<hr/>
	2,819
Year not given	52
	<hr/>
	2,871

There are also 100 claims against the Metropolitan Street Railway Company for accidents prior to lease to New York City Railway Company. These and the actions of 1902, 1903, and 1904 are what may be called "old actions," which for some reason have become stranded, presumably in many cases because the attorneys having them in charge have but little expectation of success. It is unreasonable to suppose that meritorious causes of action, in which a money judgment might have been recovered years ago, should be thus allowed to slumber. They should be promptly put in a position where they will no longer impede the progress of this proceeding, so that the abandoned causes may be eliminated, and those in which a trial is wished for may be tried without further delay.

The actions for accidents begun in 1905 could also have been tried long before now, had plaintiff's attorneys been reasonably diligent. The state courts have several parts devoted to the trial of actions of this sort, and certainly are not in the habit of refusing a plaintiff the right to try his cause promptly, because of any dilatory excuse on the part of a defendant corporation. The issues of this year (1905), therefore, will also be sent as a single group to an additional special master, and the "old actions" (prior to 1905) to still another special master.

As to the actions for accidents begun in 1906, it cannot be said that plaintiff's attorneys have been dilatory; but, in view of the large number of them, it is desirable that an additional special master should be selected to hear them, and thus give claimants an opportunity for prompt liquidation.

An order may be prepared directing Special Master William L. Turner to transfer for liquidation all claims for refusal of transfer to a special master to be named by the court, and directing said special master to proceed according to the practice in equity to take such proof as may be presented in each case and report thereon to this court with all convenient speed. When these claims shall have been liquidated, and liquidation approved by the court, they will be returned to Special Master Turner for classification with the other claims.

Similar orders may be prepared as to tort actions for 1905, for 1906, and tort actions prior to 1905, and a similar separate order covering actions against the Metropolitan Street Railway Company.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO.

(Circuit Court, S. D. New York. March 16, 1908.)

CORPORATIONS—INSOLVENCY PROCEEDINGS—PROOF OF CLAIMS.

In insolvency proceedings against a corporation, no claimant can be recognized as entitled to share in the assets in the hands of the receivers, unless his claim has been proved before a master in accordance with the order of the court, although judgments obtained against the corporation in other courts may properly be accepted by the master as sufficient proof of the claims and their amount.

See 160 Fed. 221, 222, 224.

Byrne & Cutcheon, for complainants.

James L. Quackenbush, for defendant.

Masten & Nichols, for receivers.

LACOMBE, Circuit Judge. Some of the special masters who have been appointed to liquidate the claims of alleged creditors which have been filed against defendant report that there seems to be some misunderstanding as to the practice. When receivers were appointed it was stated by the court that in liquidating claims the master would accept a judgment in favor of the claimant as sufficient proof of the claim and its amount, unless there was some evidence to show that the court rendering the judgment had been imposed upon. As was pointed out in a memorandum recently filed (161 Fed. 784), that statement was not intended to imply that this proceeding should be held up indefinitely till all claimants might bring to trial such actions as had been brought upon their claims. Judging from past experience, such a course would postpone the termination of this receivership for years to come.

No claimant can be recognized as entitled to receive any distributive share of whatever assets have come or may come into receivers' pos-

session, unless his claim has been proved and its amount liquidated before the special master agreeably to equity practice. The master will make up a calendar and give proper notice to claimants. As each claim is reached in its order, he will proceed to liquidate. If a judgment sustaining it is presented, he will liquidate in conformity thereto. If no judgment be presented, he will liquidate on such evidence as may be produced before him by claimant and defendant. If the claimant presents no evidence, he will liquidate on defendant's proofs. If no evidence at all is presented, he will report that fact to the court, showing that notice to liquidate was duly given, and stating that the claim is disallowed for the reason that there is nothing to show its validity.

The court does not undertake to restrain claimants whose claims were in suit before receivership, or have since been sued upon, from prosecuting such suits to judgment against the defendant; but, except in cases where some lien on the property was acquired before receivership, it is only the claims that have been proved before the special master which will be entitled to share in whatever dividend may be distributed when the assets or their proceeds are marshaled.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO.
et al. MORTON TRUST CO. v. METROPOLITAN ST. RY.
CO. et al. GUARANTEE TRUST CO. v. SAME.

(Circuit Court, S. D. New York. March 30, 1908.)

RECEIVERS—CERTIFICATES.

Receivers' certificates authorized in insolvency proceedings against a street railroad company.

In Equity. On petition of receivers of Metropolitan Street Railway Company for leave to issue receivers' certificates.

See 160 Fed. 221, 222, 224.

Masten & Nichols, for receivers.

Bronson Winthrop, for Morton Trust Co.

Davies, Stone & Auerbach, for Guarantee Trust Co.

LACOMBE, Circuit Judge. There seems to be a very urgent necessity for the issue of certificates to the amount asked for (\$3,500,000), and the prayer of the petition is therefore granted. The certificates will be superior in lien to the two mortgages, viz., the general and collateral trust mortgage and the refunding mortgage. The certificates are to run for one year and to pay 6 per cent. semiannually. Details as to offering for sale may be arranged on settlement of order. The order will not contain any specific appropriation of the proceeds, but instead there shall be inserted a general clause to the effect that receivers shall keep a separate account of the proceeds of these certificates, and that no part thereof shall be used except in the improvement, acquisition, preservation, or maintenance of property which is covered by both of said mortgages, and that all rolling stock bought with such proceeds shall be marked to that effect.

HOOD RUBBER CO. v. ATLANTIC MUT. INS. CO.

(Circuit Court, S. D. New York. June 5, 1908.)

INSURANCE—MARINE INSURANCE—POLICY—CONSTRUCTION.

An open marine policy on goods to be transported by rail and lake provided: "This insurance is not to cover more than \$100,000 by any one steamer, or in any one place at one time." *Held*, that such clause should be construed to mean that the policy was not to cover more than \$100,000 in value carried by any one steamer, so that, goods to the value of \$349,426.70 having been assembled and loaded on a single vessel, and damaged in a disaster to the amount of \$85,996.70, the insurer was only liable for such proportion of the loss as \$100,000 bore to the actual value of the shipment on the vessel.

At Law. Demurrer to complaint in action on policy of marine insurance.

Wing, Putnam & Burlingham, for plaintiff.

Carter, Ledyard & Milburn, for defendant.

RAY, District Judge. The defendant for a due consideration issued to the plaintiff a marine insurance policy whereby in substance and effect the Atlantic Mutual Insurance Company to Hood Rubber Company did make insurance and cause to be insured at and from Boston or East Watertown, Mass., by railroad to a shipping port on Great Lakes and thence by steamer on Lakes to ports on Lakes on goods, principally boots and shoes, laden or to be laden on board the good railroad and steamer or steamers, one million dollars. "This insurance is not to cover more than \$100,000 by any one steamer, or in any one place at one time." The proper determination of this demurrer depends on giving the correct interpretation to the words:

"This insurance is not to cover more than \$100,000 by any one steamer, or in any one place at one time."

The plaintiff shipped goods in different consignments at different times, each shipment of less than \$100,000 in value, the largest being valued at about \$12,500; but at a port on the Lakes shipments of the value of \$349,426.70 were assembled and loaded by the Rutland Transit Company on one vessel, the F. H. Prince, at one time, and she sailed with plaintiff's goods of that value on board, met with disaster, and the goods were damaged to the amount of \$85,996.70, of which the defendant paid \$24,610.79, conceding its liability to that extent, and same was received, but without prejudice to an action for the balance, if liable therefor.

The complaint is so framed as to present the real controversy between the parties. The defendant insists that it is only liable on the basis that the entire cargo on the F. H. Prince was of the value of \$100,000; that the words quoted should be read as follows:

"This insurance is not to cover more than \$100,000 worth, or in value, of goods or property shipped by any one steamer at one time, or gathered in any one place at one time."

On the other hand, the plaintiff claims that the words should be read:

"This insurance shall not cover more than \$100,000 of loss or damage on or to goods shipped by any one steamer at one time, or assembled in any one place at one time."

Or, putting it another way, the plaintiff insists that the clause mentioned does not limit to \$100,000 the insurance upon goods on one steamer at one time, but limits to that sum the amount recoverable by the insured in respect to a loss to goods carried by one steamer. The defendant's position is that by the very terms of its policy it insured the goods on the F. H. Prince, valued at \$349,426.70, to the amount of \$100,000 only, and that under the well-established principles of marine insurance it is liable only for such a proportion of a loss as the amount by it insured bears to the agreed value of the whole subject of insurance; or, stating the proposition differently, that it is liable for such proportion of the amount by it insured as the loss is of the subject of insurance. I think this clause in question, which was on the margin of the policy, means this:

"This insurance is not to cover more than \$100,000 of property in value, carried by any one steamer at one time, or assembled in any one place at one time."

I think the evident purpose was to limit the insured to cargoes of property not exceeding \$100,000 in value, and to prevent the assembly in one place of more than that amount of property in value. Probably what the insurer intended to say was:

"This policy or agreement is not to insure more than \$100,000 worth of property carried on any one vessel at one time, or assembled in any one place at one time."

Clearly it did not mean to say:

"This insurance is not to cover more than \$100,000 loss or damage by any one steamer, or in any one place at one time."

"One hundred thousand dollars loss or damage by any one steamer" would not correctly represent the idea, if it was intended to say:

"This insurance is not to cover more than \$100,000 loss or damage on goods carried by any one steamer, or assembled in any place at one time."

The goods insured were to be in transit, and this the parties knew. They were to be transported partly by rail and then to destination by water. The words we naturally would insert after "\$100,000" are "in value carried," so it would read:

"This insurance is not to cover more than \$100,000 in value carried by any one steamer," etc.

I am not cited to any case covering this exact case, and I am unable to find one; but the language of Patteson, J., in *Crowley v. Cohen*, 3 B. & Ad. 478, is suggestive. At the bottom of the policy was written the following:

"£3,000 only to be covered by the policy in any one boat on any one trip."

The court was not called upon directly to pass on the meaning of the clause, but incidentally it said:

"The proviso that only £3,000 should be covered in any one boat on any one trip shows that at least more than one voyage was contemplated, in which each boat might take as much as £3,000 worth of goods."

My attention is called to other cases, which are instructive, but not decisive.

It is unnecessary to comment on the second and third causes of action, for travel and expenses, etc., and for general average losses, expenses, and sacrifices. Defendant has conceded its liability on the basis mentioned and paid accordingly. If I am correct in my understanding of the clause mentioned, each cause of action is disposed of. It is not alleged or claimed in the complaint, or on the argument, that it can be shown that the words used in the contract of insurance set forth have any special meaning other than such as the law and entire contract gives them; that is, it is not claimed the plaintiff's case can be aided by extrinsic evidence.

It follows that the demurrer must be sustained, with costs. The plaintiff, if so advised, may file and serve an amended complaint within 30 days, on payment of such costs.

HOOD RUBBER CO. v. RUTLAND TRANSIT CO.

(Circuit Court, S. D. New York. June 5, 1908.)

1. SHIPPING—SPECIAL CONTRACT—VALUE OF GOODS.

The owner of a line of lake steamers could lawfully make a special contract with the shipper not to place more than \$100,000 worth of goods on any one of the vessels at one time, and having made such contract, was bound to perform the same, notwithstanding its common-law duty as a carrier to forward all goods as received.

2. SAME—BREACH.

Defendant having contracted not to place more than \$100,000 worth of plaintiff's goods on any one of its vessels for transportation at one time, and with knowledge that plaintiff's insurance was limited to \$100,000 worth of goods on any one steamer at any one time in violation of the contract loaded an assembled shipment valued at \$349,426.70 without plaintiff's knowledge on a single vessel, which shipment sustained a damage of \$85,996.70. *Held* that, since the insurance company was only liable for such a proportion of the loss as \$100,000 bore to the whole value of the goods shipped, defendant was responsible for breach of contract for the balance of the loss.

At Law. Demurrer to complaint in action against defendant, a common carrier, for damages for handling the goods of plaintiff in violation of the agreement of the parties.

Wing, Putnam & Burlingham, for plaintiff.

Albert H. Harris (Chas. C. Paulding, of counsel), for defendant.

RAY, District Judge. The defendant is a common carrier, and at the times in question was engaged in the business of transporting goods upon the Great Lakes between the port of Ogdensburg, N. Y., and other ports on said Lakes by means of a line of steamers owned and

operated by it. The plaintiff, a manufacturer and seller of rubber goods, was accustomed to ship same from Watertown, Mass., to Ogdensburg, N. Y., by rail, and thence by defendant's steamers to ports upon said Great Lakes. The shipments made by plaintiff from time to time were each less than \$100,000 in value. The plaintiff was accustomed to insure each shipment against perils of the seas and lakes during such transportation under a form of insurance policy which contained the following:

"This insurance not to cover more than \$100,000 by any one steamer, or in any one place at one time."

In the month of April, 1904, the defendant, well knowing plaintiff's practice to so insure its shipments of goods, agreed with the plaintiff that, in consideration of such shipments being made by way of Ogdensburg and defendant's line of steamers, the defendant would not upon the arrival of such shipments at Ogdensburg load more than \$100,000 worth thereof upon any one steamer at one time. The plaintiff relied upon said promise, and made shipments from Watertown by way of Ogdensburg and defendant's steamers, and continued to insure said shipments of goods during transportation in the manner aforesaid only, and under a policy containing the clause referred to. On or about June 20, 1904, the defendant, with full knowledge of the value of said shipments and in violation of its agreement, loaded several of such shipments of merchandise on one of its steamers, the F. H. Prince, for transportation to a point or points of said Great Lakes. The value of each of said shipments was much less than \$100,000; but the aggregate value of the shipments which the defendant put upon the F. H. Prince at one time in violation of its agreement was \$349,426.70. During the voyage the said goods on said steamer were damaged in the sum of \$85,996.70. The plaintiff had no knowledge or notice until after the loss and damage that the defendant had violated its agreement and placed such goods of the value aforesaid on said steamer. The plaintiff insured the goods aforesaid under the policy aforesaid, containing the clause aforesaid, relying upon the defendant's promise and agreement not to load more than \$100,000 worth thereof on any one steamer at any one time.

After such loss due proofs thereof were made and served, and the insurer, the Atlantic Mutual Insurance Company, conceded its liability, for such proportion of said loss as the sum of \$100,000 bears to the sum of \$349,426.70, the total value of the goods on said vessel, being the sum of \$24,610.79, and paid that sum to the plaintiff. The insurer denied liability for the balance of said loss and damage, amounting to the sum of \$61,385.91, and refuses to pay said balance, upon the ground it was not liable therefor, as it was only a partial insurer of said goods in the sum of \$100,000. The plaintiff sustained other loss and damage, which it would have recovered of the insurer in full under the said policy, but for the clause therein to which attention has been invited, and but for the fact that defendant in violation of its agreement placed \$349,426.70 worth of goods on said vessel at one time. The complaint sets out the facts in regard to said damages, etc. The complaint alleges damages by

reason of the facts aforesaid in the sum of \$65,769.52, and demands judgment therefor. The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The defendant insists that the complaint shows on its face that the insurer was and is liable for all the loss mentioned in the complaint under its policy of insurance, notwithstanding the clause to which attention has been called. The contention is that the entire loss, etc., was less than \$100,000, and that the policy of insurance covered loss to the extent of \$100,000. In *Hood Rubber Company v. Atlantic Mutual Insurance Company*, 161 Fed. 788, this court has just decided that the clause, "This insurance not to cover more than \$100,000 by any one steamer, or in any one place at one time," cannot be read to mean \$100,000 of loss by any one steamer, but must be construed to mean \$100,000 in value of goods or merchandise carried by any one steamer at any one time. As the Atlantic Mutual Insurance Company is not liable for the entire damage under the allegations of this complaint, a good cause of action is stated against the Rutland Transit Company. It had knowledge of plaintiff's course of business and insurance, and promised and agreed that it would not put more than \$100,000 worth of plaintiff's goods on any one of its steamers at one time. Relying on that agreement, the plaintiff, to the knowledge of the defendant, insured under the policy aforesaid, and forwarded its goods to be transported by this defendant under its express agreement aforesaid. The defendant violated that agreement without the knowledge or consent of the plaintiff, and as a result of the violation the defendant has been unable and will be unable to recover of the insurance company damage and loss sustained by it to the amount of \$65,769.52. The plaintiff sustains these damages by reason of the violation of its agreement by the defendant, Rutland Transit Company.

The defendant insists that it was its duty to forward such goods as came to it, as these goods were marked to a particular address and destination. That is true; but it was not its duty, having made a special contract with the plaintiff not to place more than \$100,000 worth of goods on any one of its vessels at one time, to forward these goods in violation of that special agreement. Having made a special contract and agreement, it was bound thereby. It was an agreement it had the right to make. The damages claimed were within the contemplation of the parties, and resulted from the breach of the contract alleged in the complaint.

The demurrer is overruled, with costs; but defendant may answer within 30 days on payment of such costs, to be taxed.

In re BLANCHARD et al.

(District Court, E. D. North Carolina. December 31, 1907.)

1. BANKRUPTCY—PARTNERSHIP—MORTGAGE OF FIRM PROPERTY BY ONE PARTNER.

A mortgage given by one partner on partnership property, although with the consent of his copartner, cannot be enforced as against firm creditors in bankruptcy; nor has the court of bankruptcy any power to give it effect as an assignment of the mortgagor's right of exemption out of the partnership property.

2. SAME—EXEMPTIONS—NORTH CAROLINA STATUTE.

Under the personal property exemption law of North Carolina, in case of bankruptcy the bankrupt must select his exemption in kind, and cannot wait until the property has been sold and claim the maximum value of his exemption in money from the proceeds.

In Bankruptcy. On review of referee's decisions.

R. C. Lawrence and J. G. McCormick, for creditors.

PURNELL, District Judge. The record is again before the court, with the indorsement: "Order sent some time ago. Do not know why record was overlooked"—in handwriting of the district judge; but the order seems to have been lost, and, counsel having been heard, the cause must again be decided. The first question arising on the record is as to the validity of a mortgage from A. E. Howard to E. J. Johnson for \$946.75, with interest from February 4, 1906, dated February 4, 1907; and, second, a mortgage from J. C. Blanchard to A. R. McEachan and J. A. Johnson, October 4, 1906 for \$775.

As to the first mortgage from Howard to Johnson, February 4, 1907, the facts are, as testified to by R. C. Lawrence, Esq.: In January, 1906, Howard executed to Johnson his promissory note for \$775, payable January 1, 1907, for money borrowed. The mortgage, executed February 4, 1907, was for the principal and interest of the note of 1906, and the sum of \$125 advanced by Johnson to enable Howard to pay cost and attorney's fees in a proceeding in bankruptcy then about to be filed, and so used. Was it valid for the \$125? It was made within the four months, but for a cash consideration, a loan in contemplation of bankruptcy; for it may be inferred, from the facts admitted and proved, that Johnson knew or had reason to believe the borrower was insolvent and contemplated bankruptcy, and he loaned the money for this purpose, i. e., to pay costs of filing fee expenses and attorney's fees. Attorney's fees paid by the bankrupt are not specially favored by the bankrupt act, as witness the provisions of section 60, subd. "d" (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]):

"If a debtor shall, directly or indirectly in contemplation of the filing of a petition by or against him pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court and the excess may be recovered by the trustee for the benefit of the estate."

The trustee files no such petition in the case at bar, and, it may be inferred, will not. The mortgage was given "with the consent of Blanchard." The mortgage and petition in bankruptcy bear the same date, though Mr. Lawrence says the mortgage was executed the day before the petition in bankruptcy was filed. Both were prepared the same day. The referee holds that as both of these mortgages were given by the individuals comprising the copartnership on the firm's property to secure an individual indebtedness, and not executed as a firm conveyance, and the mortgage of Howard to E. J. Johnson being largely to pay a pre-existing debt, to wit, \$831.75, "the interests of the mortgagee in the fund in excess of the personal property exemption allowed by law are postponed to the rights of the firm's creditors generally, but will operate as an assignment of the personal property exemption which may be allowed to each bankrupt in the event the court should hold that the said bankrupts are entitled to their exemptions." This court has no jurisdiction over exemptions of bankrupts, except to allot them. In re Paramore & Ricks (D. C.) 156 Fed. 218.

The mortgage, executed the day before the petition to secure a pre-existing debt, was a preference; and this is now admitted by counsel, and cannot be proved. Section 67c (2), providing what liens shall be disallowed by the adjudication, provides:

"If the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy."

Subdivision "d" of this section seems to be an exception:

"Being given or accepted in good faith and not in contemplation of or in fraud of this act and for a present consideration which have been recorded according to law. * * * shall not be affected by this act."

If referees will look to the bankrupt act as the chart of their duty and the law of the case, and not be confused by state decisions, it would be better for all concerned. The bankrupt act is an act of Congress passed in accordance with the Constitution (art. 1, § 8, cl. 4):

"Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States."

And article 6 of the Constitution provides the acts of Congress which shall be passed in pursuance of the Constitution shall be the supreme law of the land.

Johnson seems, from the evidence, to have accepted the lien in good faith, not in contemplation of a fraud of the bankrupt act, and to have parted with his cash, a present consideration, and to have had his lien duly recorded, which brings the claim for \$125 within the exception; but it may be said to be a "close shave," even were we dealing with individual estates, in which event the court would feel constrained to allow the claim to this extent against the estate of Blanchard as not affected by the adjudication. As to the ruling of the referee on this claim, he is reversed. We are dealing with partnership assets, not of the individuals.

As to the second claim, that of McEachan and Johnson, the mortgage seems to have been given and accepted before bankruptcy was contemplated, or there was any suspicion of insolvency, for money to

enable these young men to go into business, the manufacture of brick, more than four months before the adjudication, and under the express provisions of the act of July 1, 1898, the bankrupt act, is not affected by the passage of the act. But both of the foregoing liens are personal obligations secured by mortgages on the interest of the individuals in firm property. The court will not discuss this abstract question, which seems to have confused counsel and the referee, but simply hold the firm debts must be paid first out of the firm assets as provided in the bankrupt act, that separate accounts of firm debts and assets must be kept, and, if there is more than sufficient for this purpose, a marshaling of assets, as provided in section 5c. Loveland (3d Ed. p. 312), ably discusses this distinction between partnership and individual debts under the bankrupt act, citing the authorities, among others, *McDaniel v. Stroud* (decided by the Court of Appeals of this Circuit) 106 Fed. 486, 45 C. C. A. 446; and this has been the rule in bankruptcy since the decision of Lord Chancellor King in *Re Cooke*, 2 P. W. 500, affirmed by Lord Eldon in *Ex parte Clay*, 1 Ves. 813, and *Ex parte Tuitt*, 16 Ves. 193. It was enacted in the English bankrupt act of 1885, as it is now in the act of 1898. The partnership and the individuals composing it are distinct entities. In *re Eagles & Crisp*, 99 Fed. 695, 3 Am. Bankr. Rep. 733; In *re Barden*, 101 Fed. 553, 4 Am. Bankr. Rep. 31; In *re Farley* (D. C.) 115 Fed. 359. Hence, as far as the debts before mentioned, both being individual debts, they must, as to the firm or partnership assets, be postponed until the firm or partnership debts are paid and disallowed in this proceeding. Saying the liens were given with the consent of the other partner is not sufficient to make them partnership debts or bind partnership property. It should and must be evidenced by some consent or joinder in writing.

The third claim mentioned in the report is a mortgage executed by the partnership, Blanchard & Howard, to C. M. Fuller and H. B. Fuller, owned solely by C. M. Fuller, dated January 11, 1906, and recorded more than a year before filing the petition in bankruptcy, to secure \$210. The chattels covered by this mortgage were sold by order of the former referee, now dead, for \$360. The referee holds that said claim should have priority over the debts of general creditors. This, under the provisions of the bankrupt act cited and the general spirit of the act, was correct, and the referee is affirmed.

The claim of L. Shaw, as reported, is almost identical with the foregoing, except as to amount and property mortgaged. The amount of this debt was \$250, with interest at 6 per cent. from November 1, 1906, secured by a mortgage on property sold under an order of the referee providing the lien should attach to the fund arising from the sale. The engine pledged in the mortgage sold for \$425, and the brick mill \$245. A like decision was rendered by the referee that the said claim have priority over the claims of general creditors. In this the referee, for the same reasons, is affirmed.

Counsel for the bankrupts "moved the court that the bankrupts be allowed their personal property exemptions out of the cash in the hands of the trustee, said exemption to be paid under the final distribution sheet herein." Counsel asked that testimony be taken to show the reason why the personal property exemption was not allotted in

kind, when counsel was sworn and attempted to explain by producing a letter from the former referee in which he says:

"I am not sufficiently familiar with the details of the case to say whether or not bankrupts will be benefited by a specific allotment at this time. If the bankrupts agree to the sale of the property as above suggested, I do not see how any question could arise, nor how they could be damaged."

The late referee was a good lawyer, well posted in bankrupt law, and no one would think of his attempting to mislead a brother attorney. I have no idea he did, or intended to do so. He probably was advertent to the law of personal property exemptions according to Const. N. C. art. 10, § 1, as construed by the Supreme Court of the state, and followed by this court under the provisions of the bankrupt act. That the debtor must select exempt property in kind, and then, where it is such as will enhance the sale of other property, such as staple articles in a stock of goods, he may, by consent, have the property or articles thus allotted sold by the trustee with the other personal property, and take the cash for which such goods so selected sold. In no event can he receive more than \$500. There is no halo around personal property exemptions. They are simply exemptions, and are not handed out on a silver waiter. There is a burden resting on one claiming an exemption. He must claim it. This the bankrupts did not do in the way contemplated by law, but it may be inferred, without further effort than a letter to the referee by their attorney, made no effort in this behalf, but it may be concluded from the record by their silence and inaction assented to the sale free of incumbrance. The claim before the referee was too late, and even now essentials are not filed or shown. There is no consent on the part of either partner to two personal property exemptions being allowed, carved out of the meager assets of this estate. Neither partner shows or offers to show he has not another personal property exemption, independent of their partnership assets, both essential to an allotment. It is not a case for sympathy or a feeling or disposition to aid two young men who started into a venture on borrowed capital and failed. It is a question of law. Creditors lose. Why should those by whom they lose, by trying to aid, be allowed out of the wreck what they do not seem to have had before they started into the venture on borrowed capital? It is not law; hence cannot be allowed.

The recommendation of the referee that the personal property exemption of the individuals be allotted to them in cash is not and can not be adopted. This proceeding is by the firm, and there are firm debts sufficient to consume all the firm assets. The funds must be so applied.

In re BLANCHARD & HOWARD.

(District Court, E. D. North Carolina. March 30, 1908.)

1. BANKRUPTCY—JURISDICTION OF COURT—EXEMPTIONS.

A court of bankruptcy is without jurisdiction to adjudge a bankrupt's exemption to a mortgagee, or to any one except the bankrupt.

[Ed. Note—Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. SAME—PARTNERSHIP—RECORD.

In proceedings in bankruptcy against a partnership, the individual schedules of the partners are not a part of the record, nor can they be considered as such.

In Bankruptcy. On petition for rehearing.

For former opinion, see 161 Fed. 793.

McIntyre & Lawrence and J. G. McCormick, for mortgagee claimants.

PURNELL, District Judge. On a petition for a rehearing it is stated:

"(1) The court states it does not appear that each of the partners consented to the allotment of a personal property exemption to the other partners. The court was inadvertent to the fact that the petition, signed by both the partners, makes specific claim to such personal property exemption.

"(2) The court states it does not appear said bankrupts have not other property, outside the partnership assets, out of which said personal property exemptions could be allotted. The court was inadvertent to the fact that attached to the partnership schedules are individual schedules, which show the bankrupts have no individual property whatsoever.

"(3) That bankrupts have waived their rights to the exemptions because they did not demand the allotment before the property was sold, followed by a restatement touching the mortgages and the correspondence with the referee, fully discussed in the original opinion.

"(4) The court misconceived the effect of the allotment, for that it would appear from the opinion that the bankrupts themselves would receive the benefit of the allotment of exemptions. As a matter of fact the bankrupts will not receive a dollar of the allotment, for their right thereto has been transferred by mortgage to the parties who advanced them money with which to engage in business. Wherefore petitioners pray that the court grant them a rehearing of that portion of the case and opinion."

The difficulty in this case has been that it was heard at the request of counsel without the record, and their "statement of facts" taken to be full and true. The court has always been ready and willing to correct any error or apparent error into which it may be led or fall, and congratulates counsel on their course, much more creditable to themselves and respectful to the court, of calling attention to errors and giving the court credit for a disposition to do right, justice to all, and wrong to none, instead of indulging in the questionable practice of "cussing the court" when they lose out in a case. Except being inadvertent to or not informed as to some of the facts, this court cannot now see that it has committed or been led into error.

In the fourth statement of counsel they persist in an erroneous conception of the law, as construed by the Supreme Court of the United States in *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup.

Ct. 751, 47 L. Ed. 1061, and followed by this court in *Re Paramore & Ricks*, 156 Fed. 211, that after allotment the court of bankruptcy has no further jurisdiction over exemptions to administer them. It is again held by this court that it has no jurisdiction to order a personal property exemption to any one except the bankrupt. It may be as well, therefore, for counsel to get rid of this supposed equity in the mortgagee claimants. Nearly everything now urged was considered when the original opinion was written, and, while it is true the court was inadvertent to some of the facts in allegations 1 and 2, the schedule referred to in 2 was improperly attached to the partnership schedules, had no place there any more than any other ex parte statement, and the matter therein stated could not properly be considered. This was a partnership proceeding. The statute and general orders of the Supreme Court are paramount in bankruptcy proceedings, and should be strictly adhered to. When they are not, attorneys and their clients must take the consequences. Not being a proper paper to be filed with the schedules, the court was not simply inadvertent to, but ignored, the paper, as it should have done. As a matter of equity the court would be inclined to order the personal property exemptions paid to the mortgagees, if the bankrupts were entitled thereto, but has no power to do so *stricti juris*; and not being entitled to such exemptions, as before decided, this court cannot go out of its way and violate the law to do equity, or what seems to be equity, in the premises. The decision was not based exclusively on the matters it is now said the court was "inadvertent to," but upon these matters in connection or combination with others. Even admitting all that is claimed in the petition, it cannot change the result.

The petition is overruled, and the former decision affirmed.

SHELBY STEEL TUBE CO. v. DELAWARE SEAMLESS TUBE CO.

(Circuit Court, E. D. Pennsylvania. June 3, 1908.)

APPEAL AND ERROR—INTERLOCUTORY DECREE AWARDING INJUNCTION—SUPERSEDEAS—POWER TO VACATE.

Where an appeal has been taken to the Circuit Court of Appeals from an interlocutory decree granting an injunction to restrain the infringement of a patent, and the Circuit Court has accepted an appeal bond and made it a supersedeas, such court has no power, after the appeal has been perfected, to suspend the operation of such bond and vacate the stay prior to the receipt of a mandate from the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2260.]

In Equity. On motion to vacate stay.

Clarence D. Kerr, C. P. Byrnes, and Thomas W. Bakewell, for the motion.

Charles K. Offield, opposed.

ARCHBALD, District Judge.¹ In the opinion heretofore filed (151 Fed. 64) the court sustained the patent and awarded an injunction, whereupon the defendants appealed, and upon giving bond the appeal

¹Specially assigned.

was made a supersedeas. The Court of Appeals having affirmed the decision (160 Fed. 928), a motion is now made to vacate the stay; the defendants having succeeded in deferring the mandate by a petition for a rehearing, after which, if refused, notice is given of an intention to apply to the Supreme Court for a certiorari. The power of the court to remove the stay is denied by the defendants, the effect of the appeal as allowed, as it is claimed, being to prohibit further proceedings, but is maintained by the complainants on the ground that the only action sought for is the vacation by the court of its own discretionary order.

Ordinarily, under the existing federal statutes, where the proper steps have been taken, an appeal, the same as a writ of error, by operation of law acts as a supersedeas. In case, however, of an appeal from a final decree granting or dissolving an injunction, the judge who allows the appeal may in his discretion, at the time of such allowance, suspend or modify the injunction during the pendency of the appeal on such terms, as to bond or otherwise, as he may consider proper (equity rule 93); the decree, of course, where the power is not exercised, retaining its intrinsic force, and the injunction remaining operative. *Hovey v. McDonald*, 109 U. S. 150, 162, 3 Sup. Ct. 136, 27 L. Ed. 888. It is also further provided by the act creating the Circuit Court of Appeals (Act March 3, 1891, c. 517, § 7, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]) that, in case of an appeal from an interlocutory order granting or continuing an injunction, proceedings in the court below shall not be stayed during the pendency of the appeal, unless it is so ordered by that court, or the Court of Appeals, or one of its judges. The question is whether the suspensive character given to the appeal at the time it is allowed can be recalled at will by the court allowing it before the appeal is finally disposed of.

There is but little light thrown upon this question by the decided cases. In *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690, after a supersedeas had been allowed, on the party giving bond with accepted sureties, the order was annulled by the judge who had allowed it, the security given not being considered sufficient, and the Supreme Court refused to disturb this. But this action was taken the very next day after the supersedeas had been allowed, and within the time when the court had the right to refuse or order it, and is not, therefore, decisive. On the other hand, in *Butchers' Association v. Slaughterhouse Co.*, 1 Woods, 50, Fed. Cas. No. 2,234, it was doubted by Judge Bradley at circuit whether he had authority to increase the amount of an appeal bond beyond that which he had previously accepted, on the ground that the jurisdiction of the Supreme Court attached by the approval of the bond, superseding further action. The case of *Westinghouse Air Brake Co. v. Christensen* (C. C.) 128 Fed. 749, is of no particular relevancy, the contempt proceedings there entertained, pending the appeal, being clearly justified; it being useless to retain an injunction in force unless there is authority at the same time to vindicate it. Nor is anything favorable to the complainants to be derived from *Boston & Maine R. R. v. Gokey* (D. C.) 150 Fed. 686, but rather the contrary; the decision there being that the supersedeas, secured at the time of the appeal, continued in force pending a petition to the Supreme Court for a certiorari, the stay of execution additionally ordered being merely out of extra caution. The case which comes near-

est to justifying the present motion is *Timolat v. Philadelphia Pneumatic Tool Co.*, 130 Fed. 903, where a previous order granting a supersedeas was vacated on motion; the court deeming it advisable to retain the injunction in force while the appeal was pending, after having at first suspended it. But this action, like that in *Black v. Zacharie*, was evidently taken while the case was still in the grasp of the court, or at least was so regarded, which may account for its authority not being questioned. No doubt, as declared in the *Haberman Case*, 147 U. S. 525, 13 Sup. Ct. 527, 37 L. Ed. 266, discretion is given to the lower court "to proceed or not on the interlocutory decree pending the appeal." But this means no more than that, in granting the appeal, it may reserve the right to do so.

Proceeding, then, to dispose of the case on principle, the better view would seem to be that, the court being called upon to decide, at the time of allowing the appeal, the effect to be given to it, and having decided either that the injunction is to be retained or that it is to be superseded, no authority exists to subsequently modify this. By the express terms of the rule the order is to be made "at the time of such allowance," which implies a single definite action, taken in that immediate connection, giving character to the appeal once for all; the injunction continuing in force as of course in the absence of it. Moreover, the stay, if allowed, is to be during the pendency of the appeal, which means until the mandate comes down; that being the only way by which the lower court is advised of the final disposition of the case. *Durant v. Essex County*, 101 U. S. 555, 25 L. Ed. 961; 13 Ency. Plead. & Prac. 837. There is nothing to sanction the splitting up of this period, recognizing the suspensive character of the appeal so long as the court deems it advisable, and then disregarding it. This may not be so clear with regard to the Court of Appeals act, by which the case is more immediately governed; but it is sufficiently so, and, even if it were more doubtful than it is, it is to be construed, if possible, the same way as the rule, for the sake of uniformity. In either case, the appellant having been required to give bond—where that is exacted, as it usually will be—and having been put to the trouble, if not the expense, of doing so, the undertaking being for the whole period of the appeal, and the appellee having the benefit of it, the arrangement, not to say bargain, so made is to be adhered to, as to the one party the same as the other, and not changed according to the shifting views of the court, overturning expectations rightfully based upon it. If this does not sufficiently safeguard the interests of the appellee, the appellate court is always open to him. *Rubber Co. v. Goodyear*, 6 Wall. (U. S.) 153, 156, 18 L. Ed. 762; *French v. Shoemaker*, 12 Wall. (U. S.) 86, 99, 20 L. Ed. 270; *Jerome v. McCarter*, 21 Wall. (U. S.) 17, 31, 22 L. Ed. 515.

While, then, as intimated at the argument, I might be inclined to recall the stay, in view of the protracted character of the appeal, and, indeed, might not have originally granted it at all, had I realized how liberally it was to be indulged in, having suspended the injunction and required a bond, I am of the opinion that I have no authority to undo this, and that the suspensive character given to the appeal must continue.

The motion to vacate the stay is overruled.

SPRINGER v. ST. LOUIS SOUTHWESTERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1908.)

No. 2,680.

1. RAILROADS—INJURY TO PERSONS ON TRACK—ARKANSAS STATUTE.

Kirby's Dig. Ark. § 6607, providing that "it is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the tracks," which is construed by the Supreme Court of the state to apply to the running of trains in railroad yards, only requires that the trainmen shall keep a lookout ahead on moving trains, and, where such lookout is properly kept, does not, without more, render a company liable for the death of a person killed in railroad yards who was not seen.

2. SAME—PERSON KILLED IN SWITCHYARD DURING FIRE—CONTRIBUTORY NEGLIGENCE.

A fire started in the daytime in a residence addition of Pine Bluff, Ark., destroying about 100 houses. In endeavoring to save their household goods the residents carried them onto the tracks of the railroad immediately south of the burning district. These tracks were in the switchyards of the company, without any streets or private crossings thereon. During a period of about 45 minutes of the fire the railroad company had run its cars off of the first tracks next to the fire, when the employés, discovering that some oil tanks on the remaining cars were beginning to smoke from the heat of the fire and were in danger of explosion and augmenting the danger of the situation, ran an engine to the end of the cars to push them out. There was an opening in this line of cars of four or five feet, not left under conditions to indicate an invitation to the people to use it as a passway for carrying goods. Just before this movement of the train a switchman went to this opening and adjusted the drawheads for the connection, and gave warning to the people thronging about the place of the intended movement, and then passed down the train to warn persons who were passing over and beneath the drawheads. The deceased, who worked in a mill shop outside of the addition, left his post and went to the fire, and was assisting in carrying a mattress through said opening. He was warned by a third person of the danger just before the accident, and the bell on the engine passing down the open tracks to the rear of these cars was ringing, and continued to ring as the movement of the cars began. The engineer and his fireman kept a lookout as the movement of the train began, but did not observe the defendant. *Held*, that to the deceased, who was a mere volunteer on its right of way, the company owed no other duty than not to wantonly or recklessly injure him, and his failure to stop, look, or listen directly contributed to his death, and a verdict for the defendant below was properly directed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 891.]

Adams, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Charles T. Coleman (Samuel M. Taylor, William D. Jones, George W. Murphy, and William M. Lewis, on the brief), for plaintiff in error.

Nicholas J. Gantt, Jr. (Samuel H. West, Frank G. Bridges, and William T. Wooldridge, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action by the administratrix of John I. Springer to recover damages for personal injury to him, resulting in his death, alleged to have been occasioned by the negligence of the defendant railway company. About 2 o'clock p. m. February 13, 1907, a fire broke out in an addition to the city of Pine Bluff, Ark. It was of such character as to destroy nearly 100 houses and drive the inhabitants into the streets and southward onto the railroad tracks of the defendant. Immediately on the south side of this addition, extending along three blocks, were the switchyards of the defendant, running east and west. There was a network of perhaps 12 tracks used exclusively by the railroad for storing and switching its cars. There were no street or road crossings over said tracks. The fire originated in a lot in the westernmost block, bordering on the western end of the switchyard. The fire spread eastward and northeast.

While the evidence tended to show that there were some facilities for the people to pass out to the west, and to the northeast to the ground, known as the "shop property," where the railroad and other shops were located, the readiest mode of escape for the people from the fire area and to carry out their household goods and effects was onto and over the said railroad tracks. Naturally enough, there was intense excitement among the people, hurrying and struggling to save their exposed personal property, which they undertook to accomplish by carrying and tumbling the household goods wherever they could find a place between the net work of railroad tracks. When the fire began to extend eastward, there were cars of various kinds on the tracks next to the lots where the fire raged. Within the first 45 minutes of the fire the danger to the cars became apparent, and the employes of the company had removed from the west to the east the cars off of the first five northernmost tracks. On the sixth track there then stood a train of freight cars, at one point in which the cars were broken, with a space between them of four or five feet. Some of the people, in carrying their household effects to the south, would climb through this train over the drawheads, and others began to pass through the said narrow passageway where the cars stood apart. About this time the yard master or foreman discovered that the oil tanks on the cars to the west side of said cut off were becoming so hot from the heat of the fire they began to smoke. To save the company's property, as well as to prevent a not improbable explosion, augmenting the impending danger to property and the lives of people within its range, the superintendent gave direction to the crew to move said train to the east out of danger. To effect this the engine was carried to the west end of the train, facing east, to push it eastward.

Springer did not live in said addition, and had no property interests there to look after. The plaintiff's witness Frazier was indulged to testify that Mr. Peck, division superintendent of the defendant, told him:

"That he had had the shops closed down and ordered the men to come down and help save the stuff. He told me to keep them as long as they could do any good. The shopmen were at the fire. They carried my goods out of the

house; but the goods were burned up in the street. Most of the goods were carried over, then, in the railroad yards."

To say nothing of this being mere hearsay testimony, there is nothing in the record to show that Springer was in the employ of the defendant. The only testimony touching this matter is that of the widow of the deceased, who said:

"He [Springer] was employed by the Cotton Belt Railway Company as a scratch boss in the mill; that is, he marked the timber to be dressed."

His immediate foreman, Wheelan, testified:

"I was foreman in the mill department of the shops, and Springer worked under me. The men were not ordered to quit work and go to the fire. They kept dropping out and going. Springer was familiar with the yards. I do not know that Springer had gone to the fire. I went to the fire after all the men had gone. I did not tell them not to go."

After he reached the vicinity of the fire, witness Peebles testified that he (Peebles) had been carrying goods out of a house, and, when he went out to the railroad tracks and discovered that some goods were taking fire, he saw Springer and said to him, "Let's try to save some of the stuff;" that they carried a dresser through said opening, then returned and picked up a mattress, and while Springer was attempting to pass through the opening with it he was caught and crushed between the cars.

The negligent liability of the defendant railroad for this accident is charged in two counts of the petition. The substance of the first count is that, while the people and Springer were fleeing with portions of their goods across said tracks, "the defendant, without exercising ordinary care and caution, and without keeping a constant lookout for persons upon its tracks, negligently, recklessly, and wantonly, by its agents and employes, with a locomotive steam engine pushed certain cars then and there standing on its said tracks, which said Springer and others were passing, causing them with great force to come together, catching said deceased," etc. The second count, after setting out the preliminary facts, charges that:

"The defendant, without exercising ordinary care and caution, and without keeping a constant lookout for persons upon its tracks, negligently, recklessly, and wantonly, by its agents and employes, with a locomotive steam engine, negligently, wantonly, and violently pushed certain cars then and there standing on its tracks, and which cars were at the time about four or five feet apart, and between which said John I. Springer and others were passing, causing them with great force to come together, catching said deceased."

The answer, after setting out the facts occasioning the movement of said cars, alleged contributory negligence of the deceased. At the conclusion of the evidence the court directed a verdict for the defendant.

Much reliance is placed by plaintiff's counsel upon the following statute of Arkansas (Kirby's Dig. § 6607):

"It is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the tracks of any and all railroads, and if any persons or property shall be killed or injured by the neglect of any employes of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and re-

sponsible to the person injured for all damages resulting from the neglect to keep such lookout, and the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed."

It is held by the Supreme Court of that state that this statute applies as well to the running of trains in railroad yards as elsewhere. *Railway v. McQueeney*, 78 Ark. 28, 92 S. W. 1120; *Railway v. Graham*, 102 S. W. 700. On its face this statute only creates the liability of a railroad when the injury or death results from neglect, which consists in failing to keep a constant lookout for persons upon its track. Like any other act of negligence, which is always a relative term, the degree of vigilance is measured by the surrounding circumstances.

The chief insistence of plaintiff's counsel is that under the special circumstances, when the employes in charge of the movement of the engine and cars knew that a multitude of people were thronging about the track on which the movement was proposed to be made, it was a wanton act to undertake it without taking such affirmative measures of precaution as would certainly have assured them that no person would be on the track. This extreme proposition cannot rest alone upon the terms of said statute. The only requirement it imposes is that the persons running the train should "keep a constant lookout for persons upon the track." Applied in a practical way, the lawmakers evidently had in mind the probability that persons, whether rightfully or wrongfully, might get upon railroad tracks, and therefore, out of consideration for their lives and limbs, they required those running trains to keep a constant lookout for such possibilities, and thereby avoid, as near as might be, injuring them. When, however, the conductor, engineer, and fireman, while the train is running, keep such lookout, they discharge the duty imposed by this statute, and no liability would attach to the railroad for striking and injuring the person upon its track in so far as the statute itself is concerned. This, it seems to us, must be conceded.

In this respect the testimony of the engineer and the fireman in charge of the engine was that from their respective sides of the cab each kept a sharp lookout ahead, and they had no knowledge that the plaintiff had gone between the cars, although they knew that many people were about the train and had been passing through the same. It therefore devolved upon the plaintiff to show something more to inculpate the defendant company. On the cross-examination of the engineer (Dillon) he was indulged to state what he said to the switchman who gave him the order to move the train, which was to the effect that it was dangerous, as they were liable to kill somebody, and that he was loath to make the movement. It was inadmissible to bind the defendant by this free expression of opinion by the engineer. Being admitted, it evidenced only the sense of the danger of moving the cars at the time and place, and the necessity in executing the order of exercising due care.

The law has equal regard for the rights of the railroad company, and its conduct in the matter of precaution must be compared with that of Springer's. The right of self-preservation and protection in the eye of the law is accorded to the corporate entity, which but

represents the aggregate stockholders, as well as to the individual. The cars stood upon a track dedicated to the exclusive use of the railroad company. There was no public highway over this ground, and the public had no right to appropriate it to a private use. When the property of the railroad company became exposed to imminent danger of destruction, from the proximity of the fire, it had the unquestioned right to the immediate use of its track, in its private yards, for the extrication of its cars. The emergency admitted of no delay. When the yard master or overseer discovered that the oil tanks were beginning to smoke from the heat of the fire, a delay of a few minutes might have been attended with disastrous results, not only to the cars of the railroad, but to the lives of hundreds of people and their goods thronging and scattered close to the cars. The lack of energetic and prompt action on the part of the employes to rescue the cars might have rendered the company liable for other and greater damages.

Under such conditions, what duty did the law impose upon the railroad toward the man Springer, before it could move its own property on and over its own right of way? He was not on the defendant's track and right of way by authority, or even as a licensee from the defendant. The employes had not seen him, and did not know that he was there, or that he contemplated passing between the cars. As a general precaution, taken by the railroad, the evidence shows the following facts: Woody, a switchman, who worked in the field, testified:

"Before the engine came to the cars, I was getting people out of the way from the engine and cars. I saw a lot of people jumping through the cars over the drawbars, and I wanted to keep any more from going through. The engine coupled on and no more people were jumping through the cars. I hollered to the people to stand back, so that I could see down the line we were shoving, and a lot of people got back. I gave the signal to the engineer to come ahead. I saw there was an opening down there about five feet in the cars, and I went down that way to catch the coupling; but before I got there the cars came together, and somebody said a man was killed, and I gave the signal to stop. * * * Another switchman, Robert Searles, was between me and the engine. We hollered to the people at the time to get out of the way, and they all stood back. I did not see a man between the cars. We were acting under the foreman's orders to move the cars to keep them from burning."

He further states that they did not see anybody carrying goods through the opening, but the people he was hallooing at were going over the drawheads; but he saw others stopping people from going through the opening. Both citizens and employes were assisting him in keeping the people back. "I hollered to the people in a high pitch."

McKay, another switchman, testified that:

"Just prior to the accident I walked to the car where he [Springer] went through and opened the knuckle and then walked about two car lengths to the east. I saw the engine coming, and wanted to get on the other side. So I went through on the north side, and there was quite a number of fellows running back and forth through there. I said: 'You had better look out; there is an engine coming against that car.' As I said this I met another bunch and said the same thing, and I walked east about two car lengths on the north side of the car."

The other switchman, Searles, testified as follows:

"We coupled to the west string and I was told to wait until the other switchman walked up to the opening. I was midway to the first car and the engine. Woody was the other switchman. We waited for him to go to the opening. He gave me the signal to move ahead, and I gave it to the engineer."

There was no contradiction of this evidence. In addition to this, the bell on the engine, as it was moving on to the west end of the train, was ringing and continued to ring as the movement of the cars began. Several witnesses, outside of the employes, heard the bell and took notice. But, says counsel for the plaintiff, the switchman should have stood at the small opening and continued to cry out for the benefit of Springer, as if he was then blind and deaf, and the railroad company owed him some especial duty. As people had been climbing through the cars throughout the length of the train, the switchmen had also to see to that incident. As the people in the vicinity took heed of his warning and gave way, he had the right to assume that their attention would be given to the movement of the cars, while he went along the line to keep other people from attempting to pass through over the drawheads.

If, however, it should be conceded that under such state of facts a jury might be permitted to say that the company fell short of the full measure of its duty toward Springer, what can be said in extenuation of his conduct? Did he even approximate the performance of the duty the law laid upon him? If he had home, or family, or property involved in that conflagration, from a sentimental viewpoint his conduct might invite some considerate indulgence. The law is not builded on sentiment or emotion. It deals with the practical relations of men as members of the social compact—with checks and mutual obligations, which experience has crystallized into generally recognized custom, or has taken the form of positive statute. Springer had no business to take him upon the defendant's right of way. He had gone to the vicinity of the fire from impulse, if not curiosity. It is a reasonable inference that, as the mattress which Peebles and Springer were carrying was between them, Springer went in between the cars without stopping or looking or paying any heed to anything else than the mattress, as it fell to the north side of the cars.

What were the open, visible facts about that yard just preceding this accident? Within the preceding 45 minutes of the raging of the fire the railroad men had been running an engine up and down until they had cleared five of the tracks. The plaintiff's witness Schnable, testified that:

"The company was switching with a couple of engines up and down those tracks, and paid no attention to the people trying to save their goods. * * * Cars and switch engines were moving on the tracks. In their excitement, people did not realize their danger. * * * Switching was done on the track south of the main line."

If this is so, the "switching with a couple of engines up and down these tracks" was additional warning to Springer that it indicated a movement of the train, which was exposed after the train north of it had been pulled away, at any moment. The presumption was that

there could be no other purpose in running an engine over the cleared tracks than to pull out this train. Several witnesses testified to seeing the engine, and hearing its bell, that hitched to the train on track 6, and heeded the warning. The fact that no other person than Springer was injured but accentuates his heedlessness.

Within that time Springer had learned of the fire while in his shop to the east of the town. Judging from the diagram in the record, the distance of that shop from where the accident occurred was about four blocks. It is incredible that Springer should not have observed the preceding movement of the engine and the cars. More than that, just before the engine moved to push the train of cars in question, the brakeman passed through this opening to adjust the knuckle, which was an act to indicate preparation for movement. The switchman gave the warning, which the people in the vicinity heard and stepped backward. If Springer did not see or hear these things, the further evidence is that the engine was moving at the west end of the train, with the bell ringing, which continued during the movement of the cars. Other people heard this signal and saw the engine in motion, which was in full view and only a short distance away. More significant still of his recklessness, the witness Barbler testified:

"I knew Mr Springer, and saw him just before he was killed. He was carrying furniture away from the fire. We were right near the opening between the cars on track 5. We had hold of a mattress and carried it up to the opening, and told him it was dangerous to go through, and he dropped it and went on and got something else. I went away and didn't see him any more. This was eight or ten minutes before the accident."

We discover no evidence of internal improbability of the truth of this statement, nor any external facts which a disingenuous and disinterested mind should regard as casting any reasonable doubt on its veracity. The imputed conflict between his statement and that of Peebles is rather seeming than real. The expression, "We had hold of a mattress, and carried it up there to an opening, and told him it was dangerous to go through, and he dropped it and went on and got something else," does not conflict with Peebles' statement, as Springer, before Peebles spoke to him, may have been engaged in like work.

Realizing the force of all this evidence, counsel for the plaintiff suggests that, in the absence of direct proof to the contrary, the presumption should be indulged that Springer heeded the warning and did listen and look before attempting to pass through the cars. There are two complete answers to this:

(1) The witness Bobbitt testified, without contradiction:

"I had been leaning against one of the cars just before the accident. I saw the engine coming and moved away. I saw Springer go between the cars, carrying some household goods. He was going straight ahead looking south without looking east or west. If he had looked, he could have seen the engine coming. There was nothing to obstruct his view."

He did not see Springer hurt, or notice some women near the opening. We do not perceive any ground for discrediting his statement, simply because he did not see and identify a lot of other people who chanced to be in that throug

(2) The law declares that, under the surrounding conditions, Springer did not look and listen, or that he did not heed the warnings, as he could not have listened without hearing the bell, and he could not have looked without seeing the engine moving, as it was in full view, only a short distance away. *Northern Pac. R. Co. v. Freeman*, 174 U. S. 380, 384, loc. cit., 19 Sup. Ct. 763, 43 L. Ed. 1014; *Hayden v. M., K. & T. Ry. Co.*, 124 Mo. 573, loc. cit., 28 S. W. 74; *Railway Co. v. Andrews*, 130 Fed. 67-71, 64 C. C. A. 399; *Rollins v. Railway Co.*, 139 Fed. 639, 71 C. C. A. 615; *Railroad Co. v. Chapman*, 140 Fed. 129, 71 C. C. A. 523; *Rich v. Railway Co.*, 149 Fed. 79, 78 C. C. A. 663.

In *Pittsburg, etc., R. Co. v. West*, 34 Ind. App. 95, 69 N. E. 1017, the court said:

"The presumption arises that a traveler approaching and about to cross the railroad track saw whatever was in the range of his vision had he looked, or heard whatever he might have heard had he listened."

There is nothing in the Arkansas statute, hereinbefore quoted, which in any degree exempted Springer from the consequences of his own heedlessness, without which the accident would not have happened. The Supreme Court of Arkansas has repeatedly and persistently said that the rule of application to any person when entering upon the tracks of the railroad company to keep a lookout for his own safety is too deeply rooted to tolerate debate. "The true rule, which no amount of amplification can simplify, is that, whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable." *Johnson v. Stewart*, 62 Ark. 164-170, 34 S. W. 889; *Railway Company v. Leathers*, 62 Ark. 235, 35 S. W. 216; *Railway Company v. Dingman*, 62 Ark. 245, 35 S. W. 219; *Burns v. Railway Co.*, 76 Ark. 10, 88 S. W. 824; *Barry v. Railway Company*, 77 Ark. 401, 91 S. W. 748. See, also, *Adams v. Railway Co.*, 83 Ark. 300, 103 S. W. 725. This principle has been so repeatedly applied to cases in *pari materia* in this jurisdiction that to reverse this case would tend to unsettle the rule. *Mo. Pac. Ry. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641; *Crookston Lumber Co. v. Boutin*, 149 Fed. 680, 79 C. C. A. 368; *Davis v. C., R. I. & P. Ry. Co.*, 159 Fed. 10, decided at the September term, 1907. This rule is aptly stated in *Carlson v. Railway*, 96 Minn. 504, 105 N. W. 555, 4 L. R. A. (N. S.) 349, 113 Am. St. Rep. 655, as follows:

"The duty of exercising caution in attempting to cross a railway track, a place of known danger, is not relaxed by the opportunity or occasion for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution." *Guhl v. Whitcomb*, 109 Wis. 69-85, 85 N. W. 142, 83 Am. St. Rep. 889.

Some reliance is placed by counsel for plaintiff upon the case of *Railway v. Cain* (Ark.) 104 S. W. 533. Persons were passing in front of cars standing on the side tracks, when other cars were "shunted" against the standing cars, which sent them forward so as to injure the plaintiff. Because of the fact that there was evidence to show that the brakeman at or near the end of the moving cars saw the

plaintiff and his companions as they were about to cross the track behind the standing cars, and observed their movements, it was held that the case should go to the jury. Especially so, when the testimony tended to show that the brakeman, after he had observed the parties going upon the track, by calling their attention to the moving cars, could have warned the plaintiff of the danger. The court said:

"The most serious question is whether the jury were warranted in finding that the brakeman knew or had reason to know that the plaintiff did not see the moving cars, and was, therefore, oblivious of his peril; for, unless the brakeman discovered the fact that the plaintiff was oblivious of the danger, he had the right to act upon the assumption that the latter would not expose himself to it by going upon the track. It is not a question whether the brakemen could have discovered the plaintiff's peril in time to have avoided it, but whether he did discover it."

The case is rather authority for the proposition that, if the party was injured where he had no right to be, there was no responsibility for the accident on the part of the railroad company, unless it discovered his peril in time to have avoided the injury. Under the facts and circumstances of the case at bar, we have no need to controvert the ruling of courts respecting the responsibility of railroad companies for injuring persons under conditions where the conduct of the employes amounts to an implied invitation to persons to undertake to pass over crossings where the cars stand separated, without exercising a proper degree of care when suddenly closing up the space. It will be found, on careful analysis of the cases, that the responsibility of the railroad company is conditioned, "unless he [the injured person] contributed to it by his own negligence," or some equivalent expression.

The narrowness of the space, four or five feet, between the cars, where the injury in question occurred, indicates that it was not intended as a passway for carrying through it furniture and household goods; otherwise, it would have been left wider. Clearly, it was made before the fire originated, as the engine did not come to track 6 until after the cars were removed from the first five tracks. As it was not a public crossing, where the public had a right to cross, and, therefore, might reasonably assume that the railroad left the opening for public accommodation, and inasmuch as the small opening was there prior to the fire, it cannot even plausibly be asserted that the railroad company should be held to have apparently invited the public to use it. Springer had no right to be where he was injured. He was uninvited by the railroad to be there. Under extreme exigency the railroad was using its own track in its private yards to save its own property from imminent peril. Under such conditions it owed such an intruder as Springer no other obligation than not to wantonly run him down. The effort made by the employes to see that the track was cleared, together with the open movement of the engine and the ringing of the bell, contradict any imputation of recklessness or wantonness on the part of the defendant.

The trial judge saw and heard all the witnesses. He was familiar with the physical facts of the place. His judgment on the undisputed facts, in our opinion, should be affirmed. It is so ordered.

ADAMS, Circuit Judge (dissenting). I am unable to agree with the majority in this case. I think the evidence clearly warranted submission to the jury of the issues here involved. The evidence, including the failure to observe the requirements of the laws of Arkansas, strongly tends to show negligence on the part of the company in moving its train of cars which killed decedent. At that time the citizens of Pine Bluff, including men, women, and children, were desperately struggling to save their household goods from conflagration by carrying them southward across the railroad tracks to a place of safety. No other direction was available to them. A train of freight cars which obstructed their flight had been opened, making a passageway of four or five feet in width, through which they had for 45 minutes been permitted to pass and repass. From 1,000 to 1,500 excited persons were making or liable at any time to make use of the passageway. The situation was such that the engineer in charge of the switch engine, when ordered to couple on and move the train eastward, thereby closing up the gap or passageway, at first refused to do it. He testified thus:

"When the switchman ordered me to go on that track, I told him that it wouldn't do; that we would kill somebody if we did, or were liable to do so. I didn't want to move that car; but he ordered me to, and it was my duty to obey. * * * I knew that the whole space in there was filled with people and that they were passing to and fro. I knew that they were carrying things there and putting them down; but he signaled me on, and I had to go."

While decedent had no property exposed to the peril of the fire which required moving, he was engaged in assisting others who had. He was not a trespasser. Not only does the evidence tend to show, but I think it conclusively shows, that he was rendering assistance by direction of defendant's agents. He was employed in the defendant's shops nearby, and with many other workmen was out doing what he could to aid the distressed citizens of the place. James Frazier, the chief of the fire department, testified that Mr. E. A. Peck, the division superintendent of defendant, was there, and that he told him that "he had had the shops closed down, and ordered the men to come down and help save the stuff." He also testified that the superintendent told him "to keep them as long as they could do any good." Mr. Peck fails to deny this testimony. While Mr. Wheelan, the foreman of the shops testified in his direct examination as stated in the opinion of the majority, he testified on cross-examination as follows:

"I went to the fire after all the men had gone. They did not come back that evening. The majority of them lived in the burnt district, and I suppose they went to help. We did not dock any of them for the time lost."

Not only was decedent aiding the stricken people by consent of his employer, but there is ample evidence tending to show that he and all others were by like consent of the company passing over the railroad tracks and between the cars in question in the performance of their work. They had, with the full knowledge and consent of the company, been doing it for 45 minutes before Springer was killed, and not only had no objection been made by any of the officers or agents of the company, but they had facilitated the use of the

tracks and passageway by the people. The defendant generously and commendably acceded to the exigent demand of the occasion. It allowed or licensed the use of its track and passageway between the cars by the people. It does not take the time required to bar rights by the statute of limitations to establish a license. It may be established in a short time for a particular and temporary purpose, and in my opinion it was so done in this case. Springer was obeying the command of the defendant in doing what he did at the time he was killed, and he and others engaged with him were crossing over the tracks and making use of the passageway in question by the license and invitation of the defendant. While Springer and the others were responding to that invitation, the law required the exercise on defendant's part of ordinary care and prudence for their safety. *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235; *Foster v. Portland Gold Min. Co.*, 52 C. C. A. 393, 114 Fed. 613; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216.

Importance seems to be given by the majority to the fact that there were some oil tanks on cars in the yard which were liable to be ignited, and therefore required hasty removal. There is evidence that the oil tanks were in no danger, and also evidence that they were in danger of ignition; but, assuming the fact to be that they were in danger, that fact affords no reason for departure from the general rule governing the conduct of the defendant towards others situated like Springer. It could not disregard its duty to them to save its own property. Both required consideration and attention. The exposure of the oil tanks and all the other facts as they existed were entitled to consideration in determining whether under all the circumstances the defendant exercised ordinary care. The more complicated and complex the facts, the more reason is there for submitting them to the consideration of a jury, whose appropriate function is to weigh and determine them. While I think it conclusively appears that Springer was killed by the negligent act of the defendant company—that is, by failure to exercise ordinary care for his safety—I cannot be mistaken in saying that there was substantial evidence tending to show that its negligence caused his death. This is all that is necessary to require a submission of the issue of negligence to the jury.

This brings me now to a consideration of the issue of contributory negligence upon which the majority rely for affirmance. Before considering this it is well to take our bearings in the law. Contributory negligence is a defense which the defendant is required to plead and prove. It is properly defined to be a failure to exercise ordinary care for one's own safety, and by "ordinary care" is meant that kind of care which ordinarily prudent persons usually exercise in similar circumstances. The defendant, therefore, had the burden in this case of showing that at the time Springer was killed he failed to exercise that care for his own safety which ordinarily prudent persons generally do in circumstances like those in which he was placed at the time. The rule is well established, too, that the defense of contributory negligence must be made out by proof that would satisfy all reasonable men in the exercise of a fair and honest judgment, before the

court can take the issue from the jury and say as a matter of law that the defense has been sustained and direct a verdict for the defendant accordingly. Now, how about the facts in this case? Do they show so conclusively that all reasonable men in the exercise of fair and honest judgment would say so that Springer was not at the time he was injured exercising the care and prudence for his own safety which ordinarily prudent persons usually do in like circumstances? That is the question. If it is answered in the affirmative, the case should have been taken from the jury, as it was. If it is answered in the negative, the issue should have been submitted to the jury for its exclusive determination.

What are the facts? Everybody was excited. From 1,000 to 1,500 anxious people were straining every nerve to save their own and their neighbors' property from the conflagration raging close by. As one witness put it:

"Everybody was excited, and the people running around the tracks did not know how much danger they encountered. There was no other way of escape. * * * If they went north, there was the river. If they went west, they had to go through the fire. South and east were the yards and shops."

Another witness said:

"There must have been 1,000 or 1,200 people crossing and recrossing those tracks. They were scattered everywhere—all over the yard and tracks where they were carrying goods. Others were passing and repassing through the opening, carrying goods through. There were men, women, and children."

Another said:

"The tracks were covered with people running to and fro, trying to save their things. The only way to save them was across the railroad tracks."

In this condition of intense excitement, confusion, and distraction, Springer had already carried one load of goods through the passageway, deposited it in a place of safety, returned for a second load, and was carrying that along the way and between the cars, which he had already once found perfectly safe. When he approached the opening there was no person there to warn him that the gap was to be closed. He possibly might have said to himself that the defendant would perform its statutory duty and provide a lookout if it was about to move its train, especially in circumstances of such peril to many as then surrounded the situation. It may be conceded that witness McKay, a part only of whose testimony is found in the majority opinion, had been there a short time before. He said:

"There was quite a number of fellows running back and forth through there."

He also said:

"You had better look out. There is an engine coming against that car."

But this is not all his evidence. He further said:

"I spoke to them in a pretty good voice, just a little louder than I am now using on the witness stand. I walked right through there, and kept walking. I did not stop long enough to see whether those who were coming and going with furniture heard me or not."

He not only testified that he walked east about two car lengths on the north side of the car, but he added:

"Then everybody said there was a man killed."

This testimony, in my opinion, falls far short of showing conclusively, or even persuasively, that McKay gave Springer notice of the intended movement of the train of cars. All it necessarily means is that he (McKay) passed along in the midst of the prevailing noise and confusion, and in a tone of voice not much louder than a witness employs in a quiet courtroom made his announcement. But where was Springer then? McKay walked the distance of two car lengths before the commotion naturally incident to so grave a matter as taking the life of a human being broke out. We may reasonably infer from this that, as Springer with his heavy load of household goods upon him would not be likely to walk faster than McKay who was without any burden, the former was at least two car lengths away from the opening when McKay in a moderate tone of voice made his announcement. We may also reasonably enough assume that, in the midst of the crowd of people and the inevitable noise and confusion, Springer could not have seen McKay or heard his announcement, even if he had been nearer than two car lengths from the opening. I do not think any one can fairly read the testimony of McKay without concluding that it is a matter of conjecture, pure and simple, whether, under the circumstances surrounding him at the time, Springer did in fact see or hear McKay, or whether he in the exercise of ordinary care could have seen or heard him.

But it is said that Woody, the field switchman, gave some notice which Springer negligently failed to heed. He was the one who gave the signal to the engineer to come ahead. Some of his evidence is quoted in the opinion, but not all. He testified on cross-examination that he "did not see anybody carrying goods through the opening, that he did not warn anybody at that particular opening, that he could not see people going through the gap because people were between him and the gap, and that he had to look over their heads to see that there was a gap." He also testified on cross-examination that the persons he "was hollering at were going over the draw-heads" at other places than between the cars at the opening. The facts to which I have just called attention, as well as the many reasonable inferences to be drawn from the attending facts and circumstances, take away from the evidence of witness Woody that conclusiveness requisite to declare its legal effect. He, like McKay, utterly fails to make certain, or even probable, the fact that Springer either heard, or in the exercise of ordinary care ought to have heard, any warnings given for the movement of the train.

There was evidence tending to show that a bell was ringing on the switch engine as it approached the west side of the train of cars, but that evidence was discredited by the proof that there were two switch engines carrying bells, and that the sound might have emanated from the other engine. It is also not unfair to assume that the noise and confusion would prevent Springer from hearing the bell or appreciating its meaning, inasmuch as the engine moving the train, even

if the bell was on it, was a good many car lengths away from the gap. Witness Bobbitt is also relied upon as giving testimony which justified the peremptory instruction in favor of the defendant. He testified that:

"He saw Springer go between the cars carrying some household goods. He was going straight ahead, looking south, without looking east or west. If he had looked, he could have seen the engine coming."

When his testimony is critically examined, as it ought to be in a case of this kind, all he really states is that just as Springer was entering the gap he was looking south, and did not look east or west. Non constat he might a moment before only have given the requisite attention. *Union Pacific R. Co. v. Rosewater* (C. C. A.) 157 Fed. 168. Moreover, this witness is discredited by his failure to observe other things which undoubtedly occurred.

Other evidence found in the record is relied upon, and particularly that of two women, who stated that they saw the engine approach the west end of the train, and in their opinion Springer might have seen it if he had looked.

The foregoing is substantially all the evidence upon which we are asked to justify a peremptory instruction given to the jury below on the ground of Springer's contributory negligence. If, in fact, it is not all of the evidence on that subject, it fairly represents in its uncertainty and inaccuracy the body of the evidence relied upon for that purpose. I am unable to find in it that certainty requisite for a direction as a matter of law that Springer failed to exercise ordinary care for his own safety. In actions of exigency, of high state of excitement, of confusion and noise, people do not ordinarily act with the same coolness, deliberation, and foresight as they exhibit on occasions when conditions favor calm and deliberate mental processes. This most natural human infirmity ought to be, and has been, recognized judicially in the determination of questions of ordinary care. Mr. Justice Holmes, when one of the judges of the Supreme Judicial Court of Massachusetts, in the case of *Pomeroy v. Westfield*, 154 Mass. 462, 465, 28 N. E. 899, on this subject said as follows:

"But, further, in determining the right of a plaintiff to recover, there are two elements to be considered: First, how far he is chargeable with knowledge of the danger which he incurred; and then, under what exigency he acted. That is to say, the exigency legitimately may affect, not only the question how far he appreciated or ought to have appreciated the danger but also how far he could run a risk known to be greater than prudently could be incurred under ordinary circumstances without losing his right to recover in case he was hurt."

Judge Macfarlane, speaking for the Supreme Court of Missouri in *Dickson v. Omaha & St. L. Ry. Co.*, 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429, lays down the rule that in circumstances of emergency a person is not chargeable with negligence if he fails to appreciate the safest and best course to pursue. Judge Barclay, speaking for the Supreme Court in *Schroeder v. C. & A. Ry. Co.*, 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827, says that ordinary care to avoid an injury by a person must "be judged from

the standpoint furnished by the facts of the particular case, and also by considering the exigency under which he acted."

The foregoing cases do not state any new rule, but rather afford a clear statement of a necessary corollary of the old one, which we daily apply in defining ordinary care to be that care which ordinarily prudent persons exercise under similar circumstances. As ordinary care in a given case is measured by what ordinarily prudent persons do under similar circumstances, it follows necessarily that the circumstances of a given case not only may, but must, be considered in determining the issue of ordinary care as involved in that case. In view of the peculiar facts of this case and the applicatory law, I believe a great injustice has been done to the plaintiff in error by the judgment of the majority. Adherence to the letter of the "look and listen" doctrine has superseded the proper regard for its spirit, and the function of a jury in a case peculiarly appropriate for its exercise has been usurped by the court.

CLAY et al. v. WATERS.

BOATRIGHT v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1908.)

Nos. 2,628, 2,629.

1. **BANKRUPTCY—PROPERTY OF BANKRUPT—TITLE OF TRUSTEE.**

The title to money or property belonging to a bankrupt before adjudication vests in the trustee, subsequently appointed, under the express provisions of Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451); but the trustee acquires no title to money or property in the hands of third persons which did not belong to the bankrupt prior to the adjudication.

2. **SAME—OWNERSHIP OF PROPERTY—EVIDENCE.**

Evidence held to establish that \$40,000 secreted in a bank by a bankrupt, within eight months after the adjudication in bankruptcy, belonged to him before the adjudication, and passed to his trustee in bankruptcy by virtue thereof; but otherwise as to money and jewelry found on his person at the time of his death, a year and a half after the adjudication, to which the trustee acquired no title.

3. **TORTS—JOINT WRONGDOERS.**

When several persons unite in an act which constitutes a wrong to another, intending at the time to commit the act under circumstances which fairly charge them with intending the consequences which follow, they are all jointly and severally liable for the wrong done, regardless of their individual participation in its accomplishment or their individual gain or profit resulting therefrom.

4. **BANKRUPTCY—SECRETION OF FUNDS OF BANKRUPT—LIABILITY OF ATTORNEY.**

Where, after the death of a bankrupt, who had concealed a large sum of money on deposit to the credit of fictitious persons in a Canadian bank, his confidential attorney went with the bankrupt's mother and widow and represented to the bank that they were the identical persons in whose names the money was deposited, and through his influence procured the payment of such deposit to them, after which such attorney's bank account assumed an importance and magnitude unknown before, which was not explained, and he thereupon immediately invested funds in real estate security and notes to the amount of \$6,975, he was properly charged to that extent as a trustee thereof, and was properly required to transfer the same to the bankrupt's trustee.

Appeal from the District Court of the United States for the Southwestern Division of the Western District of Missouri.

R. M. Sheppard and Thomas Dolan, for appellants.

J. W. Halliburton (Samuel McReynolds and H. W. Currey, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge. These are appeals from a decree holding Priscilla Boatright, mother of Robert Boatright, and George R. Clay, her attorney, liable for appropriating money and jewelry possessed by Boatright, the bankrupt, at the time of his death, and divesting Clay and his wife, Cora, of title to certain real estate and promissory notes in which some of the money was invested. On December 22, 1902, Robert Boatright was, on the petition of his creditors filed November 22, 1902, adjudicated a bankrupt. He failed to attend the first meeting of creditors before the referee, or to submit to an examination as required, and never filed schedules of assets or liabilities. He absented himself from the jurisdiction of the court, or concealed himself so that compulsory process was unavailing. In August, 1903, he went to Windsor, in the Dominion of Canada, and in the assumed name of "John Bagwell" deposited in the Canadian Bank of Commerce located in that city \$40,000 in money to the credit of "John Bagwell," "Polly Bagwell," and "Priscilla Bagwell," and made the same subject to the sight draft of either of them. In May, 1904, Boatright died at Kansas City, Mo. Several thousand dollars in money and some jewelry were found on or about his person. Soon after his death Priscilla Boatright, his mother, and Polly Boatright, his widow, went to Windsor, Canada, accompanied by Clay, the attorney, and by his assistance and co-operation satisfied the officers of the Canadian bank that they were the identical Priscilla and Polly Bagwell in whose names the \$40,000 had been deposited by John Bagwell in August, 1903, and each drew out one-half of the amount deposited, with accrued interest, amounting for each to the sum of \$20,553.64, and appropriated the same to their own use. In like manner, also, they divided the money and jewelry found on or about Boatright's person at the time of his death in Kansas City. Priscilla Boatright secured between \$3,000 and \$4,000 of that money and some of the jewelry.

The present suit was a plenary action in equity, instituted by the trustee of the estate of Robert Boatright against Priscilla Boatright, George R. Clay, and Cora M. Clay, his wife, charging that the money and property secured by the co-operation of the first two of them, both at Windsor and Kansas City, belonged to Boatright, the bankrupt, before his adjudication in bankruptcy, and therefore now belonged to complainant trustee, and that some part of the money so secured by them had been invested in certain described real estate and promissory notes, and title thereto taken in the name of George R. Clay, or his wife, Cora, which, therefore, now belonged in equity to complainant. The defendants accepted the issues thus tendered,

a trial was had in the court below, the issues were found in favor of complainant, and \$6,975 of the money secured by defendants were found to have been invested in real estate and notes in the name of George R. Clay or his wife. A final decree was entered divesting Clay's title to the land and notes, vesting the same in the trustee, awarding the latter a general judgment against Priscilla Boatright and Clay for \$17,575, and directing the former to turn over to the trustee the jewelry which she obtained from Boatright at Kansas City. From this decree the defendants prosecuted separate appeals. As there is only one record, we find it convenient to dispose of both appeals in one opinion.

If the money and property taken by defendants did not belong to Boatright before he was adjudicated a bankrupt, the trustee of his estate acquired no title to them (Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) and cannot recover in this action. If, on the other hand, the money and property did belong to him before the adjudication, title thereto vested in the trustee subsequently appointed, and he is entitled to relief. This issue is one of fact, pure and simple, and the conclusion of the trial court, unless plainly erroneous, should be followed. We do not find it necessary to resort to the analogies suggested by section 70d of the bankruptcy act relating to the effect of setting aside compositions or revoking discharges upon title to property acquired by the bankrupt after his adjudication. Neither do we find it necessary to apply rules governing the burden of proof in controverted issues invoked by counsel.

The facts disclosed by the proof, when given their natural probative force, satisfy us that the money deposited at Windsor belonged to the bankrupt before the date of the adjudication. The main facts may be briefly epitomized as follows: Boatright was a bad man, and much accustomed to crooked and fraudulent practices. He made his money by feigning to conduct real foot races and prize fights, and through that pretense swindling the innocent and guileless. The opinions in the cases of *Stewart v. Wright*, 77 C. C. A. 499, 147 Fed. 321, and *Exchange Bank v. Moss*, 79 C. C. A. 278, 149 Fed. 340, sufficiently portray his character, his occupation, and his business methods. So notorious was his infamy that the learned trial judge properly enough observed:

"It is doubtful whether there has ever been a greater scoundrel than Robert Boatright."

He and his associates in crime had become possessed of about \$300,000 in money during the 15 months immediately preceding the adjudication. No loss of this money is shown, and only a feeble and unsatisfactory effort to do it is made by the testimony of an accomplice. Boatright failed, and refused after the adjudication to make disclosure of his assets as required by law. He secreted himself, so as not to be compelled to do so. He took \$40,000 out of the jurisdiction of the court and deposited it in fictitious, assumed names, subject, among others, to his own draft.

In this narration we start with the established fact that he and a few associates, of whom he was the acknowledged chief, had an amount of money largely in excess of \$40,000 shortly before the adjudication. We end with another indisputable fact that \$40,000 in money was concealed by him outside the jurisdiction of the court within eight months thereafter. Meanwhile he persistently and successfully avoided the processes of law, which might have compelled him to disgorge. Why this dodging? Why this removal of money out of the jurisdiction of the court? Why this concealment of it? If he had acquired the money after the adjudication, none of these things would have been necessary. It could not have been taken from him by any processes of the bankruptcy court. Men are presumed to do all things with a purpose, and, when flight, concealment, and expense are resorted to, it is reasonable to presume that such resort was had for a purpose. The natural and reasonable presumption in this case is that they were had for the purpose of concealing the money in question from the reach of the bankruptcy court. Money was found in his possession just before bankruptcy proceedings were commenced, and his subsequent suspicious conduct and the failure to account for its loss justify us in the conclusion at which we have unanimously arrived that he never did lose it, but, on the contrary, concealed it to escape the demands of his creditors.

Attempt was made to show that Boatright left his accustomed place of operation in Webb City, Mo., conducted elsewhere some of his swindling foot races, prize-fighting contests, and the like during the early part of the year 1903, and thereby accumulated an amount of money in excess of \$40,000; and we are asked to indulge the presumption that the money secreted in Canada was acquired by him in the ways just mentioned after the adjudication of bankruptcy and during the first part of the year 1903. Neither the character of the witness relied upon to make this showing, nor his story, inspires our confidence. His story is vague, uncertain, and improbable, and his character leads us to discredit it. We conclude that the \$40,000 secreted in Windsor belonged to Boatright before the adjudication in bankruptcy, and consequently passed to his trustee by virtue thereof.

We are not satisfied that the money and jewelry found on his person at the time of his death in Kansas City, in May, 1904, had been owned by him prior to December, 1902. There is no such evidence of concealment or suspicious circumstances as characterized his action concerning the deposit of money in Windsor. Moreover, a year and a half had elapsed after his adjudication in bankruptcy and before his death. These and other considerations, unnecessary to mention, have brought us to the conclusion that the trustee has failed to make good his claim to the money and jewelry taken by Priscilla Boatright in Kansas City.

The questions remaining for consideration concern the liability of the defendant Clay in this action. The proof disclosed that he had for some time before and after the adjudication of bankruptcy been Boatright's confidential attorney; that he was familiar with his career; that he knew the facts attending the deposit in the Canadian

bank at Windsor; that he accompanied Priscilla and Polly Boatright to Windsor after the death of Boatright to secure the money; that he knew their real names to be Boatright, and not "Bagwell"; that he represented them to the bank as the veritable Priscilla and Polly Bagwell to whose credit the money had been deposited by Boatright; that he knew, when he accompanied the women to Windsor, of the pending proceedings in bankruptcy against Boatright and of the adjudication against him. Such is the general outline of Clay's actual knowledge. It would serve no useful purpose to detail the evidence from which we reach our conclusion; but from the foregoing general facts and the reasonable inferences deducible from them we are satisfied that it was through Clay's interposition, co-operation, and influence that the money was secured from the Canadian bank, and that he knew or had reasonable ground to believe, when he rendered his aid and exerted his influence, that he was aiding in the commission of a wrong. In these circumstances he was properly held liable with Priscilla Boatright for the money which he aided her to secure and wrongfully appropriate to her own use. The accepted rule on this subject is that "when several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow," they are all jointly liable for the wrong done, without regard to their individual participation in its accomplishment or their individual gain or profit resulting therefrom. They are joint tort-feasors, and as such jointly and severally liable for the consequences of their wrongful act. 1 Cooley on Torts (3d Ed.) 223, and cases cited.

We have so far proceeded on the assumption that Clay did not share in the fruits of the wrongful act; but this assumption is unfounded in fact. It was through him and in his name that most of the money belonging to Priscilla Boatright was transferred from the Canadian bank to the bank of Neosho, Mo., in which Clay kept his personal account. His own account soon thereafter assumed an importance and magnitude unknown before, and this fact is not satisfactorily explained. Not only so, but he soon thereafter began making unprecedented investments in the purchase of real estate and in loaning money to his neighbors, taking from them interest-bearing promissory notes secured by mortgage on real estate. In view of the earnest contention of Clay's counsel that the money invested by him was his own, and formed no part of the money obtained from the Canadian bank, we have given the evidence on this subject most careful consideration, but find ourselves unable to agree with them. We think the facts, in the light of all the attending circumstances, are inconsistent with their contention, and that the money so invested by Clay was not his own. We agree with the conclusion of the learned trial judge that \$6,975 of the Boatright money, which of right belonged to the trustee in bankruptcy, was invested by Clay in the real estate and notes described in the decree below, the title to which was taken in his own name, or that of his wife, the defendant Cora M. Clay. A resulting trust thereby arose in favor of the trustee in bankruptcy,

and the decree below, divesting title from the defendants Clay and vesting the same in the trustee, was accordingly correct.

But our disapproval of the action below in subjecting the money and jewelry taken from the person of Boatright at the time of his death to the demands of the trustee in bankruptcy requires a modification of the decree in the following particulars: The order requiring Priscilla Boatright to deposit the jewelry in the hands of the clerk of the Circuit Court for the use and benefit of the trustee should be eliminated from the decree, and the personal judgment against Priscilla Boatright and George R. Clay should be reduced from \$17,575 to \$13,578.63, and the latter sum should bear interest at the rate of 6 per cent. per annum from the date of the entry of the decree below. In all other respects the Circuit Court reached the correct conclusion.

The decree must therefore be reversed, and the cause remanded to the court below with directions to enter a decree in accordance with the views expressed in this opinion; and it is so ordered.

NOTE.—The following is the opinion of Smith McPherson, District Judge, on overruling the motion for a new trial:

SMITH MCPHERSON, District Judge. This case is by a bill in equity, answer, and replication, with evidence taken. November 22, 1902, proceedings in involuntary bankruptcy were filed in this court by creditors against Robert Boatright, and December 22, 1902, he was adjudicated a bankrupt, and on due proceedings the plaintiff became trustee. The bankrupt did not attend the first creditors' meeting, filed no schedule, and did nothing else required by the bankrupt laws. Claims amounting in the aggregate to \$300,000, were timely established against the estate, all based on the frauds and the rascality of the bankrupt in obtaining moneys from the several creditors. May 2, 1904, the bankrupt died. Neither the bankrupt himself, nor the heirs, nor the administrator since his death, has ever made application for a discharge.

It is doubtful whether, in the history of jurisprudence, there has ever been a greater scoundrel than Robert Boatright. I shall not attempt to enlarge upon this statement. The poverty of the English language does not enable me to do full justice to the subject, as will be seen by reference to the case of *Wright v. Stewart* (C. C.) 130 Fed. 905, and *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499. At his death on his person was found a large sum of money, namely, about \$10,000. After the bankrupt proceedings were pending, the bankrupt deposited in a bank in Canada \$40,000, representing himself to be John Bagwell; and he took the certificate of deposit in the name of John Bagwell, Priscilla Bagwell, his mother, and Polly Bagwell, his wife; the certificate being payable to either one or all three. After his death a part of this money was drawn out by these two women, with the assistance of the defendant George R. Clay, a practicing lawyer, then of Neosho, Mo. Part of this money was drawn through a local bank at Neosho, the defendant Clay identifying these women by the name of Bagwell, but whom he had known for quite a time by their correct names; and he likewise was with them at the Canada bank when the money was withdrawn, and he again represented that Bagwell was their true names. Defendant Clay knew Boatright's business, and knew that his means were obtained by illegal methods. The evidence fails to show just when and from whom the moneys above referred to were gotten, and the defendants urge that the title that he has to the property of the bankrupt's estate is of such property as Boatright had an interest in as of the date of adjudication, namely, December, 1902.

Ordinarily there is no question as to the correctness of the proposition that a trustee takes such property only as the bankrupt owned at the date of the adjudication, and that property afterwards acquired cannot go to the creditors in the bankruptcy proceedings. In this case the bankrupt could not get

a discharge, if living, because of his utter failure to schedule his property or to attend the first creditors' meeting, or do anything else that is required of him by the bankrupt law; and the discharge could not be granted him, because not applied for in time. And if he had applied for a discharge, and it had been granted, it would not be a defense as against any one of the creditors herein to the amount of a dollar, because all the debts were created by and through fraudulent and illegal transactions. Section 70d of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) provides that, if the discharge is revoked, the trustee takes title to all the property of the bankrupt as of the date of the decree revoking the discharge. Section 64c of the bankruptcy statute is to the effect that, if the discharge is revoked, the property acquired thereafter shall be applied to the payment of the debts owing at the time of adjudication; and section 29b provides for imprisonment of a bankrupt who knowingly and fraudulently conceals assets.

Counsel have cited no case as bearing upon this situation, and, as far as I can gather, no court has passed thereon, or if there is such a decision, it has escaped my research. Clearly, under these statutes, if Boatright had been given a discharge, and later on this discharge had been revoked, the moneys found on his person and the moneys in the Canadian bank would be assets passing to the trustee for payment of the claims herein allowed. But there has been no discharge, for one reason at least, namely, that he never applied for one; and he never applied for one because of his willfulness and his utter contempt for this court, shown in many ways, and his utter defiance of the law with reference to bankruptcy proceedings. These persons became creditors because of the rascality and villainies of Boatright. He supplements his rascality and villainies in making these men creditors by additional rascality and villainies in refusing to obey any order of the court and the requirements of the statutes; and these things being so, I cannot see how it is possible for this man to occupy a better or different position than he would occupy if he had effected a composition with his creditors, or had obtained a discharge, and such composition or discharge had been set aside by decree of this court.

Counsel for defendant argue that it will not do to presume that Boatright has committed a crime in order to reach a conclusion in this case. Such an argument is in the face of the fact that there is not one transaction of Boatright in any manner connected with this case but what was a crime; and no violence is done by reaching any conclusion by presumption herein adverse to Boatright. In fact, nothing is to be, or can be, presumed in his favor. The whole story, from first to last, is a narration of scores of events, any one of which would have been the basis for the conviction of a felony before any court having jurisdiction thereof. Defendant Clay was this man's lawyer, and while his lawyer there is nothing to show but that he demeaned himself as a lawyer should. But the facts remain that he was familiar with Boatright's life. He was well acquainted with him. He knew his wife and mother. He knew them by the name of Boatright, and knew their name to be Boatright. He knew their name not to be Bagwell, and I am using mild language when I say that he had no right to introduce these parties to the bank at Neosho, and vouch for the fact that their name was that of Bagwell; and he had no right to go to Canada with them and there again introduce them to the Canadian bank by the name of Bagwell. Through these agencies moneys were withdrawn. These matters are not satisfactorily explained. These matters were within the knowledge of Boatright and the defendant Clay. The facts within their knowledge are not disclosed. These moneys, used by the defendant Clay and Mrs. Boatright, are not explained. They ought to have been explained.

In my judgment a prima facie case was made by the plaintiff, and such a case was made as called for a full disclosure by the defendants. The moneys thus used did not belong to the Boatright estate. These several pieces of real estate could have been purchased with no other moneys; and the trustee has the right to follow these moneys and subject the property to a sale and the proceeds applied in payment of the creditors.

There will be a decree for the plaintiff.

THIRD NAT. BANK OF ST. LOUIS v. RICE.*

(Circuit Court of Appeals, Eighth Circuit. May 2, 1908.)

No. 2,707.

1. TROVER AND CONVERSION—EFFECT ON TITLE TO PROPERTY OF JUDGMENT AND SATISFACTION THEREOF.

The payment of a judgment in conversion vests the title to the property converted in the defendant as of the date of the conversion, as between the parties, but not as against a third claimant of the property, to whom the defendant voluntarily surrendered it after the conversion and before the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 314.]

2. MONEY RECEIVED—RIGHT OF ACTION—MONEY RECEIVED UNDER CLAIM OF RIGHT.

Plaintiffs wrongfully converted certain cattle, which they afterwards surrendered to a bank claiming a right to them, and which caused them to be sold. Defendant claiming a mortgage on the cattle, demanded them from plaintiffs, who stated that they had turned them over to the bank and disclaimed any interest therein. The bank then also disclaiming any interest, the proceeds of the cattle were paid over to defendant. Subsequently a third party recovered a judgment for the conversion against plaintiffs, which they paid. *Held* that, the money having been received under claim of right, there was no promise on the part of defendant implied from the transaction which would support an action against it by plaintiffs for money had and received to their use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, § 28.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Thomas F. Galt, for plaintiff in error.

Alfred Gregory and R. F. Walker (Beardsley, Gregory & Kirshner, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The defendant in error (plaintiff below) recovered judgment in the sum of \$2,086.77 against the plaintiff in error (defendant below) in an action of assumpsit for money had and received. To reverse this judgment, this writ of error is prosecuted. The controversy arose out of the following state of facts, briefly stated:

One Gillette, a large dealer in cattle in Kansas, who seems to have had a mania, as well as genius, for giving multiplied and conflicting chattel mortgages on the same herd or lot of cattle, by either mixing up the brands or giving the cattle an ostensible different situs, in 1898 acquired about 1,866 head of Texas cattle with the brand "J. A. L." There were various mortgages on these cattle. Notes issued by him, apparently secured by such mortgages, were negotiated by cattle commission merchants at Kansas City, Mo., to various purchasers, who seem to have taken them avidiously on account of the high rate of interest they bore and the assumed security on tangible cattle. In

*Rehearing denied June 19, 1908.

November, 1898, after he had exhausted his resourcefulness in obtaining money and credit by such factitious methods, and his creditors began to press him, threatening him with prosecutions for obtaining money under false pretenses, Gillette fled the country, taking refuge in the Republic of Mexico. Among those claiming mortgage liens upon some of the Gillette cattle was the firm of Rice Bros. & Nixon, doing business at Kansas City, Mo., as commission cattle merchants. After Gillette left, Rice Bros. & Nixon sent one George Rice to the pastures out in Kansas to look after the cattle in which they claimed an interest. He found some of the cattle, with the brand on which they claimed a mortgage lien, in what is known as the "Plum Feed Lots" and some in what is known as the "Brogan Pasture." He discovered on inspection that these cattle were mixed with those of another brand. Brogan, in charge of the cattle in his lots, refused to let George Rice remove them. Thereupon Nixon, of said firm, went out and met Rice. After consultation, they invaded the Brogan pasture between midnight and 1 o'clock a. m., broke down the fence, and drove away all of the cattle in the lot several miles to Neosho, a station on the railroad leading to Kansas City. Nixon then went to the Plum lot, and, leaving enough cattle there to secure Plum as an agister of Gillette, drove the residue to Neosho, and shipped the whole of the two lots to Rice Bros. & Nixon at the stockyards in Kansas City. Included in these lots of cattle were 128 head bearing a different brand from that to which the plaintiffs laid any claim. Nixon knew, when thus tortiously removing the cattle, that there were among them those to which his firm asserted no claim. His only excuse for this lawless act was the trouble and difficulty of separating in the nighttime the different brands. When the cattle reached the yards at Kansas City, Nixon separated those on which the plaintiff claimed a lien and reshipped them to a pasture in the state of Iowa. Instead of making restitution, as far as they might, by returning the 128 head of cattle to the close where Nixon found them, Nixon, acting for his firm, left them in charge of one Munger, their bookkeeper, with instructions to turn them over to the person he (Munger) might think best entitled to them.

Other creditors of Gillette were on the *qui vive*, looking out for any Gillette cattle which might come to said stockyards, as there was considerable clamor among them as to their respective rights to the Gillette cattle. Among them was the National Bank of Commerce of Kansas City, which had a branch bank at said stockyards under the immediate management of one Voorhees. Learning about the situation of said 128 head of cattle, the president of said bank, with an inspector, looked over them and informed Munger that the bank held large amounts of Gillette paper and was anxious to get hold of as many of the Gillette cattle as possible. Rice Bros. & Nixon were evidently anxious to get out of the ugly and embarrassing situation into which Nixon's tortious conduct had brought them, by unloading the burden on any one willing to take it. Accordingly Munger turned the 128 head of cattle over to the National Bank of Commerce, with the understanding between them that the bank would hold them harmless from the consequences of their acts in the transaction. As this

arrangement was between Munger, representing the plaintiff, and the bank, it is important to follow the testimony of Munger, a witness on behalf of the plaintiff. After stating that Nixon separated the 128 head of cattle in question from the others shipped in by him and taking those claimed by the firm to a pasture in Iowa, he was asked, "In whose charge did Nixon leave the 128 head of cattle?" He answered: "In my charge." Then, stating that Nixon said to him "to turn them over to the parties to whom I thought had the best claim on them," he was pressed, on cross-examination, to state the exact language or terms employed between him and the representative of the bank in turning the cattle over to the latter. His answer was that Voorhees said "that the National Bank of Commerce owned a large amount of Gillette paper, and they were making an effort to secure all of the cattle in which Gillette was interested in any way, and asked me to turn these cattle over to the bank." After stating that Voorhees said the bank would have the cattle sold and the money held as a special deposit until the rightful ownership was decided, he was asked:

"If the National Bank of Commerce did not say that they would hold the firm of Rice Bros. & Nixon harmless against any loss that they might suffer on account of your turning these cattle over to them? A. Yes, sir. * * * He (Voorhees) asked me to turn the cattle over to the National Bank of Commerce. I asked him if the National Bank of Commerce would stand good to us for the cattle in case anybody else proved a better title or a better right to them. * * * A. I did. * * * And he said that they would. If we would turn these cattle over to him, or to the National Bank of Commerce, they would stand good to us and protect us from all liability. But I did not immediately turn them over to him. I called Mr. Winants (the vice president of the bank) over the telephone and told him what Mr. Voorhees had said and the proposition Mr. Voorhees had made to me, and I asked him to confirm it, and he did. He said the National Bank of Commerce would do that. Q. Why did you wish to turn these cattle over to anybody? A. Because they did not—because we had no claim on them. Q. Is it not a fact that you were anxious to get rid of the cattle, so as to avoid being held for them, and anxious to get somebody else to take them off your hands? A. We were anxious to get rid of the cattle. Q. Were you not anxious to turn these cattle over to somebody else, in order to get rid of the liability for them? Is that not a fact? A. To a certain extent. Q. Is it not a fact? A. Yes."

He then stated that he turned the cattle over to the National Bank of Commerce for Rice Bros. & Nixon.

"Q. I will ask you if you turned these cattle over to the National Bank of Commerce to hold for the account of Rice Bros. & Nixon? A. I did not. Q. I will then ask you again if you did not turn these cattle over to the National Bank of Commerce for them to hold as their own interest? A. I did not."

Then, being inquired of as to why he turned the cattle over to the National Bank of Commerce, he answered:

"Because I thought that in all probability they had a better claim to them than anybody else on account of their owning a large amount of paper taken from the various commission firms at the Kansas City Stockyards. * * * We had absolutely no claim on the cattle."

The Bank of Commerce, discovering that it had no lien on these cattle, in turn became anxious to get rid of them. The representative of the bank advised Munger of that fact, and inquired what should be done with the cattle. Thereupon it was agreed to turn them over to

the Siegel-Sanders Commission Company to sell. At that time the cattle were in a lot subject to the order of Munger, and he gave to Voorhees a "title order in blank for them."

"Q. Was there anything in this order that the National Bank of Commerce was to hold these cattle for the person who held rightful title to them? A. The title orders are blanks furnished by the stockyards, and they do not permit anything to be written on the order except the number of animals and to whom the stock belongs and to whom it is to be delivered. That order, then, had to be surrendered to the stockyards company."

On further cross-examination of Munger, the following occurred:

"Q. I will ask you to relate your conversation with Mr. Voorhees when you turned these cattle over to him? A. Mr. Voorhees told me that the National Bank of Commerce owned a large amount of Gillette paper; that they were trying to secure as many of the cattle as possible in which Gillette had any interest; and he told me, if they would turn the cattle over to them, they would be responsible to us—hold us harmless for the value of the cattle, if there were any one appeared who had a better right to them. Q. Is it not a fact that you turned these cattle over to the National Bank of Commerce because you thought that they were the most responsible parties, that they would be able to protect you against loss? A. That is partly, but not wholly, the reason. Q. What was the other reason? A. I thought the chances were that they would have a better right to the cattle than the other claimants, inasmuch as they had taken a large amount of this Gillette paper from the various commission merchants at the yards."

The Third National Bank of St. Louis (defendant below) at that time held a mortgage on Gillette cattle which it claimed covered the 128 head in question. Its claim was placed in the hands of Mr. Ball, an attorney of Kansas City, who applied to Rice Bros. & Nixon, and informed them that his client held a mortgage on the cattle, and demanded that they be turned over to him, when he was informed "that they had nothing more to do with it; that those cattle were in charge of Siegel-Sanders Commission Company for the Bank of Commerce, and they had nothing to do with it." Thereupon Mr. Ball demanded the cattle of said commission company. He was informed by them that the Bank of Commerce claimed them, and that they had the cattle for sale, and they would proceed to sell them and turn the money over to the Bank of Commerce. Mr. Ball further testified that it was suggested in the interview that, as the cattle were in the yards on expense, Siegel-Sanders Company could sell them and deposit the money in the Bank of Commerce until it could be ascertained whether the Third National Bank of St. Louis or the Bank of Commerce was entitled to it. When he applied to the Bank of Commerce, he learned from Mr. Winants (vice president) that the Siegel-Sanders Company had sold the cattle and kept the money, and the Bank of Commerce made no claim to it. He then applied to Siegel-Sanders Company for the proceeds, and received from them a check therefor, which he indorsed and forwarded to his client. He further stated that he did not remember the brand of the cattle, but:

"I remember that I claimed under what was known as the Dunlap mortgages, and that they bore the brands purporting to be covered by those mortgages."

Soon after the foregoing occurrences, a suit was instituted, of rather a peculiar comprehensive character, in the district court of Chase

county, Kan., by one of Gillette's mortgagees, asserting priority of right to certain of the Gillette cattle, including the 128 head in question. Rice Bros. & Nixon, among others, were made parties defendant, and appeared thereto. Although named as a defendant, the Third National Bank of St. Louis was not served with process and did not appear to that suit. After taking evidence, a decree was entered therein, by consent, determining the manner in which the funds in the hands of the receiver of that court arising from the sales of cattle to which there were conflicting claims should be apportioned among them; also rendering judgment against Rice Bros. & Nixon for the value of the cattle wrongfully taken by them as aforesaid. Having satisfied that judgment, Rice Bros. & Nixon at once instituted an action at law in the circuit court of Jackson county, Mo., against the National Bank of Commerce, based on said contract of indemnity between them, made on their behalf by Munger. They were defeated in that action, on the ground taken by the court that the contract was contrary to public policy. See 98 Mo. App. 696, 73 S. W. 930, where the case is reported. Nixon having retired from the copartnership, and one of the Rice Bros. having died, W. H. Rice, as surviving partner, instituted the present action against the defendant, the Third National Bank of St. Louis, to recover the money so received by it as aforesaid, and obtained judgment therefor.

The contention on the part of the plaintiff is that, although Rice Bros. & Nixon were trespassers *ab initio* in seizing the cattle, when they satisfied the judgment against them for the tort they became substituted to the owner's right to the cattle from the date of the conversion. The correctness of this, as a general proposition of law, may be conceded. *Lovejoy v. Murray*, 3 Wall. 11, loc. cit. 18 L. Ed. 129; *Adams v. Broughton*, Stra. 1078; 2 Kent's Comm. 388; *Thayer v. Manley*, 73 N. Y. 307; *Smith v. Smith*, 51 N. H. 571, which hold that the title so acquired by the tort-feasor takes effect from the time of the conversion. This, resting upon the maxim, '*solutio pretii emptionis loco habetur*,' presumes that the wrongdoer is in possession of the property and has not voluntarily parted therewith to a third party. Judge Cooley, in his work on Torts (3d Ed., pp. 881, 882), says:

"It was decided in *Adams v. Broughton*, Stra. 1078, that judgment in trover or trespass for the value of the property vested the title in the defendant; and this decision has been followed in this country to some extent. * * * The title by relation vests as of the time when the conversion took place; but this relation is not effectual for all purposes. It could not render a third party a trespasser upon the rights of the defendant for anything done by him intermediate the conversion and the judgment; and if, after conversion, the plaintiff sold his interest in the property, the purchaser will not be affected by the suit, * * * since by the sale he has disabled himself from passing title to the defendant."

In support of the text he cites the case of *Bacon v. Kimmel*, 14 Mich. 201, where the plaintiff brought trespass, and for the purpose of proving title introduced a judgment against him in favor of the mortgagee in a chattel mortgage from whom the property had been wrongfully taken, and which judgment was subsequent to the trespass complained of in the case. Judge Christiancy said that admitting the recovery of that judgment and its satisfaction by the plaintiff—

"had the effect as between them to vest the right of property and the possession in the plaintiff, and that as between them it related back, so as to perfect the plaintiff's title from the time of the trespass for which that judgment was obtained. Still it could not affect the defendants in this suit, so as to make them trespassers as against the plaintiff. * * * There is no evidence in the case tending to show that at any time during the period covered by the declaration the plaintiff had any right whatever to the property or its possession, nor tending to show that in obtaining possession the defendants were guilty of a trespass against any one, much less against the plaintiff. And, whatever effect the recovery and satisfaction of Wheeler's judgment against the plaintiff should have had as between them by relation back, it cannot by such relation make the defendants trespassers for acts which did not constitute a trespass as against the plaintiff at the time it was committed."

To sustain the action at bar, the learned counsel for the plaintiff assume, as indeed they must, first, that the National Bank of Commerce received the cattle from Rice Bros. & Nixon as mere bailees, or under an express or implied trust to hold them for the benefit of the rightful owner whenever he might appear; and, second, that Siegel-Sanders Commission Company took them impressed with a like trust, which followed and attached to the proceeds in the hands of the defendant in favor of the plaintiff as the cestui que trust. That Rice Bros. & Nixon turned the cattle over constructively to the National Bank of Commerce on the controlling assurance that the bank would hold them harmless is confirmed by the undisputed fact that immediately after Rice Bros. & Nixon satisfied the judgment against them they made demand on the Bank of Commerce, not for the proceeds of the sale of the cattle, which they knew had been turned over to the Third National Bank of St. Louis, but for the amount paid by them in satisfaction of said judgment, based on the promise of indemnity. In their petition, as disclosed in the reported case (98 Mo. App. 696, 73 S. W. 930), they alleged:

"That it was thereupon agreed between them and defendant that in consideration of their turning the cattle over to defendant the latter would indemnify and protect them against damages by reason of their act."

As stated by the court from the evidence:

"It was then agreed between plaintiffs and defendants that plaintiffs would turn the 128 head over to the defendants; the latter agreeing to indemnify them in case they were forced to respond to damages to the owner, or, indeed, to any one of superior right. Plaintiffs, as stated by their principal witness, were anxious to get the cattle into other hands, so as to rid themselves of liability. They did not have an opinion as to which of the several claimants of liens had the best right or title; but they decided to turn the cattle over to defendant, for the reason that they thought it to be more certainly responsible than the others."

Moreover, as already shown by the testimony of Mr. Ball, witness for the plaintiff, when the Bank of Commerce advised Mr. Munger that it made no claim to the cattle, to get out of the tangle Munger gave the blank "title order" for the transfer of the cattle from their lot to that of Siegel-Sanders Commission Company to be sold. And when Mr. Ball applied to Rice Bros. & Nixon for the cattle, stating that the Third National Bank of St. Louis claimed them under mortgage, they distinctly disclaimed any interest in the cattle, and said they had turned them over to the bank. They were apprised, therefore, of the de-

fendant's assertion of right to the cattle, and they knew that the Siegel-Sanders Commission Company turned over the proceeds to the defendant. It does not now lie in the mouth of the plaintiff, as asserted in argument by his counsel, to say they do not know that the defendant ever held such mortgage. They were distinctly advised by Mr. Ball that his client asserted such mortgage, and they consented to what was done without asking to see the mortgage; and the trial in this case proceeded upon the theory that the plaintiff in the action in the Kansas district court claimed under mortgage superior in right to that of the defendant.

How, then, can it be legally possible for the plaintiff to maintain against the defendant the action for money had and received to his use? When demand was made upon them by Mr. Ball, they disclaimed any interest whatever in the cattle. There was, therefore, no fiduciary relation, or promise, either expressed or implied, between them and the defendant. It is an ancient and deep-rooted axiom of the common law, which "use has made familiar and time has rendered sacred," that "the law will not imply a promise where there was an express promise; so the law will not imply a promise of any person against his own express declaration, because such declaration is repugnant to any implication of a promise." *Whiting v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 130 Mass. 596. While there are instances where the law will imply a promise to pay by a party who protests, as where the law creates a duty to perform that for which it implies a promise to pay, as in the illustration of the refusal of a man to furnish food and clothing to his wife and children, yet the rule is that such promise shall never be implied against protest, except in cases where the law itself imposes the duty, which must be a legal, and not a mere moral or sentimental duty. This idea is expressed by Woodruff, J., in *Butterworth v. Gould*, 41 N. Y. 463, as follows:

"Where a defendant has received moneys due to the plaintiff but claiming it as his own under circumstances in which he has no authority from the plaintiff, and does not act under any pretense of such authority, and the payment to him is made in proposed recognition of his title thereto as his own, and does not operate to discharge the payor from his liability to the plaintiff, then and in such case there is no trust and no implied promise to pay the money to the plaintiff."

Had Rice Bros. & Nixon, after the conversion of the cattle, maintained the statu quo, retaining the cattle or the proceeds until they satisfied the judgment in trespass against them, their title would have attached as of the date of the conversion; and had the defendants in that situation, between the date of the conversion and the satisfaction of the judgment, tortiously taken the cattle or their proceeds from Rice Bros. & Nixon, they could have sued in trover, or have waived the trespass and brought action in assumpsit. But when, after the first conversion, the wrongdoers, as in this case, to extricate themselves, as they intended to do and supposed they were accomplishing, from ultimate liability and loss, voluntarily turned the property over to a third claimant, not in trust for themselves, but as an independent claimant, there was not an expressed or implied promise by the third person to answer to the assenting wrongdoer for the property. *Multo fortiori*,

they cannot maintain trespass or trover, as they assented to the taking. We are unable to find any precedent to support the action adopted by the plaintiff; and, in our judgment, established principles of law and procedure interdict it. The request of the defendant below for a directed verdict should have been given.

The judgment of the Circuit Court is therefore reversed, and the cause remanded, with direction to grant a new trial and for further proceedings in conformity with this opinion.

CONRAD INV. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 25, 1908.)

No. 1,530.

1. INDIANS—INDIAN LANDS—RESERVATION—APPROPRIATION OF WATERS—INDIAN TREATY.

Indian Treaty May 1, 1888, c. 213, 25 Stat. 124, establishing the Blackfeet Indian reservation, with the middle of the channel of Birch creek for its southern and southeastern boundary, which treaty was intended to promote the improvement, comfort, and welfare of the Indians, by aiding them to become self-supporting as an agricultural people, impliedly reserved to the Indians a prior right to a portion of the waters of such creek with which to irrigate the arid lands in the reservation, which right was paramount to that of persons subsequently taking up desert land claims on the public domain adjacent to the creek.

2. WATERS AND WATER COURSES—RESERVATION BY UNITED STATES.

The general government has power to reserve the waters on the public domain and exempt them from appropriation under state laws.

3. SAME—IRRIGATION—RIGHTS OF APPROPRIATORS—DIVISION.

Where the Indians on the Blackfeet reservation had a prior right to the use of the waters of Birch creek for irrigation to that of defendant, which had acquired by appropriation and purchase large quantities of land adjacent to the creek, which it had proceeded to irrigate by means of canals and a dam in the creek, a decree restraining defendant from obstructing the waters of the creek to the extent of 1,666 $\frac{2}{3}$ inches from flowing down the channel to points of diversion for the benefit of the Indians on the reservation, and providing that the amount of water in excess of that specified in the decree should be subject to the subsequent order of the court, was proper.

4. SAME—PARTIES.

In trespass by the United States for the benefit of the residents of the Blackfeet Indian reservation for the taking of the waters of Birch creek to the prejudice of the Indians, settlers who had taken up land on the faith of contracts with defendant to furnish them water, and whose rights were derived solely from defendant, were not necessary parties.

5. APPEAL AND ERROR—REVIEW—COSTS.

If an appeal is taken from a decree on the merits, it will not be reversed on a question of costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4549.]

Appeal from the Circuit Court of the United States for the District of Montana.

For opinion below, see 156 Fed. 123.

Walsh & Nolan and George H. Stanton (T. J. Walsh, of counsel), for appellant.

Carl Rasch, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from a decree entered in the United States Circuit Court for the District of Montana enjoining the defendant from obstructing the flow of a stream of water to the extent of interfering with the rights of the Indians on the Blackfeet Indian reservation. The controversy relates to the right to the flow of water in Birch creek, an unnavigable stream whose middle line forms the southern and southeastern boundary of a tract of land in the county of Teton, in the state and district of Montana, reserved by the United States government for the permanent home and abiding place of certain tribes of Indians, under the name of the Blackfeet Indian reservation.

It is alleged by the complainant, and admitted by defendant, that large portions of the lands embraced within said reservation are well adapted for stock raising, and other large portions are susceptible of cultivation; that large herds of cattle and large numbers of horses, the property of the government and of the Indians, have been and are now "pasturing and grazing upon said reservation and upon the lands within said reservation, being and situate along and bordering upon said Birch creek"; that in order to make the lands productive beyond the growth of natural grass irrigation is necessary; that the defendant, a Montana corporation, in the year 1900 constructed a dam in the channel of said Birch creek for the purpose of diverting certain waters of said creek into a canal constructed by defendant, and through said canal into ditches and reservoirs connected therewith; that defendant has used and still continues to use said canal, ditches, and reservoirs for such purpose. It appears that defendant's dam was reconstructed in 1904; that since such reconstruction—excepting in times of extreme high water, extending over not more than two or three weeks of the entire year—the dam is capable of turning all the waters of Birch creek, beyond a small amount of seepage, into defendant's canal; and that the creek below defendant's dam was practically dry at certain points during at least a portion of each of the summers of 1904 and 1905, which seems to have been a condition before unknown.

In *Winters v. United States*, 143 Fed. 740, 74 C. C. A. 666, and 148 Fed. 684, 78 C. C. A. 546, the controversy involved the right of the United States and of the Indians residing upon the Belknap Indian reservation to the use of 5,000 inches of the waters of Milk river for useful and beneficial purposes. The Indian reservation was established by the treaty between the United States and the Indians, under Act Cong. May 1, 1888, c. 213, 25 Stat. 113-133. The center of Milk river is the northern boundary line of the reservation throughout its entire width, and is the principal source of supply of water for the various uses of the government and the Indians for irrigation purposes generally upon the reservation. The water is diverted from the

river and distributed over the lands of the reservation by means of a canal and lateral ditches. The defendants in that case were settlers upon the public lands of the United States in the vicinity of Milk river, who had constructed a dam across the channel of Milk river above the reservation, and had appropriated and diverted the waters of Milk river at that point for the purpose of irrigating their lands, which they claimed the right to do under the desert land laws of the United States and the laws of the state of Montana authorizing the appropriation of the waters of the streams of that state for household, domestic, agricultural, irrigating, and other purposes. The action was brought by the United States to perpetually restrain the defendants from in any manner taking or diverting the waters of Milk river, and from in any manner impeding, obstructing, or preventing the waters of Milk river and its tributaries, to the amount of 5,000 inches, from flowing down the channel of the river to the point of diversion upon the reservation. A decree was entered in the Circuit Court for the District of Montana in favor of the complainant, and the defendants appealed. This court affirmed the decree, holding that the United States, by treaties with the Indians on the reservation, had impliedly reserved the waters of Milk river for the benefit of the Indians on the reservation to the extent reasonably necessary to enable them to irrigate their lands, and that grantees and settlers on public lands outside of the reservation could not acquire, under the desert land laws of the United States or the laws of the state of Montana relating to the appropriation of the waters of the streams of that state, the right to divert the waters of Milk river to the prejudice of the rights of the Indians residing upon that reservation. This decision has been affirmed by the Supreme Court of the United States in *Winters v. United States*, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. —. In the course of the decision, on page 577 of 207 U. S., page 212 of 28 Sup. Ct. (52 L. Ed. —), the court said:

"The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be. *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702, 19 Sup. Ct. 770, 43 L. Ed. 1136; *United States v. Winans*, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089. That the government did reserve them we have decided, and for a use which would be necessarily continued through years."

The present case is in many respects similar to the *Winters Case*. The act of Congress of May 1, 1888, which ratified an agreement with certain Indians and established the Ft. Belknap Indian reservation, with the middle of the main channel of Milk river for its northern boundary, established also the Blackfeet Indian reservation, with the middle of the channel of Birch creek for its southern and southeastern boundary, and in this case the diversion of the waters of Birch creek by means of a dam is the subject of controversy, as the diversion of the waters of Milk river by means of a dam was the subject of controversy in the *Winters Case*. The law of that case is applicable to the present case, and determines the paramount right of the Indians of the Blackfeet Indian reservation to the use of the waters of Birch creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes. The gov-

ernment has undertaken, by agreement with the Indians on these reservations, to promote their improvement, comfort, and welfare, by aiding them to become self-supporting as a peaceable and agricultural people. The lands within these reservations are dry and arid, and require the diversion of waters from the streams to make them productive and suitable for agricultural, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters Case.

In the bill of complaint in this case it is alleged that:

"In the year 1898 your orator and the Indians residing upon said reservation, for the purpose of bringing water to and upon the lands of said Blackfeet Indian reservation, with which to irrigate the same, and raise thereon crops of grass, grain, and vegetables, appropriated, took, and diverted from the channel of said Birch creek, by means of canals, ditches, and waterways, large amounts, to wit, a flow of 2,000 cubic feet per minute, of the waters of said Birch creek, and by means of canals, ditches, and waterways conducted the waters of said creek, so taken and diverted from said Birch creek as aforesaid, from the channel of said creek to and upon divers and extensive tracts of lands upon said reservation, aggregating in amount about 10,000 acres of land, and after so conducting said waters to and upon said lands used the same for the irrigation of said lands, and for domestic and other useful purposes, and by means thereof raised upon said lands crops of grain, grass, and vegetables."

It is further alleged that, notwithstanding the rights of the complainant and of the Indians to the uninterrupted flow of all the waters of Birch creek down the natural channel of said creek, the defendant in the year 1900 wrongfully and unlawfully, and without the license, consent, or approval of the complainant or of the Indians residing upon the Blackfeet Indian reservation, entered upon said reservation and the said Birch creek above the points of the diversion of said waters of said creek by the complainant and the said Indians as aforesaid, and above the places of the use of said waters by the complainant and the Indians, and built and erected and constructed upon said reservation, and in and across the channel of said Birch creek, a large and substantial dam and reservoir, and by means of said dam and reservoir obstructed and prevented the waters of said Birch creek from flowing down the natural channel of said creek to the places of diversion and use of said waters of said creek by complainant and the said Indians.

The evidence on the part of the complainant in support of these allegations is to the effect that the Blackfeet Indian reservation covers a territory in the county of Teton, in the northwestern part of the state of Montana, about 40 miles east and west by 60 miles north and south, and containing about 900,000 acres. Portions of this land are suitable for grazing purposes, while other portions are adapted for agricultural purposes. The land is arid, and, where cultivated, requires water for irrigation. Birch creek, which forms the southern and southeastern boundary of the reservation, has carried at its lowest stage 2,500 inches of water, and at its highest stage 150,000 inches of water. In the reservation and north of Birch creek is a stream, called

Blacktail creek, which flows in the same general direction as Birch creek, and finally empties into that creek. Between Birch creek and Blacktail creek, and still north of Blacktail creek, there is a tract of land containing about 20,000 acres, 50 per cent. of which, or 10,000 acres, can be irrigated from Birch creek. In 1898 the government constructed a canal, about $5\frac{1}{2}$ miles long, from Birch creek onto the lands in the reservation adjoining the creek. This canal had, when constructed, a capacity of 1,200 cubic feet of water per minute, or the equivalent of about 1,000 inches. Six lateral ditches have been extended from this canal. In addition to the canal and its lateral ditches, there are four other ditches taking water from the creek onto the lands of the reservation. These four ditches have an aggregate capacity for carrying and distributing 1,740 inches of water.

Defendant, in its answer, admits the construction of a dam across the channel of Birch creek, as alleged in the complaint. The evidence on the part of the complainant was in substance to the effect that the water of Birch creek allowed to escape over this dam was not sufficient to be depended upon for any kind of a practical use of the government ditch; that much of the time during the summers of 1904 and 1905 there was practically no water running in Birch creek at the head of the government ditch; that even the springs which had theretofore assisted in feeding the stream had diminished or disappeared, showing that they were fed by underflow of the stream from above and that their source had been cut off; that the government had theretofore attained a certain amount of success in accomplishing its purpose in establishing the reservation, to get its Indian wards interested in agricultural pursuits, but that since the building of defendant's dam had cut off the former abundant supply of water the Indians, who had begun to take some interest in agricultural pursuits, had become discouraged; that the climate was such as to make some extra winter care and feeding necessary for anything like success in the handling of live stock; that without irrigation it was impossible to raise grain or a crop of grass heavy enough to cut for winter feeding, which condition had compelled the Indians to dispose of their stock, which had theretofore been summered on the government's fenced inclosure and wintered by the Indian owners on their several allotments of land on the unfenced strip along Birch creek; and that for that reason the Indian population on this strip had decreased in numbers and those remaining had made no substantial progress. The testimony on the part of the defendant is that the ditches on the reservation are out of repair and do not carry any such amount of water as claimed by the complainant, and that 400 inches of water is sufficient for all purposes on that part of the reservation where the water of Birch creek can be distributed and used; that the defendant has constructed a canal on the south side of Birch creek, with a carrying capacity of 20,000 inches, and that defendant has appropriated that amount of the water of Birch creek; that when the enterprise was inaugurated the defendant owned 11,000 acres of land which it proposed to irrigate with the waters flowing through its canal; that its holdings of land have steadily increased by purchases from the government and from individuals, who have acquired title by homestead,

pre-emption, and desert land entries, until at the time of the hearing in this case it owned about 44,000 acres of land capable of irrigation from its canal; that the value of the property of the defendant employed in its system of irrigation was about \$500,000.

Conceding that the defendant's enterprise is all that it claims, it is still subject to the rights of the Indians on the reservation in the diversion of the waters of Birch creek, and the question remains to be determined: What, under all the circumstances, is the government entitled to reserve for their uses? The court below in its decree does not direct the removal of defendant's dam from the channel of Birch creek, but has enjoined the defendant from in any manner or by any means impeding, preventing, or obstructing the waters of said creek to the amount and extent of 1,666 $\frac{2}{3}$ inches, or the equivalent of 33 $\frac{1}{3}$ second feet, from flowing down the natural channel of said creek and the points of diversion and places of use established by the complainant for the benefit of the Indians on the reservation. This decree does not at any time reserve all the waters of Birch creek for the complainant, but leaves a considerable flow of water to be retained by defendant's dam and used in its system of irrigation; and, after a careful examination of the evidence, we are of opinion that the decree of the Circuit Court is entirely reasonable and just, and should be affirmed in this respect.

It is objected that certain parties mentioned in defendant's amended answer were necessary parties to the action, and that without them there was a defect of parties. The amended answer, referring to lands on the south and southeast of Birch creek under defendant's irrigation system, alleges that settlers in large numbers settled upon the said lands and entered into agreements with the defendant, whereby the defendant undertook to furnish such settlers with water sufficient to irrigate the lands settled upon by them, and they reciprocally agreed to take and pay for such water; that a great number of the said settlers entered the lands settled upon by them under the provisions of the desert land act, and made proof of their settlement upon and reclamation of the same; that a large number of the settlers, with a view of obtaining patents under the desert land act, set forth in their proofs that they had obtained the right, as the fact was, to obtain water from the said canal and ditches of the defendant; that such proofs were approved by the local land office, the Commissioner of the General Land Office, and the Secretary of the Interior; that the right of such settlers to have and take water from the said ditches for the irrigation of their lands became by contract for the same appurtenant to said lands and inseparably annexed thereto. This is an action of trespass, where the acts of the defendant constitute the cause of action. The rights of the parties, referred to in the amended answer, to the water of Birch creek, were derived from the defendant and remain subject to its rights. They are not separate and distinct rights, and in the nature of the case could not be. The parties who purchase water from the defendants do not divert the water from Birch creek, and have acquired no right of diversion independent of the defendant's right. It follows that in any controversy respecting such right upon the facts in this case the defendant represents the entire claim of right.

It is further objected that the decree of the Circuit Court provides that, whenever the needs and requirements of the complainant for the use of the waters of Birch creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification.

The award of costs in favor of complainant is not a subject of appeal. If an appeal be taken from a decree upon the merits, it will not be reversed upon the question of costs. *Du Bois v. Kirk*, 158 U. S. 58, 67, 15 Sup. Ct. 729, 39 L. Ed. 895.

The decree of the Circuit Court is affirmed.

RAINBOW et al. v. YOUNG, Sheriff.

(Circuit Court of Appeals, Eighth Circuit. June 8, 1908.)

No. 2,642.

INDIANS—RESERVATIONS—INTRUDERS—AUTHORITY TO REMOVE.

Under Rev. St. §§ 441, 463, 2058, 2149 (U. S. Comp. St. 1901, pp. 252, 262), the Commissioner of Indian Affairs is authorized, with the approval of the Secretary of the Interior, to cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians; and this although the reservation be within a state and the Indians be the holders, under trust patents issued to them pursuant to Act Feb. 8, 1887, c. 119, 24 Stat. 388, of allotments adjacent to the reservation, and be, therefore, citizens of the United States and the state.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

See 154 Fed. 489, 83 C. C. A. 421.

A. W. Lane, Asst. U. S. Atty. (Charles A. Goss, U. S. Atty., on the brief), for appellants.

Thomas L. Sloan (W. E. Whitcomb, on the brief), for appellee.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. This appeal calls in question an order discharging a writ of habeas corpus. There is no controversy about the facts, which are as follows: The appellants are Indian policemen at the Winnebago Indian Reservation, in Thurston county, Neb. That reservation consists of 400 acres of land belonging to the United States upon which it maintains an Indian agency and an Indian train-

ing school for the benefit of the Winnebago tribe, to the members of which allotments in severalty of the adjacent lands have been made under Act Feb. 8, 1887, c. 119, 24 Stat. 388. The duties of an Indian agent at that agency, or at least such of them as pertain to the matters here stated, have been devolved upon the superintendent of the training school under a provision in Act March 3, 1903, *infra*. Somewhat recently, when payments of certain lease moneys were about to be made at that agency to the members of the tribe by such superintendent, he was directed by the Commissioner of Indian Affairs to require collectors to remain away from the agency on the days when the payments were being made; and among those who were duly notified of that direction was Thomas L. Sloan, an attorney of Pender, Neb. On one of the days fixed for making the payments Mr. Sloan, disregarding the notice so given to him, went to the agency for the purpose of making collections from Indians to whom lease moneys were then to be paid. After he had made some collections, and while he was there for the purpose of making others, he was requested by the superintendent to leave the agency and to remain away during the day so fixed for making the payments. He refused to do so, and the appellants then removed him from the reservation, and also prevented him from returning to the agency during that day. In doing so they acted under a verbal order given to them as members of the agency police by the superintendent, who was executing the commissioner's direction. The appellants used no more force than was necessary, and did nothing of which Mr. Sloan could complain, if the superintendent's order to them was a lawful one. Subsequently they were taken into custody by the appellee upon a warrant issued by the county judge of Thurston county upon a complaint made by Mr. Sloan, wherein he charged them with a criminal assault under the laws of the state of Nebraska by reason of their removal of him from the reservation in the circumstances just stated. While they were so in custody and awaiting a trial or examination, a writ of habeas corpus was sued out in their behalf upon a petition presented to the Circuit Court of the United States for the District of Nebraska, wherein it was alleged that their imprisonment was unlawful because the act with which they were charged was done in the discharge of a duty placed upon them as agency policemen in pursuance of a law of the United States. At the final hearing upon the petition, the Circuit Court was of opinion that there was no statutory authority for the direction given by the commissioner, and that it was invalid in the absence of such authority, and so discharged the writ and remanded the appellants to the appellee's custody.

Of the questions discussed by counsel, we deem it necessary to here notice the single one of the commissioner's authority to give the direction which was disregarded by Mr. Sloan and in the orderly execution of which he was removed from the reservation. While the members of the Winnebago tribe have received allotments in severalty and have become citizens of the United States and of the state of Nebraska, their tribal relation has not been terminated. They are not permitted to alienate, mortgage, or lease their allotments without the sanction of the Secretary of the Interior. Their lease moneys are collected and

disbursed by officers of the United States. Their lands and some at least of their other property are not taxable; and the United States maintains a reservation, an agency, and a training school for their benefit. In short, they are regarded as being in some respects still in a state of dependency and tutelage which entitles them to the care and protection of the national government; and when they shall be let out of that state is for Congress alone to determine. *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 308, 23 Sup. Ct. 115, 47 L. Ed. 183; *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566; *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. —; *United States v. Thurston County*, 74 C. C. A. 425, 143 Fed. 287; *Hollister v. United States*, 76 C. C. A. 337, 145 Fed. 773; *Beck v. Flournoy, etc., Co.*, 12 C. C. A. 497, 65 Fed. 30; *United States v. Mullin (D. C.)* 71 Fed. 682. Besides, the reservation from which Mr. Sloan was removed is the property of the United States, is set apart and used as a tribal reservation, and in respect of it the United States has the rights of an individual proprietor (see *Commonwealth v. Clark*, 2 Metc. [Mass.] 23; *Commonwealth v. Dougherty*, 107 Mass. 243; *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Fossbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866; *Harshman v. Rose*, 50 Neb. 113, 69 N. W. 755), and can maintain its possession and deal with intruders in like manner as can an individual in respect of his property (*Camfield v. United States*, 167 U. S. 518, 524, 17 Sup. Ct. 864, 42 L. Ed. 260; *Jourdan v. Barrett*, 4 How. 168, 185, 11 L. Ed. 924; *Stephenson v. Little*, 10 Mich. 433). With these observations, we turn to the statutes bearing upon the authority of the Commissioner of Indian Affairs, and in considering them it is well to remember, as was said in *United States v. Macdaniel*, 7 Pet. 1, 14, 8 L. Ed. 587, that:

"A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

The Revised Statutes contain these sections:

"Sec. 441 (U. S. Comp. St. 1901, p. 252). The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third, The Indians."

"Sec. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations."

"Sec. 2058. Each Indian agent shall, within his agency, manage and superintend the intercourse with the Indians agreeably to law; and execute and perform such regulations and duties, not inconsistent with law, as may be

prescribed by the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs."

"Sec. 2149. The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being thereon without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person."

And in Act March 3, 1903, c. 994, 32 Stat. 982, is the following:

"That the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may devolve the duties of any Indian agency or any part thereof upon the superintendent of the Indian training school located at such agency whenever in his judgment such superintendent can properly perform the duties of such agency."

No other statute imposes any limitation applicable here upon the exercise of the authority so given to the Commissioner, and upon this record it cannot reasonably be doubted that the commissioner, in giving to the superintendent the direction before named, acted with the approval of the Secretary of the Interior. *Wilcox v. McConnell*, 13 Pet. 498, 513, 10 L. Ed. 264; *Confiscation Cases*, 20 Wall. 92, 109, 23 L. Ed. 320; *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915; *United States v. Fletcher*, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. Ed. 378; *In re Brodie*, 63 C. C. A. 419, 422, 128 Fed. 665, 668.

In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage. And, while there is no specific provision relating to the exclusion of collectors from Indian agencies at times when payments are being made to the Indians, it does not follow that the commissioner is without authority to exclude them; for by section 2149 he is both authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation "any person" whose presence therein may, in his judgment, be detrimental to the peace and welfare of the Indians. This applies alike to all persons whose presence may be thus detrimental, and commits the decision of that question to the commissioner. Of course, it is necessary to the adequate protection of the Indians and to the orderly conduct of reservation affairs that some such authority should be vested in some one, and it is in keeping with other legislation relating to the Indians that it should be vested in the commissioner. *United States ex rel. West v. Hitchcock*, 205 U. S. 80, 27 Sup. Ct. 423, 51 L. Ed. 718. There is no provision for a re-examination by the courts of the question of fact so committed to him for decision, and, considering the nature of the question, the plenary power of Congress in the matter, and the obvious difficulties in the way of such a re-examination, we think it is intended that there shall be none. *United States*

ex rel. West v. Hitchcock, *supra*; Standliff v. Fox, 81 C. C. A. 623, 152 Fed. 697.

It follows that the commissioner's direction to the superintendent and the latter's verbal order to the agency policemen were given in the exercise of a lawful authority, and therefore that what was done by the policemen was done in the lawful discharge of a duty placed upon them in pursuance of a law of the United States.

The order of the Circuit Court is accordingly reversed, with a direction to discharge the appellants from custody.

NATIONAL BANK OF COMMERCE OF SEATTLE v. DOWNIE et al.
(two cases).

SEATTLE NAT. BANK v. SAME (two cases).

(Circuit Court of Appeals, Ninth Circuit. May 11, 1908.)

Nos. 1,527, 1,528, 1,529, 1,532.

BANKRUPTCY—SECURED CLAIMS—ASSIGNMENT OF CLAIMS AGAINST UNITED STATES.

Under Rev. St. § 3477 (U. S. Comp. St. 1901, p. 2320), providing that assignments of claims upon the United States shall be void unless witnessed and acknowledged and made after the claim has been allowed and a warrant drawn therefor, the assignment by a bankrupt to a bank, as collateral security for money borrowed, of claims against the United States under contracts only partially performed, such assignments not being witnessed or acknowledged, was ineffective, and the claims passed by operation of law to the bankrupt's trustee for the benefit of general creditors.

Appeal and Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the Western District of Washington.

Bausman & Kelleher, for Seattle Nat. Bank.

George E. de Steiguer, for National Bank of Commerce of Seattle.
Peters & Powell and Cooley & Horan, for appellees.

Kerr & McCord, for trustee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. Arthur Gamwell and Philip Wheeler, partners under the firm name of Gamwell & Wheeler, were adjudged bankrupts in the District Court of the United States for the Western District of Washington, Northern Division, on the 16th day of April, 1907, and the same day R. E. Downie was appointed receiver of the partnership property. Thereafter he was elected and qualified as permanent trustee, and by an order made June 20, 1907, was authorized to collect all sums of money due the bankrupts from the United States government or any department thereof. On the 4th day of June, 1907, the National Bank of Commerce of Seattle filed its proof of debt against the bankrupt partnership, in the sum of \$37,149.85. The proof set forth that the only securities held by said corporation for

said debt were certain described claims against the United States government on account of supplies furnished and assigned to the bank by the said Gamwell & Wheeler to secure said indebtedness. These claims appear to be 16 in number, and amount in the aggregate to the sum of \$33,517.48. The first claim is dated December 10, 1906, and the last February 15, 1907. On June 18, 1907, the Seattle National Bank filed its proof of debt against the bankrupt partnership for the sum of \$22,582.19, with interest. The proof set forth that the only securities held by said corporation for said debt were certain described claims against the United States government on account of supplies furnished and assigned to the bank by said Gamwell & Wheeler to secure said indebtedness. The claims appear to be 61 in number and amount in the aggregate to \$38,509.32. The first claim is dated September 25, 1906, and the last April 4, 1907.

The respondents filed objections to the allowance of these assigned securities. One of these objections was that the assignments were invalid under section 3477 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2320), and that the claims against the government belonged to the creditors of the bankrupts generally.

On the 10th of July, 1907, the parties hereto entered into a stipulation as to said assigned claims, as follows:

"That the facts in relation to the claims against the government of the United States, assigned by said bankrupts to the above-mentioned banks as collateral security for the indebtedness due from said bankrupts to said banks, and to the allowance of which claims as security for such indebtedness the above-named trustee and the Barber Asphalt Paving Company and the Mukilteo Lumber Company have objected to, are as follows: That each and all of said claims against the United States government, so assigned, were claims for money due from the government of the United States to the said bankrupt upon account of contracts entered into between said bankrupts and the United States, for the furnishing of materials by said bankrupts to various departments of said government. That said assignments were each and all voluntarily made in consideration of a loan made by said bank to said bankrupts at the time of said assignments and as collateral security for the repayment of said loans and without notice to the other creditors of said bankrupts. That all of such assignments were made after the entering into of said contracts, and after partial performance thereof by said bankrupts before the allowance of any of such claims or the ascertainment of the amount due thereon, or the issuing of any warrant for the payment thereof, and that none of said assignments were executed in the presence of any witnesses at all, and that none of them recite any warrant for the payment of the claim assigned, and that none of them were acknowledged by any officer having authority to take acknowledgment of deeds, or any other acknowledging officer at all, and that none of them were certified as being acknowledged by any officer. The said loans to each of said banks exceeded in amount the value of said collaterals so assigned to secure the same, and there is now due to each of said banks on account of said loans an amount in excess of the value of the said collaterals so assigned to each of said banks respectively. The claims of said banks and the objections thereto on file are made a part hereof."

The referee in bankruptcy, on the 22d of July, 1907, allowed the claim of the Seattle National Bank in the sum of \$22,582.19, and interest, and the claim of the National Bank of Commerce in the sum of \$37,149.85, and interest, and ordered and decreed that said banks were each of them respectively entitled to receive on account of claims against the United States government, so assigned to it and shown by

the claims of said bank respectively on file, whatever amount might be collected from the United States government of said claims, and the securities of said banks by reason thereof were allowed, and the trustee was ordered, as collections of said claims were made, to pay the same to the banks holding the assignments thereof. Thereupon the respondents, except the trustee, petitioned the District Court for a review of the order of the referee. Upon this review the judge of the District Court allowed the claims of the banks as general debts, but disallowed their claims of preference. The National Bank of Commerce of Seattle and the Seattle National Bank have brought this matter to this court for review, both by appeal and by petition.

The appellees rely upon the provisions of section 3477 of the Revised Statutes of the United States to support the order of the District Court. That section is as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

This statute has been before the court in a number of cases and held applicable to all cases where the assignee seeks to enforce the assigned claim against the United States. *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503; *St. Paul R. R. Co. v. United States*, 112 U. S. 733, 28 L. Ed. 861.

In *United States v. Gillis*, *supra*, it was contended on behalf of the assignee of the claimant that the statute was applicable only to claims asserted before the Treasury Department, but the court said:

"We discover nothing in the reason, nothing in the mischief the act is plainly intended to remedy, and nothing in the language employed tending to warrant the admission of any exceptions from the comprehensive provisions made, nothing that can justify our holding that when Congress said all transfers or assignments, partial or entire, absolute or conditional, of claims against the United States shall be null and void, they meant they should be in operation (inoperative) only when presented to the accounting officers of the treasury, but effective when presented everywhere else."

It has also been held applicable to assignments in which a contract is made for the prosecution of a claim against the United States and an assignment is made of a portion of the claim or a lien created on it to secure payment for services rendered in prosecuting the claim. *Ball v. Halsell*, 161 U. S. 72, 16 Sup. Ct. 554, 40 L. Ed. 622; *Nutt v. Knut*, 200 U. S. 12, 26 Sup. Ct. 216, 50 L. Ed. 348. In the latter case the court, referring to the clause in the contract making the payment of the attorney's compensation a lien upon the claim asserted against the the government, said:

"In effect or by its operation it transferred or assigned to the attorney, in advance of the allowance of the claim, such an interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute, for its obvious purpose, in part, was to forbid any one who was a stranger to the original transaction to come between the claimant and the government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of the government."

It has also been held applicable to assigned orders drawn by the owner of a claim against the United States upon the attorneys employed by him in the prosecution of the claim, directing them to pay to a third person certain sums out of any money coming into their hands on account of the claim. *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032. In this case the court, referring to the language of the statute, says:

"It would seem to be impossible to use language more comprehensive than this. It embraces alike the legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself."

On the other hand, it has been held that the statute does not render invalid an assignment where the original claimant became a bankrupt and assigned his property to an assignee in bankruptcy. "It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed." *Erwin v. U. S.*, 97 U. S. 393, 397, 24 L. Ed. 1065.

It has also been held: That the statute did not embrace the case of a voluntary general assignment by an insolvent for the benefit of his creditors. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 226; *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981. That it does not render invalid a contract of partnership to furnish supplies to the United States or a promise by one to another of the partners to pay a sum already due him under the partnership articles out of money to be received from the United States for such supplies. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940. That it does not affect the right of a mortgagee of real estate leased to the United States, or of a pledgee of the funds thereof, to recover from the mortgagors or pledgors the amount of funds paid to them by the United States. *Freedman Saving & Trust Co. v. Shepherd*, 127 U. S. 494, 8 Sup. Ct. 1250, 32 L. Ed. 163 and *Shepherd v. Thomson*, Id. That its inhibition of powers of attorney, executed in advance of the allowance of the claim and the issuing of a warrant therefor, cannot be used to compel a second payment after the amount thereof has been paid to the person authorized by the claimant to receive it. *Bailey v. United States*, 109 U. S. 432, 3 Sup. Ct. 272, 27 L. Ed. 988. That it does not prevent any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the government from withdrawing the proceeds of such claim from the reach of creditors, provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the

government, nor in any wise obstruct any action that such officers may legally take under the statute relating to allowance or payment of claims against the United States. *Price v. Forrest*, 173 U. S. 410, 423, 19 Sup. Ct. 434, 43 L. Ed. 749. The purpose of the statute is to protect the government, and not the parties to the assignment. *Goodman v. Niblack*, *supra*. Hence, where a claim has been allowed by the accounting officers of the United States, a warrant issued therefor and delivered to the claimant, the government is no longer concerned with his disposition of the draft or the funds which it represented. *York v. Conde*, 147 N. Y. 486, 42 N. E. 193; *Farmers' National Bank v. Robinson*, 59 Kan. 777, 53 Pac. 762.

In the present case, the claims of Gamwell & Wheeler against the government of the United States were voluntarily assigned after entry into the contracts and after partial performance, but before the allowance of any such claims, the ascertainment of the amount due thereon, or the issuing of any warrant for the payment thereof. None of the assignments was executed in the presence of any witnesses, and none of them recites any warrant for the payment of the claims assigned, and none of them was acknowledged by any officer having authority to take acknowledgments of deeds, and none of them was certified as being acknowledged by any officer. These assignments are therefore within the express language of the statute, and not within any of its exceptions. They are also within the terms of the statute as interpreted by the Supreme Court in *Spofford v. Kirk*, *supra*, in *St. Paul & Duluth R. R. v. United States*, *supra*, in *Ball v. Halsell*, *supra*, and not within the exceptions mentioned in any of the other cases to which reference has been made. But the transfer of these claims to the trustee in bankruptcy by operation of law comes within the exception declared by the Supreme Court in *Erwin v. United States*, *supra*. It follows that the assignments in question are null and void, and that the trustee in bankruptcy is the proper person to receive from the officers of the United States government any and all sums due to the said bankrupts, which, when received, are a part of the general assets of the bankrupt's estate for the benefit of all creditors alike, and without any preference in favor of either of said banks.

The order of the District Court in each of the above-entitled cases is affirmed.

CONSTANTINE & PICKERING S. S. CO. v. AUCHINCLOSS et al. (two cases).

McLEAN et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 22, 1908.)

(Nos. 234-236.)

SHIPPING — DEMURRAGE — CONSTRUCTION OF CHARTER PARTY — "LOADING BERTH."

Charter parties required the vessel in each case to load a cargo of phosphate at Port Inglis, Fla., and provided that the vessel should proceed to the Port Inglis anchorage, "or as near thereunto as she may safely get, and there load. * * * The cargo to be brought alongside

and taken from alongside free of risk and expense to the vessel, any custom of the port to the contrary notwithstanding. * * * Steamer or vessel to proceed to safe anchorage at port of loading indicated by the merchant and there load." Also: "The cargo to be supplied at the average rate of not less than 400 tons per weather working day, * * * commencing 24 hours after vessel is in loading berth and is ready to receive cargo and written notice given to that effect." Vessels were obliged to load at such port some miles from shore, and the government had established there two loading buoys. Three vessels were ordered to proceed to the port at the same time, and they reached there and anchored, and gave notice that they were ready to load. *Held*, that the "loading berth" referred to in the charter was the "safe anchorage" spoken of in the prior clause; that, having reached such anchorage and given the required notice, the lay days commenced, and the charterer could not require the vessels to await their turn at the loading buoys before the time commenced, even though that may have been the custom of the port, nor avoid liability for demurrage because of their detention for two or three weeks beyond the time, either because they could not get to the buoys or because they could not, perhaps, have been fully loaded where they lay—its duty being to load them there, so far as could be safely done, and then permit them to move further out for its completion.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of New York.

The final decrees of the District Court awarded demurrage, amounting in the aggregate to \$7,390.65, to the libelants for the detention of their steamships *Queenswood*, *Homewood*, and *Moness* at Port Inglis, Fla., in the winter of 1905-06.

Miller, King, Lane & Trafford (Benjamin A. Morton and William S. Montgomery, of counsel), for appellant.

J. Parker Kirlin and Orville C. Sanborn, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The judge of the District Court decided that the charterers were under obligation to furnish the vessels safe berths at which they could load within a reasonable time and that, failing to do so, they were liable for demurrage under the provisions of the charter. We think this conclusion was correct. The vessels were chartered to carry cargoes of phosphate from Port Inglis to Europe and were detained from 2 to 3 weeks from the expiration of their lay days if computed as commencing 24 hours after the entry of the vessels at the custom house and notice of their readiness to receive cargo. To be more accurate, the *Queenswood* was delayed 14 days and 22 hours, the *Homewood* 13 days and 14¾ hours and the *Moness* 22 days and 3½ hours.

The respondents seek to escape liability for this admitted delay by the contention that the government had located two loading buoys at the so-called harbor of Port Inglis, which is eight miles from the coast, and that by the terms of the charters lay days did not begin to run until 24 hours after the vessels were actually anchored at one of these buoys and that the custom of the port required that vessels should take precedence at these two loading berths according to the date of their

entry at the custom house. In other words, it is argued, if the two loading berths were occupied by vessels having prior entry at the custom house, that the charterers could keep the chartered vessels idle for a week, a month or three months without incurring the slightest liability.

When the Queenswood, Homewood and Moness arrived November 16th, 28th and 30th, respectively, they anchored in 22½ feet of water, except the Homewood, which anchored in 22 feet. When loaded these vessels drew 20 feet, 17 feet 3 inches and 20 feet 3 inches, respectively, at their deepest point. As to the Homewood there can be no question that, allowing for the slight rise and fall of the tide, she had at least 4½ feet of water at all times under her keel. We fail to see, as to her, at least, how any excuse is established based upon insufficient depth of water. As to the other two it may be that when the loading had progressed to a point where there was but 2 or 3 feet of water under the bottom, it should have been suspended until the vessel was removed to a loading buoy or to a point further out where the water was deeper. This course, it appears, was frequently pursued in the case of deep draft vessels.

We fail to understand why the loading could not have been begun and continued so long as there was not the slightest danger of the vessels touching bottom. If the respondents' contention in this regard be well founded, it will apply to vessels drawing 10 feet as well as those drawing 20 feet when loaded. The former can be held in idleness at the will of the charterer although the danger from insufficient depth of water could by no possibility be a factor in the case. To illustrate: A. charters B.'s vessel, which draws 20 feet loaded, to proceed to a designated pier for a cargo of coal, the pier having 30 feet of water at its outer end and but 15 feet at its shore end. When the vessel arrives she finds the outer end of the pier occupied by another vessel and she immediately makes fast to the pier between this vessel and the shore end and notifies the charterer that she is ready to receive the cargo. Would the latter be justified in refusing to furnish it on the ground that she was not in a safe berth? On the contrary would it not be his duty to load her as fast as practicable and move her into deeper water to receive the remainder of the cargo as soon as the other vessel had vacated the berth at the end of the pier? We see no distinction in principle between the two cases. If the loading had proceeded as indicated it would at least have greatly reduced the time the vessels were delayed at the loading buoys. It is argued that it was unsafe for vessels to load elsewhere than at the loading buoys, and if they had done so and damage had resulted by reason of a storm the charterers might have been held liable. We are unable to see how such a contention can succeed. The master of each vessel having anchored and given notice that he was ready to receive the cargo, it is not easy to see how the charterers assumed the risk of damage to the vessel by complying with her master's request. The libelants could argue with even greater plausibility that if a storm had arisen and injured the vessels during the time they were improperly delayed, that the charterers were liable for the damage.

The testimony satisfies us that the loading could have proceeded at

the points where the vessels were anchored as safely as at the buoys. The Queenswood, for instance, had five anchors and her total anchorage weight was greatly in excess of that at the easterly buoy. We are constrained to believe that the refusal to load was not due to any apprehension of disaster but to the fact that the charterers did not have lighters enough and men enough to load more than two vessels at a time. The charter parties were executed on printed forms prepared by the respondents and each provides that the vessel shall proceed to the Port Inglis anchorage—

"or as near thereunto as she may safely get and there load. * * * The cargo to be brought along side and taken from along side free of risk and expense to the vessel, any custom of the port to the contrary notwithstanding. * * * Steamer or vessel to proceed to safe anchorage at port of loading indicated by the merchant and there load."

If there were nothing but the foregoing provisions to be considered it could not be contended for a moment that there was any obligation on the part of the vessel to anchor at a particular buoy. Her obligation was discharged when she reached a safe anchorage as near Port Inglis as she could safely get. She was then an arrived vessel and was entitled, after due notice, to "there load."

But it is argued that the clause dealing with the time lay days are to begin to run makes it clear that the "safe anchorage" of the preceding provisions is but a synonym for "loading buoy." The language relied on is as follows:

"The cargo to be supplied at the average rate of not less than 400 tons per weather working day * * * commencing 24 hours after vessel is in loading berth and is ready to receive cargo and written notice given to that effect."

We think the term "loading berth" as here used refers back to the safe anchorage previously provided for, to which the vessel was to proceed and where she was to load. The clause is to be construed as if it had provided that the cargo was to be supplied "24 hours after vessel is in safe anchorage, as aforesaid" or in "said anchorage" or "in said loading berth." The position most favorable to the respondents is that the charter is ambiguous and doubtful in this respect. Conceding, for the moment, this to be so, we think the doubt must be resolved against the charterers. They knew all the facts and were familiar with all the conditions and if they intended to require the vessels to reach one of the two buoys before lay days commenced to run they should have made their meaning so plain that the vessel owner could not have been misled. It may be doubted whether any prudent owner would have signed a charter containing such a provision.

It is argued that the libelants were bound by the custom of the port to load in turn at the two buoys. If the proof establishes a uniform custom, and this is not free from doubt, and if the vessel owners were aware of the custom, and this is by no means certain, such a custom would not override the express provisions of the charter party as we interpret it. We do not consider the relations of the respondents to the Port Inglis Terminal Company, the Dunnellon Phosphate Company and the other enterprises being developed at Port Inglis, further than as they show the general knowledge which the respondents had

of the entire situation at that point. With such full information as to the capacity of the port for loading and unloading vessels, the respondents sent more vessels there than could be given reasonable dispatch and, in the circumstances, we think the damages due to the delay thus occasioned, should fall upon them rather than upon the vessel owners.

The decrees are affirmed with interest and costs.

THE NO. 4.

THE C. W. MORSE.

(Circuit Court of Appeals, Second Circuit. May 11, 1908.)

Nos. 242, 243.

1. COLLISION—FOG—EXCESSIVE SPEED.

Where two vessels were both under headway at the time of a collision between them in a fog, which occurred despite all efforts to avoid it after they became visible to each other, one or both must have been in fault for excessive speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 215.

Collision rules, speed of steamers in fog, see note to the Niagara, 28 C. C. A. 532.]

2. SAME—STEAM VESSELS MEETING—MUTUAL FAULTS.

A collision on the Hudson river opposite Thirty-Third street, New York, in a dense fog, between a steamer passing down and a meeting lighter, *held* due to the fault of both vessels; the steamer being in fault for excessive speed, which appeared from the evidence to have been not less than eight knots, and the lighter for inattention in failing to hear the fog signals of the steamer and to take measures accordingly to avoid a collision before the vessels came within sight of each other.

[Ed. Note.—For cases in point, see, Cent. Dig. vol. 10, Collision, §§ 214, 215.

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

3. SAME—INLAND RULES—"NARROW CHANNELS."

"Narrow channels," within the meaning of article 25 of the inland navigation rules (Act June 7, 1897, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]), are bodies of water navigated up and down in opposite directions, and do not include harbor waters, with piers on each side, where the necessities of commerce require navigation in every conceivable direction. Tested by such rule, the Hudson river above Twenty-Third street, New York, and within the city limits is not a narrow channel.

Appeal from the District Court of the United States for the Southern District of New York.

Wallace, Butler & Brown, for the lighter.

Wheeler, Cortis & Haight, for the C. W. Morse.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. April 30, 1907, about 7:30 a. m., the side-wheel steamer C. W. Morse, on a trip from Albany to New York, 432 feet in length, 4,500 tons, with engines of 5,000 horse power, came into collision with lighter No. 4, about 115 feet long and of 457 tons burden. The stem of the Morse penetrated the port side of the

lighter at a point about 38 feet from her stem to a distance of 8 feet, and the lighter sank almost at the point of collision, about opposite Thirty-Third street, some 375 feet from the line of the piers on the New York side. The collision occurred in a fog so dense that neither vessel saw the other until they were within a distance estimated by the various witnesses at from 100 to 400 feet. The district judge held that it was a case of inevitable accident, and his decree can be sustained only if no fault be discovered in either vessel.

Two witnesses from the lighter testified that she came down the river from Sixty-Fifth street at full speed in a clear space about 300 feet wide between the new York piers and a fog bank, but that when she reached Twenty-Ninth street the fog rolled up from the south so thick that she turned back to the company's slip at Thirty-Fourth street. On the other hand, many witnesses from the Morse testify that she had been blowing fog signals about every half minute all the way from 129th street down to the place of collision. The lighter also called some witnesses who were in slips and on piers near by, some of whom testified that they plainly saw the Morse as she passed down the river, and some thought they saw the collision distinctly anywhere from 600 to 1,000 feet off. But, this testimony being quite inconsistent with the testimony from either vessel and with the probability of a collision, we give it no weight. On the subject of the fog generally, we adopt the story of the Morse. We do not believe the lighter passed Thirty-Fourth street in clear weather and that she turned back at Twenty-Ninth street for a refuge. She had cargo to be delivered at Thirty-Fourth street, and we think she turned back when near Twenty-Ninth street because she had passed Thirty-Fourth street without knowing it.

We agree with the district judge that both vessels at the time of the collision had a little headway. If the Morse had been motionless, we do not think that the lighter, even if approaching at an angle of 30 degrees, could have pushed sideways with sufficient force to impale herself on the stem of the Morse to a distance of 8 feet. On the other hand, if the lighter had been motionless, the plates in the after part of the wound would not have been turned back as they were, and the stem of the Morse would not have been bent to port. Conceding that inferences from wounds in vessels are more or less conjectural, still the very plain indications on both boats incline us to think that each was in motion when they collided.

The first question on the subject of liability is whether the vessels were proceeding at a moderate speed, as required by article 16 of the inland regulations (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]) when they began to navigate with reference to each other. If each vessel had headway on, as we have found, one or both must have been at fault for failing to avoid the other within the space she was visible. This seems to be the definition of moderate speed adopted by the Supreme Court. *The Nacoochee*, 137 U. S. 330, 339, 11 Sup. Ct. 122, 34 L. Ed. 687; *The Umbria*, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053; *The Chattahoochee*, 173 U. S. 540, 548, 19 Sup. Ct. 491, 43 L. Ed. 801. Therefore the im-

portant inquiry, notwithstanding that each had come nearly to a stop at the time of collision, is what were their respective speeds before they began to try to keep clear of each other. Upon this vital question it is to be regretted that the testimony is so insufficient. In the case of the *Morse* there is no accurate testimony as to the time elapsed between passing any fixed point and the collision. Her witnesses do positively testify that her engines had been for some time working under one bell close shut off, which they say is as slow as they can be worked, except by hand. Although a careful experiment was made, showing that seven turns at full speed astern would bring the *Morse* to a stop when her engines were so working, no testimony at all was offered showing the speed she would be making under such conditions, which was the material question. The assistant engineer, who was working the engines, said he thought that she made 12 to 14 turns back between the time he got the backing bells and the time of the collision, which, in view of the experiment, would indicate that her engines must have been working at a greater speed than under one bell close shut off. He also testified that with 40 pounds pressure she would make from 10 to 12 turns with her engines so working. The diameter of her wheel being 32 feet, the circumference is 96 feet, and with 10 to 12 turns, making liberal allowance for all usual resistances, she cannot be brought under 8 knots an hour. Less than such a speed in fog has been held immoderate on the open ocean, and is a fortiori so in a crowded harbor. The *Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148; The *Eagle Point*, 120 Fed. 449, 56 C. C. A. 599, certiorari denied 189 U. S. 510, 23 Sup. Ct. 850, 47 L. Ed. 923; The *Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687.

The engineer of the lighter was drowned, but the master says that she was going under one bell, which would ordinarily be 4 to 4½ miles an hour, but that in his opinion she was not at that time making more than 3 to 3½ miles, which seems to us a moderate speed. We are, however, quite convinced that the *Morse* had been blowing her fog whistle about once every half minute for some time before the collision, and that those on the lighter going down the river ahead of her, and after turning so as to meet her, should have heard it long before the two vessels had got into close proximity. If they had heard it there is every reason to suppose a collision would have been avoided. Only two persons have testified on the subject of the *Morse's* whistle from the lighter. The mate admits he heard one blast, while the master, who was with him in the pilot house, heard nothing until the alarm whistle immediately before the collision. It was not until then that the lighter's engines were reversed.

The suggestion is made that the progress of sound in fog is mysterious, and that there may have been areas of sound within which the *Morse's* whistle, though carrying much further, was inaudible to those on the lighter; but, there being evidence of deficient observation at least in the master, and as the *Morse* heard the lighter's whistle, and as the lighter was both going down ahead of and afterwards meeting the *Morse*, we are inclined to attribute the failure to

hear the whistle to inattention, rather than to any areas of inaudibility carried with her by the lighter. For similar reasons we think that the lighter had not sounded her own whistle as long as she ought to have done. Those on the Morse heard it twice immediately before the collision, and there is no reason to suppose that, if it had been oftener blown, they would not have heard it sooner.

Enough has been said to dispose of the case; but there are some other charges of negligence which we think is well to consider.

It is contended that the North river at the place of collision is a narrow channel, within article 25 of the inland regulations, and that therefore the Morse was at fault for not going down on the New Jersey side of the river. We have held in the *Bee*, 138 Fed. 303, 70 C. C. A. 593, that the upper bay, regarded as a whole, is not a narrow channel, but intimated that channels designated by the government might each be considered a narrow channel in respect to vessels moving up and down them; also in *The Emma J. Rose*, 145 Fed. 13, 76 C. C. A. 43, we have held that the Hudson river between Yonkers and the city line is a narrow channel, while, on the other hand, that between the upper bay and Twenty-Third street it is not a narrow channel. *The Islander*, 152 Fed. 385, 81 C. C. A. 511. The ratio decidendi of the latter case is that channels within the rule are bodies of water navigated up and down in opposite directions, and that therefore harbor waters with piers on each side, where the necessities of commerce require navigation in every conceivable direction, up and down, across, and up and down between piers on the same side, cannot be considered narrow channels. The only difference between the waters below Twenty-Third street and above it, within the city limits, is that the government has designated by buoys an anchorage ground from the west side to nearly midstream between Twenty-Fifth and Forty-First streets. This would seem to be an additional reason for not applying the narrow channel rule, since its enforcement would require south-bound vessels to navigate through the anchorage ground, which, though lawful, is, when possible, to be avoided.

The lookout of the Morse was stationed immediately in front of the pilot house, some 65 feet abaft of the stem. As soon as the first signal of the lighter was heard he went forward, but was unable to see her. It was a manifest fault to station a lookout in such a place, but we do not think it contributed to the collision.

Both vessels being held at fault, and both having appealed, the decree of the court below is reversed, without costs, and with instructions to enter a decree for half damages and half costs, with the usual order of reference.

SAN FRANCISCO & P. S. S. CO. v. CARLSON.

(Circuit Court of Appeals, Ninth Circuit. May 18, 1908.)

No. 1,542.

1. NEGLIGENCE—TRIAL—QUESTIONS FOR JURY—PROXIMATE CAUSE OF INJURY.

What was the proximate cause of a personal injury is ordinarily a question for the jury, to be determined as a fact under proper instructions, in view of the circumstances attending it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 327-332.]

2. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.

An employé does not assume any risk arising from his employer's failure to perform the duties owing from him to the employé with respect to the appliances furnished for the doing of the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551-558.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. SAME—ACTION FOR INJURY—ISSUES FOR JURY.

In an action by an employé against a steamship company to recover for a personal injury resulting from the catching of a freight elevator on a steamship, which plaintiff was operating, alleged to have been due to the absence of a bumper, or safety block, the questions of the proximate cause of the injury, of negligence, and contributory negligence *held* properly submitted to the jury under proper instructions.

In Error to the Circuit Court of the United States for the District of Oregon.

William D. Fenton and Ben C. Dey, for plaintiff in error.

Henry E. McGinn, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error brought this action to recover damages for injuries sustained by him by reason of the alleged negligence of the plaintiff in error, defendant below and owner and operator of the steamship *St. Paul*. The case shows that the plaintiff in the action was regularly employed by the steamship company as a longshoreman, but on the day of his injury was serving as winchman, in the absence of the regular winchman. The winch was used to work a lever by means of which the two elevators of the ship, called, respectively, the "port elevator" and the "starboard elevator," were lifted and lowered in the process of loading and unloading freight. The elevators were moved up and down by means of wire cables, which cables were attached to a beam, and which beam was about 8 feet above the deck of the ship and about 20 feet above the bottom of its hold. The cables so attached passed down on either side of the elevators to the bottom thereof, then immediately under them, then up on the other side of the elevator, and then over a pulley to a drum, where it was wound up by force of a steam engine so operating the contrivance that, as the cable of one elevator was wound around the drum and that elevator raised, the other cable

would unwind and lower the opposite elevator. The beam to which the cables were attached had a flange by which the elevators were liable to be caught, and which it seems did in fact catch the starboard elevator on the occasion in question, resulting in the plaintiff's injury. To prevent the elevators from reaching the flange, the defendant company attached to the beam what the plaintiff in error calls "bumpers" and what the defendant in error denominates "safety blocks," which bumpers or safety blocks had rubber on their underside and extended about 8 inches below the beam, thus preventing, when in place, the elevators from becoming jammed and caught in the flange. There was evidence tending to show that the bumper or safety block of the starboard elevator shaft had in some way become detached, resulting in the catching of that elevator in the flange of the beam and its subsequent dropping with the plaintiff, and it is the alleged negligence of the defendant in failing to keep the bumper or safety block in place that is the ground of the plaintiff's action. The answer of the defendant company put in issue its alleged negligence, and also set up in defense that the plaintiff was himself negligent in the operation of the elevator, that his injury was caused by reason of some fellow servant raising the port elevator while the starboard elevator was caught, thus allowing the latter to fall, and also that the plaintiff assumed the risk of danger incident to the operation of the elevators, all of which affirmative defenses were put in issue by the plaintiff.

The first point made and insisted upon by the plaintiff in error is that the court below erred in refusing to instruct the jury to return a verdict for the defendant, in support of which it is contended, first, that the absence of the bumper or safety block was not the proximate cause of the plaintiff's injury. In submitting the case to the jury, the court below instructed them upon that point as follows:

"It is and was the duty of the defendant company to furnish the plaintiff a safe place in which to work, and reasonably safe appliances and safe machinery with which to do his work; but I instruct you that the duty of the master in this regard is fully performed when he uses due care and precaution in providing such safe place and machinery, and if, after having observed such care and precaution, the machinery becomes at fault or defective in some way without his knowledge, then he would not be liable. But if he knew, or ought to have known by the observation of reasonable care and foresight, that the defect existed, then he would be accountable for any damages ensuing by reason of such defect. It is also the duty of the defendant to keep the machinery in safe and suitable repair; that is, he must use ordinary diligence and care to see that it is so kept in repair. Negligence may be defined in a general way as the doing of a thing which the dictates of common prudence or foresight would indicate ought not to be done, or which a reasonably careful and prudent man would not have done, having in mind the attending conditions and circumstances of the occasion, or the omission to do a thing which the same prudence and foresight would say ought to be done, considering again the attending conditions and circumstances. And now, keeping in mind the duties imposed upon the employer—that is, the defendant—and the elements that go to make up negligence, it is for you to determine from all the evidence adduced in your hearing upon the subject, and applying your own common knowledge and experience, whether or not the defendant was chargeable with negligence in connection with the absence of the safety or bumper blocks in the starboard elevator, and for the alleged irregularity in the movement of the port elevator while the star-

board elevator remained fast by reason of being jammed against the beam above. These things you are to consider: The absence of the blocks; the manner in which the elevator became fast; the irregularity of the movement of the port elevator, if you find that the movement of such elevator was irregular, while the other was jammed above; and the way or manner in which the plaintiff and the foreman of the defendant were at work at the time to relieve the starboard elevator. And you are to ascertain and fix, if possible, the responsibility as it respects the relative parties as to the condition and operation of the elevator; and if you find, from a full and fair consideration of the whole subject, that the defendant has been or was negligent, and that its negligence was approximate [the proximate] cause of the accident and injury to plaintiff, then the plaintiff will be entitled to recover, unless you shall find in favor of the defendant as to one or more of the defenses interposed, which I will now explain to you. You are to understand by the proximate cause that cause which conduced directly to the accident or injury."

The chief officer of the steamship had, on his cross-examination by counsel for the plaintiff, testified as follows:

"Q. Did you make an examination of these bumpers before the ship left San Francisco? A. When are you referring to? Q. On the trip from San Francisco, the time that Carlson was hurt, did you make any examination of the elevators? A. I would not say that particular trip. Q. It is customary, isn't it, for the officers of the ship to always make a tour of inspection? A. Yes, sir. Q. At sea? A. At sea; yes, sir. Q. And he takes you with him? A. Yes. Q. And whom does he take with him? A. The chief steward. Q. And did you make an examination on that trip every day when you were coming from San Francisco to Portland of the freight elevators? A. Why, no, sir. Q. Why did you not? A. Why, it was impossible to get there. The ship was full of cargo; that is, in the hold of the ship. Q. Did you make any inspection before the men commenced work here in Portland to ascertain whether those bumpers were there? A. You could not get there at that time; no, sir. Q. So no examination was made to ascertain whether those bumpers were there. When did you make an examination, can you tell, prior to the time this man was hurt, to see whether those bumpers were there? A. I would not say whether they were there or not. Q. You don't know? A. No, sir. Q. Did you make any examination, after the accident happened to Carlson, to determine how it was that this thing got stuck up there in the flanges, or what has been termed the 'flange'? A. Yes, sir. Q. You did make an examination? Did you find the bumpers on the starboard elevator? A. I can't say. Q. You don't remember? A. No, sir."

Redirect examination:

"Q. If they were taken off, you did not replace these bumpers after the accident? A. If the bumpers were taken off, they were not replaced, sir."

We are of the opinion that the court below was right, both in respect to its refusal to direct a verdict for the defendant and in its instruction upon the subject of proximate cause. "The proximate cause," says the Supreme Court in *Insurance Co. v. Boon*, 95 U. S. 130, 24 L. Ed. 395, "is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." Under the evidence in the case the question was properly one for the jury, as it usually is, under appropriate instructions. Said the court in *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 474, 24 L. Ed. 256:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892. The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application; but it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In respect to the alleged assumption of risk by the plaintiff it is enough to say that an employé does not assume any risk arising from his employer's failure to perform the duties owing from him to the employé with respect to the appliances furnished for the doing of the work in question.

The only point in the case about which we have had any doubt is that of the alleged contributory negligence of the plaintiff. He testified, among other things, that the starboard elevator got caught in the flange of the beam because the bumper or safety block had become detached; that he tried to loosen it with a piece of scantling, and, that not succeeding, the quartermaster of the ship took charge and worked at it a while, and then the foreman of the work, one Smith; that the foreman and the quartermaster ran the port elevator up and down a little; that they would raise it four or five feet, and then drop it, thinking that in that way they would loosen the starboard elevator; that finally the foreman got a keg of lead weighing about 300 pounds and told the witness to take hold of the other end of it; that on rolling the keg on the starboard elevator the latter fell with the plaintiff and inflicted the injury for which he sues. The plaintiff also testified that, while he knew that the men had been working with the port elevator, he did not know that it was up while the starboard elevator was caught in the flange of the beam, and that if the port elevator had been down, where it should have been, and where he thought it was, the starboard elevator could not have fallen with him more than four or five inches. The court below left the question of the plaintiff's contributory negligence to the determination of the jury, instructing them as follows:

"This involves the inquiry as to whether plaintiff was at fault, first, in allowing the elevator to become fast, whether he knew of the absence of the blocks and should have so operated the winch as to avoid the trouble, and, second, whether he was careless and negligent in going about the work of relieving such elevator from its condition; and in this connection you will consider whether he acted as an ordinarily careful and prudent man would have acted in being upon the elevator when it fell, having in mind the fact that the other or port elevator had become raised meanwhile, and considering whether the plaintiff knew, or ought by the exercise of ordinary diligence to have known, that such port elevator was then raised, and consider his re-

sponsibility, and if his acts were the cause for its being so raised. In this relation you will consider also the part which Smith, the foreman of defendant, played in the affair; not that the company should be held responsible for the acts of Smith, for nothing is contained in the pleadings about that, but for the purpose of ascertaining the real responsibility of the plaintiff for the conditions which conduced to the accident; and if, upon full consideration, you find that the plaintiff's own acts were the proximate cause of his injury, and that those acts were carelessly and negligently done, then your verdict should be for the defendant. This defense is what is ordinarily denominated as that of contributory negligence."

We are of the opinion that the trial court was right in submitting this as well as the other questions in the case to the determination of the jury; and, finding no error for which the case should be reversed, the judgment is affirmed.

FRANKLIN TRUST CO. v. PENINSULAR PURE WATER CO.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1908.)

No. 737.

1. WATERS AND WATER COURSES—WATER COMPANIES—RIGHTS IN STREETS—COLLATERAL ATTACK.

The power of a water company under its charter and municipal ordinances to lay its pipes in streets and highways cannot be collaterally attacked by another corporation in a suit in equity for an injunction.

2. SAME—WATER COMPANIES—GRANT OF FRANCHISE TO USE STREETS—CONSTRUCTION.

A franchise granted by a municipality to a private corporation to occupy streets in the construction of a water system will not be construed as giving an exclusive right, in the absence of express words to that effect.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

R. G. Bickford and O. D. Batchelor, for appellant.

S. Gordon Cumming and Joseph J. De Kinder, for appellee.

Before PRITCHARD, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PURNELL, District Judge. Appellant is a corporation chartered and doing business in the state of New York. Appellee is a corporation chartered and doing business in the state of Virginia. By deed of trust or mortgage, dated the 1st day of July, 1892, the Newport News Light & Water Company, a Virginia corporation, conveyed to the appellant, as trustee, in trust to secure \$1,000,000 of bonds, all its property and franchises then owned or thereafter to be acquired. Included in the property and franchises embraced in the terms of the said mortgage is the water pipe line of said Newport News Light & Water Company, extending from the westerly border of Elizabeth City county, where it adjoins the city of Newport News, through said county, and through the towns of Hampton and Phoebus and the National Military Home for Disabled Volunteer Soldiers and the United States military reservation at Fortress Monroe, to its easterly boundary at

Old Point Comfort, which pipe line occupies the avenues, streets, and alleys of the said towns, home, and reservation, and the roads and highways of said county, in pursuance of subsisting franchises and permits from the authorities, and the mortgagor of appellant is engaged in the business of supplying water to the inhabitants of said territory by means of the said pipe line. In the spring of 1906 the appellee began the construction of a system of water pipes in the territory aforesaid, and was proceeding to lay its pipes in many of the avenues, streets, alleys, roads, and highways then and now occupied by the pipes of the appellant's mortgagor. Upon being advised of the purpose of the appellee in this regard, appellant's mortgagor addressed to the appellee a communication protesting against the appellee company laying its pipe in the streets, or any interference directly or indirectly with the pipes or mains of appellant company's pipes or mains.

Appellee persisted, and on the 1st day of September, 1906, appellant filed a bill in the Circuit Court at Norfolk, in which the foregoing facts were set forth, and alleged appellee was so laying its pipes and threatening to lay its pipes in proximity to the pipes and mains of appellant's mortgagor as to hinder and prevent proper and convenient access for purposes of making repairs and connections, and that the proximity of such new pipe line would be a continuing menace on account of the danger from breakage and leakage, and that the injury to the pipe line of appellant's mortgagor from electrolytic corrosion would also be thereby enhanced, and that the manner in which appellee was laying its pipe line and making the joints was imperfect, thereby increasing the threatened danger resulting from its proximity; and said bill alleged specific instances of violations by the appellee of the statutory requirements in Virginia, regulating the distances to be observed by one pipe line in paralleling and in crossing another, and alleged violations of the statutory requirement that one public service corporation must give notice to another before crossing it with its works, and alleged violation of the statutory requirements that before making any such crossing the damage which might be done thereby should first be ascertained by the exercise of the power of eminent domain, and alleged that appellee had not the power of eminent domain, and had not the power to occupy the streets or highways, for the reason that such powers were not conferred by its charter and did not exist under the general law prior to the adoption of the new Constitution in Virginia and the laws enacted in pursuance thereof, and that the appellee had not amended its charter, as it is permitted to do under the new law, so as to acquire these powers. The prayer of the bill does not seek to enjoin the appellee from occupying the streets and highways of the territory involved, but seeks to restrain the appellee from occupying the streets occupied by appellant's mortgagor in such manner as to do injury to its property. On November 12, 1906, appellant by leave of the court amended its bill by the addition of the following paragraph:

"That by virtue of the franchises acquired and owned by the Newport News Light & Water Company and now held by the plaintiff, Franklin Trust Company, trustee, under the deed of trust aforesaid, for the use of the streets

and highways which the defendant Peninsular Pure Water Company is proceeding to occupy with its pipe line, a contract exists between the state of Virginia and the municipalities of Hampton and Phoebus and the county of Elizabeth City of the one part and the plaintiff of the other part, whereby the said state of Virginia and the said municipalities have undertaken and are obligated to protect the plaintiff in the enjoyment of its said franchises, and to that end to prevent any unwarranted occupation of the streets and highways in which the pipe line of the said Newport News Light & Water Company is laid in pursuance of its said franchises to the injury of plaintiff, and to prevent the occupation thereof by any other pipe line of any other company and of the defendant company in particular, at a nearer distance than six feet of pipe line of the Newport News Light & Water Company when paralleling the same, that distance being necessary for the proper enjoyment of the franchises so held by the plaintiff as assignee of the said Newport News Light & Water Company; and the Legislature of Virginia was and is without authority to prescribe a limit of three feet in such cases, since in so doing it impairs the obligation of the contract under which the plaintiff holds its franchises as aforesaid, and its action is therefore in violation of the Constitution of the United States."

To appellant's bill the appellee filed its answer, denying all the material averments of the bill and exhibiting certain claimed franchises or permits from the Board of Supervisors of Elizabeth City county and the councils of the towns of Hampton and Phoebus for the occupancy of the highways, streets, and avenues thereof. It is agreed in the brief of appellee that this statement of the case, taken principally from one of appellant's briefs, is substantially correct. After hearing counsel at Norfolk and Richmond, on the 5th of February, 1907, the Circuit Court entered its order dissolving the temporary injunction and dismissing the bill at complainant's cost. To which order or decree complainant excepted and assigned the following errors, to wit:

"(1) In this case the plaintiff, as trustee in a mortgage or deed of trust conveying the property and franchises of a water company to secure the payment of \$1,000,000 of coupon bonds, alleges that the defendant, another water company, is so laying its water pipes in the streets and highways traversed by it as to do irreparable injury to the property and property rights so held in trust by the plaintiff, and that the defendant is occupying, and threatening further to occupy, such streets and highways without any right or authority whatsoever so to do; in other words, that the defendant is engaged in the commission and maintenance of a public nuisance, and while so engaged is committing a continuing or permanent trespass upon the property and property rights so held in trust by the plaintiff, and thereby causing an injury not estimable or reparable in damages. Such a case is relievable in a court of equity, and was sustained by the proofs; and the court erred in dismissing the bill, which sought an injunction against the further commission of the nuisance or trespass, only in so far as its continuance wrought special and irreparable injury to the plaintiff.

"(2) In any event the court should have restrained and enjoined the defendant from any further violation of the statutory requirements in the laying of its pipes, to wit: that when it becomes necessary for one company to cross with its pipes the pipes of another company, underground, it shall allow at least twelve (12) inches of clear space between the pipes at the point of crossing, and in paralleling shall allow a distance of three (3) feet wherever possible; and in failing and refusing so to restrain and enjoin the defendant the court erred.

"(3) The evidence shows that the defendant has already laid much of its pipe in express violation of the statutory requirements aforesaid of twelve (12) inches of clear space at crossings and three (3) feet when paralleling, and a mandate should have been issued in pursuance of the prayer of the bill re-

quiring this pipe to be taken up; and in failing and refusing to issue such mandatory order the court erred.

"(4) It was incumbent on the defendant, under the statute law in force in Virginia, to give notice of its proposed crossings of the plaintiff's pipe line before proceeding to make same, and, the evidence showing that it had failed to give such notice, it should have been restrained and enjoined from making further crossings until the statutory notice required had been given; and in failing and refusing so to restrain and enjoin the defendant the court erred.

"(5) The statute law of Virginia contemplates and requires that a public service corporation seeking to occupy the streets and highways of the commonwealth and to cross the works of any other public service corporation shall have the power of eminent domain, and, it appearing from the record of this cause that the defendant has no such power, it should be enjoined and restrained from further occupying the streets and highways, or at least from occupying them in a way to injure the plaintiff, until such power shall be acquired by it; and in failing and refusing so to enjoin it the court erred."

It will be noted that each of these exceptions point to a legal proposition. No opinion was filed in the Circuit Court. It was a bill in equity, asking for equitable relief on what would more properly be a cause of action at law. Three briefs were filed for appellant, all of which have been carefully examined, without any equitable merit in the exceptions or assignments of error being discovered. The Circuit Court dismissed the bill at the cost of complainant, and in this action we concur.

Appellee contends that the construction of its line, both as to material and labor, is of such a character that it has not caused and does not threaten any injury to appellant or its mortgagee, and several pages of the briefs are directed to a discussion of the testimony on this point or issue in the cause. This contention seems to be sustained by the testimony. In short, appellant has not shown satisfactorily any substantial injury or damage, done or threatened, and has no standing in a court of equity to question the validity of appellee's charter or municipal authority, under which it proposed or was acting, even if they were invalid. Such acts should be attacked by a direct action instituted for this purpose, and cannot be attacked collaterally by a proceeding in equity. *High on Injunctions* (2d Ed.) § 917; *Savings & Trust Co. v. Bear Valley Irr. Co.* (C. C.) 112 Fed. 693; *Osborn v. Mo. Pac. R. R. Co.*, 147 U. S. 259, 13 Sup. Ct. 299, 37 L. Ed. 155.

Appellant claims an exclusive right to use the streets and highways, a monopoly in Newport News, Phoebus, etc., a claim never favored, either by the courts or the legislative branch of our government; and upon this point the opinion in *Clarksburg Elec. Co. v. Clarksburg*, 47 W. Va. 742, 35 S. E. 995, 50 L. R. A. 142, based as it is on decisions of the United States Supreme Court, is conclusive:

"The federal Constitution (article I, § 10) provides that 'no state shall * * * pass any law impairing the obligation of contracts.' It is beyond question that a grant by a municipal corporation, under authority of the statute of a state, to a private corporation to supply a city or town with electricity for the public use, or any similar franchise, constitutes a contract, when accepted and carried out by the corporation, which is under the protection of both the state and national Constitutions. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510. Therefore, we do not question that the electric light company possesses a contract, and lawful vested rights under it; but to

what extent? Has it the right to an exclusive franchise, effectually shutting out others from transacting a very important business, so needful to the public of the city of Clarksburg? Has that company the monopoly it claims? I shall not discuss the question whether an act of the Legislature granting such an exclusive franchise would be valid, further than to say that under the great powers of a state Legislature such an act would likely be valid under the cases just cited and others; but I can safely say that under multitudinous authorities the courts lean against construing statutes so as to grant, or to authorize municipal corporations to grant, such exclusive franchises. Such franchises constitute monopolies, which the law has through ages condemned, because they tie down and restrain and cripple the public right and interest, and sacrifice great public interests to the benefit and aggrandizement of the few." *Clarksburg Elec. L. Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 995, 50 L. R. A. 142.

This court must decline to enter into the lengthy discussion of the facts, as indulged in by counsel, as the foregoing principles apply, no matter how such contentions are decided and seem to be the principles underlying the action of the Circuit Court, the consideration of which constrains us to affirm the decree of said court in dismissing the bill.

Affirmed.

ZIMMERMAN et al. v. FUNCHION et al.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,455.

MINES AND MINERALS—EXCESSIVE AREA OF PLACER CLAIM—RIGHT TO RELOCATE EXCESS.

The fact that a placer mining claim as staked exceeds the legal limit of 20 acres renders it void only as to the excess; and, where the owner is in possession and working the same in good faith, he has the right to elect what portion he will relinquish as the excess within a reasonable time after he discovers that his claim overruns, and cannot be forced to surrender any particular part by the location thereon of an overlapping claim by another before he knows of such excess.

In Error to the District Court of the United States for the Territory of Alaska, Third Division.

McGinn & Sullivan, J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and J. A. MacKenzie, for plaintiffs in error.

T. C. West, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action of ejectment tried before the court below by stipulation of the parties without a jury, and resulted in findings and judgment for the plaintiffs, who are the defendants in error here. The subject of the action is a strip of mining ground in the Fairbanks mining district of Alaska covered by Creek placer mining claim No. 6 Above Discovery on Dome Creek, under which the defendants in error claim, and by bench claim No. 6 First Tier Right Limit of Dome Creek, under which the plaintiffs in error claim. It is undisputed that the Creek claim was the prior location; it having been located by Funchion on the 17th day of September, 1902, for one John C. Ross, to whose interest Funchion and his code-

fendant in error succeeded prior to the bringing of the action. The bench claim was located May 12, 1904, by Zimmerman. It turned out that the placer claim, as a matter of fact, contained 21.7 acres—an excess of 1.7 acres over the legal limit of 20 acres prescribed by statute for placer claims. It is well settled that the excess did not render the entire Creek claim void, but that it was void only as to the excess. *Jupiter Mining Co. v. Bodie Cons. Min. Co.* (C. C.) 11 Fed. 666; *English v. Johnson*, 17 Cal. 108, 76 Am. Dec. 574; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Howeth v. Sullenger*, 113 Cal. 547, 45 Pac. 841; *Patterson v. Hitchcock*, 3 Colo. 533; *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505; *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 481; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 435; *McElligott v. Krogh* (Cal. Sup.) 90 Pac. 825; *Lindley on Mines*, § 362; *Snyder on Mines*, § 398.

In *McIntosh et al. v. Price et al.*, 121 Fed. 716, 58 C. C. A. 136, we held, and rightly held, that where a prior locator is in the actual possession of a claim, which as a matter of fact exceeds the legal limit of 20 acres, and is diligently working the same in good faith, he is at liberty to elect what portion of the claim he will reject as the excess, saying:

"We are very clearly of the opinion that, if any portion of the ground located by the Kjelsbergs was subject to relocation as being in excess of the permitted width, the owners thereof in possession, under the circumstances found by the trial court, could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim in which they were working and which was the valuable portion thereof, and oust them from possession by making a location thereon. The defendants in error were given no notice that the width of their claim was excessive, or that any part of their location was void, and they were given no opportunity to draw in their lines so as to comply with the local mining regulations. The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim one who has located a placer claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon that portion of his claim."

While the counsel for the plaintiffs in error concede that to be the law, they contend that where such prior locator is not in the actual possession of the claim containing an excess over the legal limit of such claims, and knowingly refuses or neglects to draw in his lines so as to embrace the legal limit only, any other prospector is at liberty to take such excess within another location from any part of the prior one; that otherwise such prior locator might hold the excess, however great, indefinitely. The question suggested is an important one, but we do not find it necessary or proper to decide it in this case, being of the opinion that it does not arise upon the record. The counsel for the plaintiffs in error rely upon Funchion's testimony, and say in their brief that he testified:

"That Zimmerman was on the ground from May 12, 1904, claiming up to his stakes, and that Zimmerman had always claimed to them, defendants in error, that they were too wide at the lower end."

We do not understand such to be the effect of the testimony of that witness, who appears to have been very frank in his answers, and

from the findings of fact was evidently believed by the trial court, which is conclusive upon us. Funchion testified, in effect, among other things, that, so far from knowing that the lines of the Creek claim as located by him included an excess, he always thought that, in fact they included less, although he had intended taking the full 20 acres, and he further testified that he employed a surveyor by the name of Jackson to survey the claim, who did so and reported as the result of his survey 17.10 acres as the contents of the claim; that subsequently Zimmerman had the lines of the Creek claim surveyed by a surveyor who reported that they contained over 20 acres; and that he (the witness) then employed another surveyor, Mr. E. G. Allen, the result of whose survey was 21.7 acres. Said the witness:

"Then we went out on the ground, and I offered Mr. Zimmerman—I told him that we had too much ground, and that, if he wanted to, I would give him 88 feet across the lower end of the claim, which would then give us 20 acres, and, if he did not take that, then, I would disclaim the excess over on the left limit. Q. What did he say? A. He said, 'Go ahead.' Q. Indicate upon Exhibit A about where the 88 feet is that you refer to. A. Across the lower end, 88 feet right across the lower end there. Q. What did he say to that, did he refuse? A. Yes, sir. Q. What did you do with reference to disclaiming on the other side? A. I went over on the left limit, and disclaimed that excess. Q. In what manner? A. By posting a notice there. Q. Putting up another stake? A. Putting up another stake. Q. How far from the stake that you put up on the hill on that corner, if you remember? A. I don't remember. I measured it from the center. Q. Sufficient to reduce the claim to 20 acres? A. Yes, sir."

This survey of Allen was not made until October 22, 1906, and this action was commenced on the 8th day of September of the same year, so that it appears from Funchion's testimony, corroborated by the surveys, that, so far from knowing that his claim included an excess over the statutory limit, Funchion thought, until some time after the bringing of the suit, that his claim embraced less than 20 acres. That witness further testified that in 1903 he and Ross sunk a hole 22 feet to bed rock on the claim near the creek where they found gold, and that in the year 1904 (the year Zimmerman located bench claim No. 6) Zimmerman did the assessment work on the Creek claim under employment by them.

Under the circumstances appearing, we do not think it was permissible for Zimmerman to select the excess of 1.7 acres from that portion of the Creek claim that he wanted.

The judgment is affirmed.

HANSON et al. v. CRAIG et al.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1908.)

No. 1,456.

MINES AND MINERALS—ACTUAL POSSESSION OF MINING CLAIM—TEMPORARY SUSPENSION OF WORK.

Where a gold placer mining claim had been duly located, its boundaries marked so as to be readily traced, and the locators had commenced sinking a shaft which was subsequently completed to bed rock, resulting in the discovery of mineral therein, a temporary suspension of the work for a few days for the purpose of procuring tools and necessary supplies

for the prosecution of the work in good faith did not constitute a break in their actual possession which would entitle another to enter upon and relocate any portion thereof, even though at the time of such entry and ouster the locators had not actually made a discovery of mineral.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

McGinn & Sullivan, J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and J. A. MacKenzie, for plaintiffs in error.
T. C. West, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action in ejectment tried in the court below with a jury, resulting in a verdict and judgment for the plaintiffs in the action. The complaint alleged that while the plaintiffs, who are the defendants in error here, were the owners and in the actual possession of a placer mining claim situate on Wildcat creek, a tributary of Treasure creek, in the Fairbanks mining district of Alaska, called the "Red Dog Association claim," the plaintiffs in error, who were defendants to the action, went upon a part of the ground and ousted the plaintiffs therefrom. There was evidence tending to show that the plaintiff Carroll and one Hugh Dougherty, as attorney in fact for the plaintiff Alice Dougherty, located and staked the Red Dog Association claim for the plaintiffs on the 5th day of January, 1906, the ground so staked being 1,320 feet wide by a mile long, and the plaintiffs being eight in number; that on the 18th of the next month the plaintiffs changed the boundaries of the claim so as to lessen the width one-half and to double the length, and marked the boundaries thereof so that they could be readily traced upon the ground, and thereafter recorded the notice of location; that on the 12th of March, 1906, the plaintiffs made arrangements for working the claim and arranged for the plaintiff Cale to go to Fairbanks, which was about 18 miles distant, in order to procure tools, blankets, and necessary supplies, and to return to the claim and commence work thereon on the 16th of March, 1906, and that in the meantime the plaintiff Carroll and Hugh Dougherty, as the representative of the plaintiff Alice Dougherty, should begin the sinking of a shaft on the claim, which they did on the 14th of March, 1906, continuing such work during the 14th and 15th of that month, and sinking the hole to a depth of about six feet; that in the evening of March 15th Carroll and Dougherty left the claim for the reason that Cale was expected to return from Fairbanks under the arrangement, and proceed with the work thereon the next morning, and for the reason that until the shaft had been sunk a sufficient distance but one man could work therein.

It appeared from the testimony that Cale selected the place on the 12th of March for the sinking of the shaft; that witness testifying:

"I told Mr. Carroll and Mr. Dougherty on the evening of the 12th that they could go to work and commence sinking a shaft immediately, and that I would leave in the morning and go to Fairbanks creek, and that it would not take me to exceed three days to get back; that I would be back on the

third day if nothing intervened—nothing interfered with me—which they agreed to do. I had a similar conversation with them on the morning of the 13th when leaving. That was the understanding, that they would go up in the morning and commence work on this shaft on this ground; and I left on that morning.”

It further appeared that Cale was delayed somewhat, and did not get back to the claim until the afternoon of the 21st of March, when he went to work in the shaft that had been commenced on the 14th of March by Carroll and Dougherty; Cale testifying:

“I immediately went to work and remained working until the shaft was sunk to bed rock. I worked alone for a while until I got the shaft down as far as I could get it and throw the dirt out. Then I went to work and timbered the shaft, and made a windlass and a few other things that were necessary to continue the work, and I then got Mr. Warren [being one of the plaintiffs] to help along in finishing the shaft, sinking it to bed rock [and that in sinking the shaft he made a discovery of gold].”

The case further shows that on the 16th day of March, and before Cale got back, the plaintiffs in error made a location of a claim called “Try Again Association claim,” which location included a part of the ground covered by the Red Dog Association claim, and from that portion of the ground so included the defendants to the action ousted the plaintiffs, and themselves commenced development work thereon, which acts by the defendants caused the bringing of the action.

The court below left it to the jury to determine whether the defendants in error were in the actual possession of the ground in controversy, and actively engaged in the prosecution of development work upon it in a search for gold, at the time of the entry thereon by the plaintiffs in error, and the question of their ouster of the defendants in error, instructing the jury in effect that if they so found, and also found that the location under which the plaintiffs claimed was so marked upon the ground that its boundaries could be readily traced, and that a notice of such location was recorded within the statutory period of 90 days, in the office of the county recorder of the mining district within which the claim is situated, a verdict should be returned for the plaintiffs, even though at the time of the defendants’ entry and ouster the plaintiffs had not actually made a discovery of mineral. In the same connection the court told the jury that if they found that the absence of the plaintiffs from the ground at the time of the defendants’ entry thereon on the 16th of March was but temporary, and for the purpose of procuring tools, provisions, and other necessary supplies for the diligent and bona fide prosecution of their work, such temporary absence would not affect the plaintiffs’ right in the premises. We are of opinion that these instructions were correct. The evidence certainly tended to show that when Carroll and Dougherty left the ground in the evening of March 15th, after working in the shaft that day and the day before, they expected Cale to proceed with the work the next morning, in accordance with an arrangement made with him to that effect, and that Cale’s delay in returning was but temporary, with no thought on the part of either of the plaintiffs of abandoning the claim. The court was in our opinion right in instructing the jury that such a short and temporary absence of the plaintiffs from their

claim as the evidence tended to show, occasioned by the necessity of procuring tools, provisions, and other supplies for the proper prosecution of their work, would not constitute a break in the plaintiffs' actual possession; and that a locator of mining ground in the actual possession of it, and in the active prosecution of work thereon in good faith, is entitled to protection against an intruder into that possession, is well settled. The evidence to which objection is made by plaintiffs in error bore upon the good faith of the possession and work of the defendants in error, and was properly admitted.

We see no reversible error in the record; and accordingly the judgment is affirmed.

THE WILDENFELS.

THE ROVER.

(Circuit Court of Appeals, Second Circuit. May 19, 1908.)

No. 238.

1. SHIPPING—LOSS OF GOODS FROM LIGHTER—LIABILITY.

Evidence *held* to sustain the finding of a trial court that loss of cargo from a lighter, which was being loaded from a ship, due to the rolling of the lighter, was not caused by its negligent handling or defective condition, but by some external cause for which it was not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 484.]

2. ADMIRALTY—PLEADING—AMENDMENT.

It was at least within the discretion of the court to refuse leave to amend a libel against a lighter to recover for loss of cargo on the ground of negligence, after the evidence had been concluded and the argument begun, by adding an allegation that the lighter was a common carrier, thus changing the action from one in tort to one in contract, and creating a new issue, to which the evidence had not been directed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, §§ 519, 525.]

3. SHIPPING—"COMMON CARRIER"—"PRIVATE CARRIER"—LIGHTER HIRED TO CARRY GOODS OF SINGLE OWNER.

Under the rule of the American courts of admiralty a lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a "common carrier" with respect to such goods, but a "private carrier," and liable only as a bailee for hire.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1313-1319; vol. 8, p. 7607; vol. 6, pp. 5369-5370.

Carriers by water, see note to *Wade v. Litcher & Moore Cypress Lumber Co.*, 20 C. C. A. 535.]

Appeal from the District Court of the United States for the Southern District of New York.

The decree of the District Court dismissed a libel filed by the American Manufacturing Company against the steamer Wildenfels and the lighter Rover for damages to a cargo of jute discharged from the steamer to the lighter and lost overboard by the rolling of the latter while being loaded at a berth at pier No. 3, Bush's Stores, South Brooklyn.

Wallace, Butler & Brown, for appellant.

Wing, Putnam & Burlingham, for the Wildenfels.

James J. Macklin and La Roy S. Gove, for the Rover.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. We are satisfied that the District Court correctly disposed of this controversy. The principal questions were of fact, relating to the construction, management and mooring of the Rover and the cause of the leak and the rolling, which resulted in the loss of the cargo. With two exceptions all of the witnesses were examined in the presence of the district judge and his finding that the Rover was not in fault is fully sustained by the proof. Surely it cannot be said that the finding is so clearly against the weight of evidence as to warrant this court in setting it aside. Even without direct proof it would seem probable that the heavy pounding and violent rolling observed about 9 o'clock was produced by some external cause. When to this is added the presence of surf in the slip and a large steamer passing close to the pier, we are not surprised that the judge thought it unnecessary to indulge in speculation and conjecture as to the proximate cause of the disaster. The burden was on the libelant to prove the negligence alleged with great particularity in the libel, and it has failed to sustain the burden. The libel was properly dismissed as to the Wildenfels. She was not shown to be at fault.

At page 94 of the record appears the following:

"Testimony closed. Counsel summed up the case. In the course of the summing up Mr. Brown asked leave to amend the libel 'so as to conform with the proof, and allege that this lighter in question was a common carrier.' Mr. Macklin: I object. The Court: You cannot amend your libel now."

Error is assigned of this refusal. Although the utmost liberality, consonant with the rights of the parties, should be allowed in the matter of amendments to pleadings in admiralty, we know of no precedent for an amendment, so radical as the one here proposed, after the testimony is closed and the advocates have begun their summing up. The proposed amendment sought to change a cause of action *ex delicto* to one *ex contractu*, or to add the latter to the former. In any view, it changed the character of the action in a particular so vital that the claimants may well have been wholly unprepared to meet it. If the libel as filed originally had alleged a breach of a contract of carriage or if an amendment had been seasonably allowed, the course of the litigation would, in all probability, have been radically different and might have been settled on the pleadings. The libel was drawn by one of the most accomplished pleaders at the admiralty bar, it was based solely on negligence and the proofs on both sides were directed to this issue. Had the claimants understood that it was proposed to enforce against the Rover the rigorous obligations of a common carrier, it is fair to assume that their proof would have been directed to this issue and not to the issue tendered by the libel. The refusal to permit the amendment at the time the motion was made was, to say the least, discretionary with the trial judge and error cannot be predicated of his ruling in this regard.

A motion was made in this court to amend the libel by alleging that the Rover received the cargo and undertook the transportation of the same as a common carrier. The notice for this motion was served March 4, 1908, 33 days after the filing of the apostles. As the admiralty rules of this court provide that such motions must be made within 15 days from such filing it would seem that this motion was made too late. Benedict's Admiralty (3d Ed.) p. 425, § 633, rule 7. Mr. Benedict, referring to the allowance of amendments, says (section 483):

"The whole subject rests entirely in the discretion of the court, as well in relation to the relief to be granted, as to the terms on which it shall be granted."

In *The Thomas Melville* (D. C.) 31 Fed. 486 (C. C.) 34 Fed. 350, Judge Brown says:

"To permit an amendment by averring substantially a new cause of damage at the trial, where reasonable objection appears, cannot be allowed. As a rule it would be impolitic and unjust. *McKinlay v. Morrish*, 21 How. 343, 16 L. Ed. 100; *The M. M. Caleb*, 10 Blatchf. 467, 471, 472, Fed. Cas. No. 9,683. Such an amendment was recently denied in the case of *The Keystone* (D. C.) 31 Fed. 412."

See *The Iona*, 80 Fed. 933, 26 C. C. A. 261, and cases cited.

But irrespective of these considerations we are of the opinion that the Rover was not, *pro hac vice*, a common carrier. It is true that her owner was in the lighterage business and was in the habit of taking goods for any one who wanted lighterage done. She had, however, no regular route, did not carry between well known termini, and, on the occasion in question, was engaged to carry, and had on board only, the jute of the libellant. She was not a general ship, but was employed for this business exclusively, no one else had a right to put a pound of freight aboard her. She became a private carrier and liable only as a bailee for hire. Her owner was under no legal obligation to carry this jute, he could have refused this and all other cargoes had he seen fit to do so and no liability would have attached to his refusal.

In 1884, Judge Brown in *Sumner v. Caswell* (D. C.) 20 Fed. 249, decided, following *Lamb v. Parkman*, 1 Spr. 343, 353, Fed. Cas. No. 8,020, that a ship hired for a specific voyage to carry a particular cargo for the charterers, is not a common carrier but a bailee for hire and bound to exercise only ordinary skill and care. This rule has recently been reasserted and affirmed by this court in the case of *The Fri*, 154 Fed. 333, 338, 83 C. C. A. 205, 210, where the court says:

"When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a carrier for hire."

Mr. Moore, in his work on Carriers, says, at page 20:

"According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment to be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action."

In *Fish v. Chapman*, 2 Ga. 349, 353, 46 Am. Dec. 393, it was held that the liability to an action for a refusal to carry is the safest criterion of the character of the carrier.

In *Allen v. Sackrider*, 37 N. Y. 341, the Court of Appeals of New York, at page 342, says:

"The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. 'On the whole,' says Prof. Parsons, 'it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable to an action, if he should refuse to carry for any one who wished to employ him.'"

See, also, as bearing on the questions involved 6 Cyc. p. 365; 9 Am. & Eng. Enc. Law (2d Ed.) 237, 238; *The Margaret v. Bliss*, 94 U. S. 494, 496, 24 L. Ed. 146; *Bell v. Pidgeon* (D. C.) 5 Fed. 634, 638, affirmed (D. C.) 18 Fed. 192; *Fish v. Clark*, 49 N. Y. 122; *The Dan* (D. C.) 40 Fed. 691.

We are convinced that the rule in this country, at least in the federal courts, is that a lighter, hired exclusively to convey the goods of one person to a particular place for an agreed compensation, is not a common carrier. The motion made in this court to amend the libel is denied.

The decree is affirmed, with costs.

THOMSON V. TRAVELERS' INS. CO.

(Circuit Court of Appeals, Ninth Circuit. May 11, 1908.)

No. 1,465.

COURTS—UNITED STATES CIRCUIT COURT OF APPEALS—MODE OF REVIEW—DECREE IN EQUITY.

A suit in a Circuit Court of the United States by an employé who has recovered a judgment for personal injury against his employer, to enforce payment of such judgment by an insurance company which issued a policy to the employer insuring it against liability on account of such injuries, the insolvency of the judgment defendant being alleged, is in equity, and the decree therein cannot be reviewed by the Circuit Court of Appeals on a writ of error.

In Error to the Circuit Court of the United States for the Western District of Washington.

Action to recover from the defendant, the Travelers' Insurance Company, the sum of \$5,000 on a policy of insurance issued to the Issaquah Shingle Company of Issaquah, county of King, state of Washington.

The contract of insurance provides indemnity for the shingle company against loss by reason of liability imposed by law for bodily injuries suffered by an employé while the policy is in force. The plaintiff was in the employ of the shingle company, and in the course of such employment was injured. The policy was in force at the time of the injury. Plaintiff, by his guardian ad litem, brought suit against the shingle company for damages and recovered a judgment for \$5,500 and costs. The shingle company had in the meantime become insolvent and was adjudged a bankrupt. The present action is brought against the insurance company to recover the sum of \$5,000 upon the judgment, and is based upon the liability for indemnity provided in the contract of insurance. In the court below a demurrer to the complaint was

sustained, and the complaint ordered dismissed. From this order and decree the case is brought here for review upon writ of error.

Walter S. Fulton, for plaintiff in error.

Kerr & McCord, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The policy of insurance involved in this case provided that no action would lie against the insurance company to recover for any loss under the policy, unless it should be brought by the assured itself for loss actually sustained and paid in money by it in satisfaction of a judgment, after trial on the issue. The complaint alleges that after the commencement of plaintiff's original action against the shingle company, and during the pendency of the action, the shingle company became insolvent and was adjudged a bankrupt; that, notwithstanding that fact, the insurance company thereafter continued to defend said action and to direct and control the proceedings therein. The shingle company, by reason of its insolvency and bankruptcy, is unable to satisfy the judgment, and the insurance company refuses to pay the judgment. The purpose of the complaint is to secure a decree adjudging the insurance company liable for the payment of \$5,000 on account of plaintiff's judgment and ordering and directing said insurance company to pay said sum on account of said judgment for the benefit of plaintiff, and requiring the defendant shingle company, upon the payment of said sum, to give an acquittance and discharge to said insurance company of all liability. The character of this action in a federal court is a suit in equity to secure an equitable remedy, but the decree of the Circuit Court is brought here for review upon a writ of error. A decree in equity cannot be reviewed by a writ of error. *The San Pedro*, 2 Wheat. 132, 140, 4 L. Ed. 202; *McCollum v. Eager*, 2 How. 61, 11 L. Ed. 179; *Ballance v. Forsyth*, 21 How. 389, 16 L. Ed. 143.

In *Walker v. Dreville*, 12 Wall. 440, 442, 20 L. Ed. 429, the Supreme Court of the United States said:

"We have so often decided that, notwithstanding the peculiarities of the Civil Code of Louisiana, the distinction between law and equity must be preserved in the federal courts, and that equity causes from that circuit must come here by appeal and common-law cases by writ of error, that we cannot now depart from that rule without overruling numerous decisions and a well-settled course of practice."

Act March 3, 1891, c. 517, § 2, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547), establishing Circuit Courts of Appeals, and providing that such courts shall exercise appellate jurisdiction to review by appeal or writ of error certain final decrees and judgments of the District and Circuit Courts, preserves the same distinction in the appellate jurisdiction of such courts. *Stevens v. Clark*, 62 Fed. 322, 323, 10 C. C. A. 379; *Highland Boy Gold Min. Co v. Strickley*, 116 Fed. 852, 54 C. C. A. 186.

The writ of error is dismissed.

WESTERN TRANSIT CO. v. BROWN.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

INSURANCE—MARINE INSURANCE—RUNNING-DOWN CLAUSE.

A running-down clause of a policy of marine insurance, providing that the insured will reimburse the owner for damages paid "if the ship hereby insured shall come into collision with any other ship or vessel," is intended to protect the insured only in case his ship actually herself comes into contact with the injured ship, and there is no liability thereunder where the insured ship by her suction caused another to sheer and come into collision with a third, although she was held liable in damages therefor in a suit for the collision.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 152 Fed. 476.

Goulder, Holding & Masten, for appellant.

Wing, Putman & Burlingham (Harrington Putman, of counsel), for appellee.

Wallace, Butler & Brown (F. M. Brown, of counsel), for Manheim Insurance Company.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The libel is filed upon a policy of marine insurance. The tug Mariposa, with the schooner Martha in tow, coming down the starboard side of a dredged cut about 800 feet wide, was met by the steamers Wilbur and Troy going up. The Wilbur suddenly sheered to port, struck and sank the Martha. In a suit by the owners of the Martha against the steamers Wilbur and Troy to recover damages for the collision both steamers were held at fault. The court found that they were coming up the wrong side of the center of the cut, were racing, and that the Troy kept so close to the Wilbur that she sucked the Wilbur's stern into her own wake, and so caused the Wilbur to sheer to port, carrying her into the Martha.

The policy of insurance contains a running-down clause, the material portion of which is as follows:

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel or raft, and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages to any other person or persons, any sum or sums not exceeding in respect of any one such collision the value of the ship hereby assured, we, the assurers, will pay the assured such proportion of such sum or sums so paid as our subscription hereto bear to the value of the ship hereby assured."

Colloquially we speak of a ship as being insured against damage by collision, but what we mean is that her owner is insured against loss arising from damage to his ship caused by collision. This peril was covered by the ordinary marine policy. When it was desired to protect the owner against loss because of his liability for damage caused by his own ship to another ship, the running-down clause was inserted in the ordinary policy. The extent of the underwriters' liability under that clause depends upon its construction; i. e., upon what the parties intended to cover by it. In respect to his legal liability as a

wrongdoer, no doubt one is as responsible for striking another with a club in his hand or with a bullet from his gun as for striking him with his fist. So, also, in respect to legal liability under the rules of navigation or in proceedings to limit liability, or under the doctrine of principal and agent, two vessels may be regarded as one. But these principles of law do not depend upon contract, and do not necessarily apply to a contract of indemnity. Whether they apply, and, if so, how far they apply to the running-down clause in a marine policy, depends upon the intention of the parties to the contract. They might have intended to protect the owner against loss because of liability to third parties caused in any way by his ship; or they might have intended to protect the owner in all cases where there was a contact between his ship and the other ship, either direct or by means of a physical connection; or they might have intended to protect the owner only when his ship actually herself came into contact with the injured ship. Presumably the premiums charged would diminish as the risks were diminished.

We entirely approve of the language of Lord Bramwell in his dissenting opinion in the case of *The Niobe*, reported as *McCowan v. Baine* (App. Cas. 1891, 401), which was a suit on this very clause:

"I say, then, in very fact, the *Niobe* did not come into collision with the *Valetta*, causing a liability in the appellant, and, according to the ordinary primary meaning of the words used, the case is not within them. This is agreed. But it is said that for some reason the primary and natural meaning of the words is to be extended; and that we should hold that there was a collision where there was none. I am at a loss to see why. I think an act of Parliament, an agreement, or other authoritative document ought never to be dealt with in this way, unless for a cause amounting to a necessity or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not, it was either they thought of the matter and would not, or because they did not think of the matter. In neither case ought the court to do it. In the first case, it would be to make a provision opposed to the intention of the framers of the document; in the other case, to make a provision not in the contemplation of those framers."

If it be supposed that the parties to this policy intended the running-down clause, as in the case first put, to cover any loss the assured sustained because of damage caused by his vessel to another vessel, then, of course, the libelant should recover the amount it has paid. If they intended, as in the second case supposed, to cover any loss caused by damage done either directly or by means of intermediate physical connection, the libelant ought likewise to recover. The *Troy* caused the *Wilbur* to sheer into the schooner by sucking the water between her stern and the stern of the *Wilbur* into her own wake, and we think her owners are as much responsible for this as if she had pulled the *Wilbur's* stern over by a hawser, or, by contact with an intervening vessel, had pushed her bodily over. The connection by water between the *Troy* and the *Wilbur*, though not so obvious, is equally a physical connection.

We think the language of the clause means that the vessel of the assured shall herself come into contact with the injured vessel, and, as the *Troy* did not come into contact with the *Martha*, the decree of the court below is affirmed, with costs.

COASTWISE S. S. CO. v. ÆTNA INS. CO. SAME v. HOME INS. CO.
SAME v. ST. PAUL FIRE & MARINE INS. CO. SAME v. PROVIDENCE-WASHINGTON INS. CO.

(District Court, S. D. New York. March 27, 1908.)

INSURANCE—MARINE INSURANCE—COLLISION CLAUSE IN POLICY.

A running-down or collision clause in a marine policy of insurance on a vessel, providing that the insurer will indemnify the assured "if the vessel hereby insured shall come in collision with another vessel and the assured become liable to pay and shall pay, any sum or sums for damages resulting therefrom to said other vessel," applies only where there is an actual contact between the insured vessel and another, and the insurer is not liable in case of a collision between a tow of the insured vessel and another, although the insured vessel may have been subjected to liability for such collision.

In Admiralty. Actions on marine insurance policies.

Butler, Notman & Mynderse, for libellant.

John F. Foley, for Ætna Insurance Company.

Robinson, Biddle & Ward, Roderick Terry, Jr., and W. S. Montgomery, for Home Insurance Company.

James J. Macklin, for Providence-Washington Insurance Company.

ADAMS, District Judge. These actions were brought by the Coastwise Steamship Company, and its trustees under a dissolution of the corporation, the owner of the tug Richmond, against the Ætna Insurance Company, the Home Insurance Company, the St. Paul Fire & Marine Insurance Company and the Providence-Washington Insurance Company to recover the proportion of losses alleged to be due from the underwriters by reason of a collision between the yacht Elsa and the barge Georgia, in tow on the port side of the Richmond, on the 31st of July, 1901.

The collision happened as stated in the decision of the case reported under the name of *The Richmond* (D. C.) 124 Fed. 993, wherein both vessels were held in fault. It was described as follows:

"These actions arose out of a collision which occurred on the Brooklyn side of the East River, a short distance above the Brooklyn Bridge, about 3 o'clock p. m. July 31, 1901, between the steam yacht Elsa, owned by E. R. Dick, and the barge Georgia, in tow of the tug Richmond, on the tug's port side. The barge and tug were owned by the Coastwise Steamship Company. The yacht was bound down the river, intending to go through the Buttermilk Channel, and the Richmond and the barge, the latter laden with about 3,000 tons of coal, were bound east. The tide was flood and it was a clear bright day. The yacht was going at the rate of about 7 miles per hour and the tug and barge, aided by the tide, about 5 miles. The Elsa was very slightly to the starboard of the tug and barge, but they were practically head and head and there was risk of collision if both vessels kept their courses. When they were less than a quarter of a mile apart, the yacht blew a signal of two whistles to the tug and starboarded her helm. The signal was not heard on the tug and two or more blast signals were blown by the yacht to her. One of these two, probably the first, was answered with a similar signal by the tug and she starboarded her helm and directed the barge to do likewise. The barge was large and unwieldy and did not respond quickly to the helm and such effect as it would have had was counteracted by the reversing of the tug's screw, which was ordered when a collision was imminent. The collision,

however, could not be avoided and the barge's starboard bow, which projected ahead of the tug about 75 feet, came in contact with the yacht's starboard side, abaft amidships, and some injury was done to both vessels."

Thereafter, the damages were paid in conformity with the decision, and the Richmond seeks to recover for her collision loss under the policies in suit. They were the ordinary form of hull time policies, running from a year from January 23, 1901, and provided that the risks designed to be covered were those of the adventures and perils of the harbors, bays, sounds, &c., of inland waters between Norfolk, Virginia, and Eastport, Maine. The policies had riders attached, which contained the following:

"Collision Clause.

And it is further agreed, that if the vessel hereby insured shall come in collision with another vessel, and the assured become liable to pay, and shall pay, any sum or sums for damages resulting therefrom to said other vessel, her freight or her cargo, in such case this Company will contribute towards the payment of three-fourths part of the total amount of said damages, in the proportion that the sum insured under this policy bears to the total valuation of the vessel as stated herein, provided, that this Company shall not in any event be held liable under this agreement for a greater sum than three-fourths part of the amount insured under this policy.

And it is also agreed that this Insurance Company will bear a like proportionate share of any costs and expenses that may be incurred in contesting the liability resulting from said collision, provided, the written consent of the Company to such contest be first obtained."

The Georgia was free from fault and the issue presented here is as to whether the wording of the policy protects the assured with respect to a collision in which the vessel insured (the Richmond) has been involved, but where the actual contact was with a vessel not mentioned in the policy but lashed alongside of the insured vessel, where the owner thereof has paid, or become liable to pay, for the damages caused by the collision.

The libellant contends: (1) that the language of the policy does not require actual physical contact with the insured vessel in order to entitle her to come within the protection of the collision clause, (2) that the question has already been decided favorably to the libellant by this court and the English court of highest authority, (3) that the decision of this court should be in harmony with the established law in England, (4) that the parties contracted upon the basis of the rule in *The Niobe* Case, (5) that two of the defendants were liable for a share of the expenses of the litigation in the *Richmond-Elsa* collision case, (6) that the actions were brought in due season, and (7) that doubts, if any, should be resolved in favor of the libellant. The cases mentioned under the second point were the *Western Transit Co. v. Brown* (D. C.) 152 Fed. 476; *The Niobe*, 7 Asp. M. C. N. S. 89.

The respondents' points are: (1) The action was not brought in time, (2) the loss here sought to be recovered does not come within the terms of the policy, the only foundation for the libellant's claim being the case of *The Niobe*, and a dictum by Judge Hough in the *Western Transit Co. v. Brown*, based upon the theory that a tug and tow are one vessel, (3) that the ordinary meaning of the word "collision" is

the "act of colliding; a striking together; a violent contact," (4) that if there is any ambiguity as to the meaning of the clause, it should be interpreted with regard to the intention of the parties.

In *Western Transit Co. v. Brown*, the libellant, the owner of the steamer *Troy*, sought to recover the damages paid in consequence of a decision adjudging her partly in fault. *Minnesota S. S. Co. v. Lehigh Valley Transportation Co.*, 129 Fed. 22, 63 C. C. A. 672. The action came on for hearing before Judge Hough, and he held that the libel should be dismissed, but used some language, in connection with the *Niobe* Case, very favorable to the libellant's contention here. When his decision was considered on appeal, decided March 10, 1908 (161 Fed. 869), the court arrived at the same result, but without approval of the language. It was said by Ward, J., speaking for the court:

"The policy of insurance contains a running-down clause, the material portion of which is as follows:

'And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel or raft, and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages to any other person or persons, any sum or sums not exceeding in respect of any one such collision the value of the ship hereby assured, we, the assurers, will pay the assured such proportion of such sum or sums so paid as our subscription hereto bear to the value of the ship hereby assured.'

Colloquially we speak of a ship as being insured against damage by collision, but what we mean is that her owner is insured against loss arising from damage to his ship caused by collision. This peril was covered by the ordinary marine policy. When it was desired to protect the owner against loss because of his liability for damage caused by his own ship to another ship, the running-down clause was inserted in the ordinary policy. The extent of the underwriters' liability under that clause depends upon its construction, i. e. upon what the parties intended to cover by it.

In respect of his legal liability as a wrongdoer, no doubt one is as responsible for striking another with a club in his hand or with a bullet from his gun as for striking him with his fist. So also in respect to legal liability under the rules of navigation or in proceedings to limit liability, or under the doctrine of principal and agent, two vessels may be regarded as one. But these principles of law do not depend upon contract, and do not necessarily apply to a contract of indemnity. Whether they apply, and, if so, how far they apply to the running-down clause in a marine policy depends upon the intention of the parties to the contract.

They might have intended to protect the owner against loss because of liability to third parties caused in any way by his ship; or they might have intended to protect the owner in all cases where there was a contact between his ship and the other ship, either direct or by means of a physical connection; or they might have intended to protect the owner only when his ship actually herself came into contact with the injured ship.

Presumably the premiums charged would diminish as the risks were diminished.

We entirely approve of the language of Lord Bramwell in his dissenting opinion in the case of *The Niobe*, reported as *M'Cowan v. Baine* (App. Cas. 1891, 401), which was a suit on this very clause:

'I say then, in very fact, the *Niobe* did not come into collision with the *Valetta*, causing a liability in the appellant, and, according to the ordinary primary meaning of the words used the case is not within them. This is agreed. But it is said that for some reason the primary and natural meaning of the words is to be extended; and that we should hold that there was a collision where there was none. I am at a loss to see why. I think an Act of Parliament, an agreement, or other authoritative document, ought never to be dealt with in this way, unless for a cause amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document

could always have put in the necessary words if they had thought fit. If they did not it was either they thought of the matter and would not, or because they did not think of the matter. In neither case ought the Court to do it. In the first case, it would be to make a provision opposed to the intention of the framers of the document; in the other case, to make a provision not in the contemplation of those framers.'

If it be supposed that the parties to this policy intended the running-down clause, as in the case first put, to cover any loss the assured sustained because of damage caused by his vessel to another vessel, then of course the libellant should recover the amount it has paid.

If they intended, as in the second case supposed, to cover any loss caused by damage done either directly or by means of intermediate physical connection, the libellant ought likewise to recover. The Troy caused the Wilbur to sheer into the schooner by sucking the water between her stern and the stern of the Wilbur into her own wake, and we think her owners are as much responsible for this as if she had pulled the Wilbur's stern over by a hawser or, by contact with an intervening vessel, had pushed her bodily over. The connection of water between the Troy and the Wilbur, though not so obvious, is equally a physical connection.

We think the language of the clause means that the vessel of the assured shall herself come into contact with the injured vessel, and as the Troy did not come into contact with the Martha, the decree of the court below is affirmed with costs."

The language of the clause in the insurance policy there was substantially like that contained in the one in question here, and the decision seems determinative of the controversy, but it is proper to say that if the libellant here had desired to secure the kind of indemnity it urges it is entitled to, it could have done so by the payment of an additional premium, when a policy would have been issued to cover the loss. Such a policy, known as a Stranding and collision policy, or Tower's liability policy, which contains the words "and or her tow," would have met with the libellant's desires.

In view of the conclusion reached that there can be no recovery under the policies, it is not necessary to consider the question of the time of the commencement of the action or the other matters discussed.

Libels dismissed.

DICKINSON v. MATHESON MOTOR CAR CO.

(Circuit Court, M. D. Pennsylvania. April 30, 1908.)

No. 116.

1. JOINT-STOCK COMPANIES—LIMITED PARTNERSHIP ASSOCIATIONS—AUTHORITY OF OFFICERS—CAPITAL STOCK.

An officer of a limited partnership association or joint-stock company has no authority to bargain away any part of its stock in consideration of services rendered by a third person in negotiating a transfer of patent rights to the company.

2. SAME—MICHIGAN STATUTES—PAROL AGREEMENT BY CHAIRMAN.

1 How. Ann. St. Mich. § 2369, provides that there shall be no liability for an amount exceeding \$500, except against the person incurring it, on a debt against a limited partnership association or joint-stock company, unless evidenced by a writing signed by at least two of the managers thereof. *Held*, that a parol agreement of the chairman of such an association to issue to the plaintiff \$16,000 of the common stock of the company in consideration of his services in negotiating a transfer to the company of certain patent rights was unenforceable.

8. ESTOPPEL—ACQUIESCENCE—ACCEPTANCE OF BENEFITS.

Where a plaintiff had no interest in certain patent rights owned by G., but only an understanding with him that the plaintiff was to receive 25 per cent. of the capital stock of any company which should be organized to exploit or induced to purchase them, and thereafter the defendant company partly through plaintiff's services was induced to purchase the patent rights from G., there was no such acceptance of benefits or retention of value contributed by the plaintiff as would preclude the company from repudiating an agreement made without authority by the chairman to issue stock to the plaintiff in consideration of his services in negotiating such transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 260-263.]

Motion for Judgment for Defendant Non Obstante Veredicto, on the Points Reserved.

E. N. Willard and Joseph D. Coons, for the motion.

John M. Coleman, John J. Lordan, and R. W. Rymer, opposed.

ARCHBALD, District Judge. The plaintiff sues to recover the value of \$16,000 of common stock of the defendant company which he claims was to be issued to him by agreement with C. W. Matheson, chairman of the Matheson Motor Car Company, Limited, a partnership association organized under the laws of Michigan, of which the defendant company, a corporation of the state of Pennsylvania, is the lawful successor. The jury have found in the plaintiff's favor, and the agreement must therefore be assumed to have been made. The circumstances attending it will be stated presently. No direct authority from the company to enter into it is shown, and, on the contrary, the right to do so is expressly negatived. Neither is there anything from which it could be implied; it being entirely beyond the authority of an officer of the company to bargain away any part of its capital stock in the manner relied on. But, more than that, it is provided by the statute of Michigan under which the Matheson Motor Car Company, Limited, was organized, that:

"No liability for an amount exceeding \$500, except against the person incurring the same, shall bind the said association, unless reduced to writing and signed by at least two managers." 1 How. Ann. St. (Mich.) § 2369.

This is decisive of the case unless it can be obviated; every one dealing with an association of this kind being affected with notice of the limitations so imposed. *Citizens' Saving Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143; *Rhoades v. Malta Vita Co.*, 149 Mich. 236, 112 N. W. 940; *Melting Co. v. Reese*, 118 Pa. 355, 12 Atl. 362; *Andrews v. Youngstown Coke Co. (C. C.)* 39 Fed. 353; *Bernard Mfg. Co. v. Packard & Calvin*, 64 Fed. 309, 12 C. C. A. 123. It is contended, however, by the plaintiff that, having obtained the benefit of the transaction, the company is not in a position to repudiate it upon the well-known principle that one who accepts the results of that which has been done in his behalf is estopped from asserting that it was done without authority; or, as it is sometimes put, that the retention of the fruits of a transaction amounts to a ratification. 16 Cyc. 787; 1 Am. & Eng. Encycl. Law (2d Ed.) 1196; *MacGeorge v. Chemical Co.*, 141 Pa. 575, 21 Atl. 671; *Interstate Insurance Co. v. Brownback*, 1 Pa.

Super. Ct. 183. The case turns, therefore, on whether that can be said in the present instance, which depends upon the following circumstances:

In the summer of 1903 Charles R. Greuter, an experienced mechanical engineer of Holyoke, Mass., and the designer and owner of certain patented motor car appliances, had his attention called to an advertisement in the "Motor Age" of a party who was looking for a reliable four-cylinder gasoline motor. Mr. Dickinson, the plaintiff, a salesman of considerable business ability, with whom he had been acquainted for a couple of years, had been endeavoring for some time to interest different motor car companies and capitalists to take over Mr. Greuter's patents and manufacture under them; it being understood that Dickinson was to receive 25 per cent. of the capital stock secured in any company which should be organized or induced to do so. His efforts in that direction, however, had not proved successful, and Mr. Greuter meanwhile had become somewhat involved, the automobile business which he was conducting at Holyoke not proving remunerative. Finding out, through Mr. Dickinson's assistance, that the parties who were back of the advertisement, which was not disclosed by it, were the Matheson Motor Car Company, Limited, of Grand Rapids, Mich., it was arranged that Mr. Dickinson should go out there and interview them, and see what could be done, securing positions for both Greuter and himself, if possible, and disposing of the patents. An appointment with the Matheson people having been obtained, Dickinson went out to Grand Rapids with such success that the Matheson people were persuaded to send two of their representatives East, Mr. C. W. Matheson, their chairman, and Mr. G. J. Barrett, their mechanical engineer, to see Mr. Greuter and examine the car which he had built. Meeting Mr. Greuter and Mr. Dickinson in New York the latter part of July, 1903, they were given a demonstration of the car by Mr. Greuter, and were finally taken in it to Holyoke, Mass., being so well pleased as the result that they were ready to enter into negotiations with regard to it. Different propositions were discussed while they were there together at Holyoke, but nothing definite was arrived at. The thing on which they seemed to split was the employment of Dickinson. The Matheson people wanted Greuter and his patents and car, but they had no use for Dickinson as salesman, at least not at that time, although the possibility was held out that they might have later. A final proposition, however, was submitted in writing by Dickinson, in the name of Greuter—either while they were still together at Holyoke, according to Dickinson, or after they had reached New York, according to Matheson, where he and Dickinson went the same evening—by which the company was to employ Greuter and take over his patents, giving him \$6,000 in cash and notes, and agreeing to pay him an annual salary of \$2,000, with \$2,000 a year of the common stock of the company additional, guaranteeing from these two sources an average income of at least \$3,600 per annum, and giving him also besides that the earnings on \$40,000 of common stock, to be retained in the treasury. "This proposition," as it was therein declared at the close, "anticipates the employment by you of F. S. Dickinson (to whom 40 per cent. of all earnings on \$40,000 of common stock, as above mentioned, is to be made

payable) upon my recommendation at such time and reasonable salary as I may suggest. [Signed] Charles R. Greuter, per F. S. Dickinson." This was on July 30, 1903, and the proposition, so made, Matheson took home with him, and later telegraphed to both Greuter and Dickinson that it was accepted with slight modifications. Up to this point it had been assumed by the Matheson people that Dickinson was a joint owner with Greuter; it having been so represented by Dickinson on his visit to Grand Rapids, where he stated that he had a 40 per cent. interest, and the same idea being carried out in the negotiations which followed. But, upon writing to Greuter after the last proposition, they were informed that this was not the case, and that he had no claim or title to any of Greuter's inventions or property, there being simply a verbal agreement between them, by which Greuter was to assign him a certain percentage of the stock which he might acquire in any company that took over Greuter's patents. Upon being advised of this, they at once entered into negotiations with Greuter direct, with the result that on August 11, 1903, they closed a contract with him substantially in accordance with the last proposition submitted, except that Dickinson was eliminated. By it Greuter signed and conveyed to the company his patents, inventions, working drawings, and property in the shop at Holyoke, and agreed to enter into the service of the company as mechanical engineer and designer for the term of five years, the company agreeing to pay him a certain amount in hand, and to employ him at a salary of \$2,000 a year. He was also to get \$2,000 a year of the common stock, and the dividends which should be declared on \$40,000, the company guaranteeing that the income to him from all these sources should amount to at least \$3,600 per annum. The next day, at New York, in pursuance to directions by telegram from Greuter, Mr. Dickinson turned over to Mr. Matheson such drawings and papers as were in his hands, meeting him for the purpose at the Park Avenue Hotel. On this occasion, according to Dickinson, the following colloquy occurred:

"Q. What conversation, if any, did you have with Mr. C. W. Matheson there?

"A. He told me he had closed a contract with Mr. Greuter, and I asked him if the terms of it were in accordance with the last proposition we talked over. He told me the portion relating to my employment had been stricken out; and I questioned him upon the delivery of the stock to me as agreed.

"Q. What did he say about that?

"A. He said it would be done. * * *

"Q. Well, how much?

"A. Forty per cent. of \$40,000."

And again on cross-examination:

"Mr. Matheson informed me that he had closed a contract with Mr. Greuter to take over his patents and to employ him as superintendent. And I asked if the contract provided for the payment of 40 per cent. of \$40,000 in common stock to me, and he said that that would be taken care of; that I would be given the stock.

"Q. Did he tell you, when he said that a contract had been completed between himself and Greuter, what the terms of that contract were?

"A. They eliminated my services. * * *

"Q. Did he tell you anything at all about the contract?

"A. Only that he had closed a contract, and it was in accordance with our last proposition submitted in Holyoke, except so far as my employment was con-

cerned, and led me to believe that I would get my compensation as agreed upon."

The occurrence at Holyoke, July 30, to which allusion is made, was given by him as follows:

"Q. Now, were there any other propositions discussed during that day?

"A. There were several. * * *

"Q. What did you finally do? What was the result of this thing? * * *

"A. The various propositions were discussed, and the portion of the last proposition made, by which the earnings of the company [on \$40,000 of stock] were to be given to Mr. Greuter, with 40 per cent. to myself, was to be eliminated. * * *

"Q. What, if anything, was said by and between you and Mr. Greuter and Mr. Matheson in reference to the compensation to you?

"A. I was to get 40 per cent. of \$40,000 of common stock. * * * They said they would give me 40 per cent. of \$40,000 in common stock.

"Q. Who said that?

"A. Mr. Charles Matheson, under directions from Mr. Greuter.

"Q. What, if anything, did Mr. Greuter say about this 40 per cent. of \$40,000?

"A. He directed Mr. Matheson to have it made out to me and delivered to me. * * *

"Q. What, if anything, did Mr. Matheson say to that request?

"A. He agreed to it.

"Q. What did he say?

"A. He said that he would deliver 40 per cent. of \$40,000 in common stock to me."

The subject being brought up again on cross-examination, he further testified:

"Mr. Greuter and Mr. Charles W. Matheson were present. It was in the factory of the Holyoke Automobile Company. * * * The proposition as last put up to them at that time embodying my employment was not satisfactory to them. They did not care to be burdened with the expense that I would be. They had no use for my services at that time, and, for that reason, I demanded that I get substantial compensation immediately for my services in the matter, and I demanded that 40 per cent. of the \$40,000 in common stock be made out to me and delivered to me, which Mr. Greuter directed Mr. Matheson to do.

"Q. What did Mr. Greuter say?

"A. He told Mr. Matheson to make out or to have made out stock to the amount of \$16,000 to me and delivered to me."

It is upon what was so said at Holyoke on July 30th, between Matheson, Greuter, and Dickinson, confirmed by the assurance given by Matheson to Dickinson at the Park Avenue Hotel, New York, on August 12th, that Dickinson relies to make out the agreement sued on. Assuming that, taken together, it is sufficient to establish an undertaking by Mr. Matheson, as chairman of the Matheson Motor Car Company, Limited, in behalf of the company, to issue \$16,000 of common stock to Mr. Dickinson, the question is whether the company is liable. That it would not be, under ordinary circumstances, in view of the Michigan statute, is conceded. It is claimed, however, as already stated, that having got the benefit of that which was done in its behalf, which it retains, the company is estopped from denying its responsibility. But a careful examination of the case fails to disclose anything on which an estoppel of that kind is able to be predicated. All that the plaintiff had

to command in the negotiations, and all therefore that he could claim to have contributed to the transaction were his services, which were not rendered for the company, but solely for himself and Greuter. He had no interest in Greuter's patents or inventions, although he represented otherwise; the arrangement with Greuter simply providing that he should have a certain percentage of the stock, secured in any company which should buy or be organized to exploit them. When, therefore, the Matheson people took over this property, they took nothing belonging to Dickinson which they can now be said to retain to his detriment. Greuter as the sole owner was at perfect liberty to dispose of his belongings to the company in the way he did, and the company owed no duty to Dickinson to consider him, after it was discovered that he had no interest, except as a matter of courtesy. Under his promise, Greuter no doubt became answerable to Dickinson, and still continues to be so, but the company did nothing to interfere with this. That his services were rendered solely in the interest of Greuter and himself there can be no question. Asked, at the trial, why the two written propositions, which were submitted, were signed by him in Greuter's name, if Greuter was present, he said: "Because I was acting as selling agent." And this he reiterates. In no sense in anything that he did was he acting in the interest of the company, and the only advantage which it got out of what he did was as he, for the benefit for Greuter and himself, sought the company out, and endeavored to make a bargain with it, by which, out of that which it was to pay or part with, he and Greuter would be benefited. From the standpoint of the company, this was entirely voluntary and unsolicited, for which upon no consideration can it be made responsible. The jury were virtually so instructed at the trial, although the question of fact supposed to be involved, as to whether, after all, there was anything of value, contributed by the plaintiff, which the company retained, by which it would be estopped, was left for them to pass upon, of which, if there was any evidence, the verdict would have to be respected. But, putting the case as strongly for the plaintiff as it is possible, it is clear that there is nothing of which this can be said, and a verdict for the defendant should therefore have been directed as requested.

Proceeding to do this now, it is ordered that judgment be entered for the defendant on the question reserved non obstante verdicto.

IN RE RECEIVERSHIPS OF STREET RYS.

(Circuit Court, S. D. New York. March 31, 1908.)

STREET RAILROADS—RECEIVERS—ISSUING TRANSFERS TO PASSENGERS.

Receivers operating street railroad lines being trustees for the owners and creditors, it is their duty to curtail transfer privileges of passengers, where it will increase the earnings of the property and there is no law of the state requiring the issuing of such transfers.

Masten & Nichols, for receivers.

LACOMBE, Circuit Judge. The receiver of the Third Avenue Railroad, of the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway, and of the Dry Dock, East Broadway & Battery Railroad, and the receivers of the New York City Railway and Metropolitan Street Railway have applied to the court for instructions as to the discontinuance of certain transfers. The subject may be considered in two aspects: (1) As a business proposition; and (2) as a legal proposition.

1. As a business proposition: It is sufficient to refer to the detailed statement of conditions set forth in the petitions submitted on this application. It is obvious that a curtailment of transfer privileges in the manner suggested will increase the cash receipts of the properties affected, and, since receivers are trustees for the creditors and owners, their duty to operate the roads so as to increase earnings is equally obvious.

2. As a legal proposition: The obligation of street railroads to issue transfers is found in section 104 of the present railroad law of this state (Laws 1892, p. 1406, c. 676), which is a re-enactment of section 4 of the transfer act of 1885 (chapter 305, p. 526, Laws 1885), and in its present form reads as follows:

"Sec. 104. Every such corporation entering into such contract [i. e., a contract by two or more companies for the use of their respective roads or routes or any part thereof] shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall, upon demand, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single road with a single rate of fare. For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit fifty dollars to the aggrieved party."

It will be seen that under the terms of this section a street railroad which carries passengers in its cars over a portion of track operated by itself and another road under an agreement for joint or common use thereof is required to give such passengers (if they so desire) transfers to the cars of that other road which are there operated and such transfers shall entitle such passengers to a continuous ride to destination on such other road. The same statute also provides:

"Sec. 102. Any street surface railroad company may use the tracks of another street surface railroad company for a distance not exceeding one thousand feet."

There have been many decisions of the state courts construing these transfer statutes, some of them conflicting; but touching the particular questions which are raised by the application now made neither the statute nor the decisions present any difficulties. It has been held by the state courts that the mere ownership by one road of a majority of the stock of another road having a separate and distinct

management does not require the exchange of transfers between the two roads. *Senior v. N. Y. City Railway*, 111 App. Div. 39, 97 N. Y. Supp. 645; *Id.*, 187 N. Y. 559, 80 N. E. 1120.

A single receiver now operates the three independent roads, Third Avenue, Forty-Second Street, and Dry Dock, which are thus subject to a common control; but he proposes to continue the exchange of transfers between them as a business proposition, to build up or restore the Third Avenue system. The only matter for consideration, therefore, is the exchange of transfers between each of these three independent roads and the roads operated by receivers of the Metropolitan and New York City Railway.

The Third Avenue Railroad consists of the original line through Park Row, Chatham street, the Bowery, and Third avenue, and also its leased, branch, or controlled lines, viz., One Hundred and Twenty-Fifth Street Crosstown, Amsterdam Avenue, north of 125th street, and Kingsbridge lines. Its cars are operated wholly on these lines (or on the lines of Forty-Second Street or Dry Dock). None of them are operated on any portion of the Metropolitan lines, and none of the Metropolitan cars are operated on any of the above enumerated Third Avenue lines. Neither uses the road or route of the other, or any portion thereof. Obviously there is no obligation under the statute to exchange transfers between the Third Avenue lines and the Metropolitan or City Railway lines.

On the route of the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway there is a common operation (with Metropolitan lines) of these two portions of track: (a) Seventh avenue from Forty-Second street to Forty-Fifth street; (b) Forty-Second street, from Fourth avenue to Madison avenue. Each of these portions is less than 1,000 feet in length, and the use of the tracks is under section 102 of the statute above quoted, not by a contract for common use. Manifestly to such a statutory use the transfer section (104) does not apply. The Forty-Second Street road and the Metropolitan also operate cars in Thirty-Fourth street, from First avenue to the East river. But each road has and uses its own tracks, so the transfer section does not apply. Moreover, the distance is less than 1,000 feet. The same roads also operate cars on Forty-Second street, from Tenth avenue to the North river; but each road has and uses its own tracks, so the transfer section does not apply.

The same roads, Forty-Second Street and Metropolitan, also use in common that portion of the old Ninth Avenue line which runs on the Boulevard from Sixty-Fifth street to Seventy-First street. Whether the arrangements under which there is a common or joint use of these tracks constitute such a contract as the transfer sections refers to is an open question. No state decision, to which attention has been called or which the court has been able to find, determines it squarely. It would seem wiser to avoid making any changes which might involve litigation over refusals of transfers until further decisions of the state courts construing the statute, or possibly some modifications in operations of the roads may leave the question no longer an open one. For the present transfers north-

bound and south-bound should be exchanged between the roads on that portion of the line; the transfer given on a car of the one road to be accepted by a car of the other bound in the same direction (*Kelly v. N. Y. City Railway*, 119 App. Div. 223, 104 N. Y. Supp. 561) at any point the passenger may board it, between Sixty-Fifth street and Seventy-First street, under existing regulations as to time of presentation. The same roads also use in common that portion of the First Avenue line which lies between Thirty-Fourth street and Forty-Second street. The situation here is the same as in the portion of the Boulevard last referred to, and transfers should be similarly exchanged. A like state of affairs exists on Tenth avenue between Forty-Second street and Fifty-Ninth street, and transfers should be exchanged there, as in the two cases last referred to.

With the exceptions above indicated, there seems to be no reason why the receivers should not discontinue all exchange of transfers between the Forty-Second Street, Boulevard, and St. Nicholas Avenue lines and the lines of the Metropolitan Street Railway and New York City Railway.

As to the Dry Dock, East Broadway and Battery Railroad there appear to be so many places where it and the Metropolitan lines use portions of each other's tracks, exceeding 1,000 feet in length, that it seems inadvisable for receivers to undertake to make any changes now. Possibly future modifications in operation of the line or subsequent decisions of the state courts may eliminate enough of these "uses in common" to leave a less complicated situation. For the present there should be no change in existing transfer arrangements between these two roads.

None of the changes which the receivers may make under authority of this opinion shall take effect until April 11, 1908, and one week's notice of proposed changes should be posted in all cars operated within the territory affected thereby.

In re **STOVALL GROCERY CO.**

(District Court, N. D. Georgia. May 15, 1908.)

No. 2,113.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—PREFERENCE OF CREDITOR.

The payment of a debt of \$3 by a mercantile firm is not such a substantial preference as will constitute an act of bankruptcy sufficient of itself to sustain an involuntary petition.

2. SAME—PARTNERSHIP—TRANSFER OF PROPERTY BY PARTNER.

A transfer of property by an individual member of a firm, although with intent to defraud individual and firm creditors, is not an act of bankruptcy on the part of the partnership which will sustain a petition in bankruptcy against it.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 6, *Bankruptcy*, § 57.]

In Bankruptcy. Involuntary proceedings. On demurrer to petition and motion to dismiss.

James L. Key, for petitioning creditors.

T. C. Battle and W. J. Heyward, for alleged bankrupt.

NEWMAN, District Judge. The petition in bankruptcy in this case was made by a number of creditors whose debts aggregated \$529.72. Two creditors have withdrawn their claims, leaving the total amount of indebtedness contained in the petition less than \$500. I doubt if this can be done, especially in view of what seems to be the fact that these two claims that were withdrawn were purchased by a son of the members of the bankrupt firm. While the amount paid for the claims is not shown, such conduct, if tolerated, allows an alleged bankrupt, after bankruptcy proceedings have been instituted, to buy up the claims of creditors filing a petition against him, and thereby give the creditors whose claims are so purchased a preference; doing in this way the very thing which it is the purpose of the bankrupt act to prevent. *In re Bedingsfield* (D. C.) 96 Fed. 190.

But it is unnecessary to determine this matter, or to discuss it further, in view of my opinion as to the grounds of bankruptcy set out in the petition. The bankrupt firm is alleged to have been composed of M. E. and C. C. Stovall, which firm, according to the petition, did business at different times under the name of Stovall Grocery Company, the C. C. Stovall Grocery Company, C. C. Stovall, and M. E. & C. C. Stovall. The first ground of bankruptcy is that on the 25th day of January, 1908 (this petition having been filed on February 1, 1908), the firm committed an act of bankruptcy by paying to one H. L. Singer a note for \$3 in full of Singer's claims, and that this was a preference, and intended to be a preference. I do not think that the payment of \$3 to a creditor a week before the bankruptcy proceeding was instituted could be classed as a preference. It is not such a substantial transaction as would, of itself, justify the institution of a proceeding in bankruptcy. Counsel for petitioning creditors does not claim that this alone would be a sufficient ground for sustaining this petition. It would be difficult to draw a line, and say what amount would be sufficient, and what would not, made in payment of a debt, to make a substantial preference. This would depend, more or less, on the character of the business, whether large or small; but certainly in a business such as that of the alleged bankrupt appears to have been, though not great, a payment of a \$3 debt could hardly be considered a preference.

The other ground of bankruptcy relied upon is this:

"That on the 24th day of December, 1907, said C. C. Stovall, a member of said firm, conveyed and transferred his undivided half interest in and to a certain lot whereon was a storehouse and dwelling, situated at what is known as 222 and 224 Highland avenue, in the city of Atlanta, said state and county, to Mattie E. Stovall, his wife, without consideration, with intent to hinder, delay, and defraud his creditors and the creditors of said firm."

And further the petition proceeds:

"That on the 25th day of January, 1908, M. E. Stovall, a member of said firm, conveyed her half interest, and the half interest theretofore conveyed to her by C. C. Stovall, in the property above described, to Beulah W. Stovall, with intent to hinder, delay, and defraud her creditors and the creditors of said firm."

It will be perceived that the act of bankruptcy alleged here is the transfer by an individual member of a firm of property with intent to defraud individual creditors and firm creditors. That is not an act of bankruptcy on the part of the firm. The partnership entity must act, and what is relied upon must be its act. This question was considered and disposed of properly, I think, by Judge Archbald in *Hartman v. John Peters & Co.* (D. C.) 146 Fed. 82. A case recited and relied upon is *In re Redmond*, 9 N. B. R. 408, Fed. Cas. No. 11,632. The substance of what Judge Archbald held can be gathered from the headnote as follows:

"A conveyance by a partner of his individual property, although with intent to prefer a firm creditor, does not constitute an act of bankruptcy by the firm, and will not sustain proceedings in bankruptcy against the partnership."

As neither of the grounds of bankruptcy contained in the petition are sufficient, the demurrer to the petition is sustained, and the same dismissed.

WALLACE v. D. APPLETON & CO.

(Circuit Court, S. D. New York. May 6, 1908.)

COURTS—UNITED STATES—DEPOSITIONS—FOLLOWING STATE PRACTICE.

Under Code Civ. Proc. N. Y. tit. 3, c. 9, art. 2, relating to the taking of depositions outside of the state, and the practice of the state courts thereunder, which practice the federal courts are authorized to follow by Act March 9, 1892, c. 14, 27 Stat. 7 (U. S. Comp. St. 1901, p. 664), commissions for the oral examination of either named or unnamed witnesses will be issued only under exceptional circumstances.

[Ed. Note.—Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

Henry W. Jessup, for plaintiff.
Sullivan & Cromwell, for defendant.

WARD, Circuit Judge. Act March 9, 1892, c. 14, 27 Stat. 7 (U. S. Comp. St. 1901, p. 664), permits depositions of witnesses in cases pending in courts of the United States to be taken in the mode prescribed by the laws of the state in which the courts are held. The taking of depositions of witnesses without the state of New York to be used within the state is regulated by article 2, tit. 3, of chapter 9 of the Code of Civil Procedure. The witnesses must be named in the commission and examined on written interrogatories annexed to it. It is true that discretion is given to the court or judge to issue a commission for the examination of named witnesses on oral examination or an open commission under which unnamed witnesses may be examined orally; but it is a fixed practice of the state courts to issue the latter commissions only under the most exceptional circumstances. *Deery v. Byrne*, 120 App. Div. 6, 104 N. Y. Supp. 836.

I think a commission should issue to enable the defendants to examine witnesses in Jerusalem, and will give them the option: (a) Of an open commission, upon condition of first paying the plaintiff \$2,500 for his expenses; (b) a commission to examine named witnesses, in-

cluding the Cavass in the employment of the American Consulate at Jerusalem, who is, I think, sufficiently described, upon condition of first paying the plaintiff \$1,500 for his expenses; or (c) a commission to examine named witnesses, including said Cavass, upon written interrogatories, the defendants paying a reasonable sum to the plaintiff for translation of cross-interrogatories, if necessary.

The trial to await the return of the commission, order to be settled on notice.

WILLIAM WRIGLEY, JR., CO. v. GROVE CO. et al.

(Circuit Court, S. D. New York. May 20, 1908.)

1. TRADE-MARKS AND TRADE-NAMES—WORDS SUBJECT TO APPROPRIATION—"SPEARMINT."

The word "spearmint" is a common English word, descriptive in its nature, and not subject to exclusive appropriation as a trade-mark for chewing gum flavored with spearmint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 6, 11.]

2. SAME—UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

The showing made *held* not to establish unfair competition by defendant by imitating complainant's cartons and packages containing chewing gum, such as to warrant the granting of a preliminary injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 106.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. On motion for preliminary injunction.

Philip B. Adams and Offield, Towle & Linthicum, for complainant.
J. K. K. Blanvelt, for defendants.

WARD, Circuit Judge. The word "spearmint" is a common English word, descriptive in its nature, and therefore not capable of appropriation as a trade-mark for chewing gum flavored with spearmint. Every one who manufactures chewing gum so flavored has as good a right to call it what it is, "Spearmint," as the complainant has, and must so describe it, if he describes it at all.

Without reference, however, to right depending upon trade-mark or upon title, no manufacturer can dress his goods so as to palm them off on the public as the goods of another. This would be enjoined as unfair competition. *Shaver v. Heller & Mertz Company*, 108 Fed. 821, 48 C. C. A. 48. The complainant does seem, by large advertising, to have created a demand within the past two or three years for spearmint chewing gum, and manufacturers of such gum inevitably get the benefit of the complainant's outlay. He rests his claim principally on his right to the word "Spearmint," which he contends has become synonymous in the public mind with the gum that he manufactures. I think it is his misfortune to have invested his money in advertising a word incapable of exclusive appropriation.

Reference is made to a preliminary injunction which I lately grant-

ed in a suit of this complainant against Gutman and others. They were sellers, and not manufacturers, and did not defend the action. All reference to the cartons and wrappers of manufacturers, among others those of the defendant the Grove Company, was struck out of the order submitted, and only the sale of goods on which the word "Spear-mint" should be so used as to imitate the dress of the complainant's goods and deceive the public was enjoined. The question whether the defendant's goods did this was left entirely untouched.

Chewing gum seems to have been put up for many years in tablets wrapped in tinfoil or in paper, five or more in a package and several packages in a carton box. These similarities between the defendant's and the complainant's output do the complainant no wrong. I do not myself see any apparent intention on the part of the defendant to imitate the complainant's cartons or wrappers, nor any proof that the public is deceived. The purchasers of cartons, whether jobbers or retailers, are not at all likely to be misled, and I do not think that consumers of packages or of single tablets generally would be deceived, if they really wanted the complainant's spearmint gum, as distinguished from spearmint gum generally.

It is easy to imagine wrappers differing more from the complainant's than do the defendant's, but the case does not seem to me one for a preliminary injunction on the affidavits and exhibits submitted; and the motion is therefore denied.

In re STEELE.

(District Court, N. D. Alabama, S. D. June 8, 1908.)

1. BANKRUPTCY—COURTS.

The act of Congress (Act July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]) creating courts of bankruptcy provides for one court only within the territory prescribed.

2. SAME—JURISDICTION.

Courts of bankruptcy have no jurisdiction outside of their territorial limits as prescribed by the act of Congress creating them.

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

3. SAME—DISTRICT JUDGES—APPOINTMENT OF REFEREE.

A United States district judge, even though a judge of the Northern and Middle districts of Alabama, has no jurisdiction, while holding court in the Middle district thereof, to make an order appointing a referee in bankruptcy for the Northern district of Alabama.

4. SAME—JURISDICTION—RULES IN BANKRUPTCY.

A United States district judge, even though a judge of the Northern and Middle districts of Alabama and residing in the Middle district, has no jurisdiction or authority to go into the Northern district, while the judge of the said Northern district is holding court therein, and make an order appointing a referee in bankruptcy and prescribing a rule for the reference of proceedings in bankruptcy to said referee so appointed by him, without the concurrence of the judge of the said Northern district.

5. SAME—VOID ORDER.

Such action by a district judge, even though a judge of both districts, being made without the concurrence of the judge of the Northern district, is coram non iudice and void, in so far as the same applies to the Northern district; and the judge of the said Northern district has the right and authority to set aside any order or orders so made.

(Syllabus by the Court.)

In Bankruptcy.

See 156 Fed. 853.

Sterling A. Wood, for petitioner.

HUNDLEY, District Judge. The matter here presented is upon a sworn petition filed by Nenian L. Steele, a referee in bankruptcy heretofore appointed by this court, calling attention to the fact that the clerk of this court is proceeding, or is about to proceed, to refer one-half of the cases in bankruptcy filed in this court to Alex C. Birch, under and by virtue of what purports to be an order of this court appointing said Birch a referee in bankruptcy, and directing the clerk to make such reference to said Birch. Such appointment and order is averred to be absolutely void, and this court is asked to set the same aside as having been improvidently made. The facts stated in the petition, upon which relief is prayed, are as follows:

"(1) That on the 1st day of November, 1907, petitioner was duly and regularly appointed a referee in bankruptcy for certain counties in this district, and that he thereupon qualified, and has since the said time been such referee, having his office in the city of Birmingham, county of Jefferson, and state of Alabama, and that at this time he is the sole and only referee appointed for said counties of said district by the said court of bankruptcy.

"(2) That on the 1st day of June, 1908, Hon. Thomas G. Jones, a district judge of the United States, residing and presiding in the Middle district of Alabama, went upon the bench in the said city of Birmingham, county of Jefferson, and state of Alabama, and while upon said bench purported to sit as the court of bankruptcy for said Northern district of Alabama, and thereupon entered an alleged order purporting to appoint one Alexander C. Birch a referee in bankruptcy for the identical counties of the said Northern district of Alabama for which petitioner had been appointed previously by this court.

"(3) That the said Hon. Thomas G. Jones was at Montgomery, which was the place of his residence, and which was within the Middle district of Alabama, sitting and holding court in and for the said district until about the hour of half past 6 o'clock p. m., on Sunday, May 31, 1908, and that at said time, on said Sunday, May 31, 1908, the said Hon. Thomas G. Jones took passage on the Louisville & Nashville north-bound train and came to Birmingham, Ala., on the same, arriving at said Birmingham, Ala., at about half past 9 o'clock p. m. on said Sunday night, May 31, 1908, returning to said city of Montgomery, Ala., and to the said Middle district of Alabama, on the next through train on the said Louisville & Nashville Railroad, and which left said Birmingham, Ala., for said Montgomery, Ala., at about half past 8 o'clock a. m. on Monday, June 1, 1908. That the above 11 hours is all the time that Hon. Thomas G. Jones has been within the said Northern district of Alabama since November 5, 1907, when he was within the said district, and remained therein for a similarly short time, and for the purpose of attempting to remove this petitioner from his office as such referee, as set forth in another petition previously filed in this court of bankruptcy.

"(4) That the said Hon. Thomas G. Jones on the said June 1, 1908, at about the hour of 8 o'clock a. m., did go to the Government Building in the city of Birmingham, Ala., and did purport to open the court of bankruptcy therein,

and that the sole and only business transacted, or attempted to be transacted, or purporting to be transacted, at the said time and place, was the alleged appointment of one Alexander C. Birch as a referee of the court of bankruptcy in and for the said Northern district of Alabama.

"(5) That the first alleged order purports to have been made on 'this 30th day of May, 1908,' when, as matter of fact, the said Hon. Thomas G. Jones was not then within the said Northern district of Alabama, but was at said Montgomery, Ala., for and during said entire day, sitting and holding court for the Middle district of Alabama, and that he had no authority whatsoever as the court of bankruptcy for the Northern district of Alabama to make the said alleged order, and that the same was void and of no force or effect.

"(6) That the second alleged order was made at the time previously stated, on the 1st day of June, 1908, and that at the said time the judge of this court was not at his place of residence, the said city of Birmingham, Ala., but was at the city of Anniston, in the Eastern division of the said district, and was then and there sitting and holding court at the time provided in all respects as required by law, and that the said action of the said Hon. Thomas G. Jones was not known to this court, and was not participated in by the judge of this court, nor was the judge of this court advised that such would be done or attempted, nor was the concurrence of this court asked in the same in any respect whatsoever, and that said alleged order was void and of no force or effect.

"(7) That there is but one court of bankruptcy for the said Northern district of Alabama, and that, under the provisions of the act of Congress relating to bankruptcy, such court of bankruptcy is authorized to 'appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed, or for other cause,' and that the said Alexander C. Birch was not appointed by the said court of bankruptcy for the Northern district of Alabama.

"(8) That in and by the said alleged orders of the said Hon. Thomas G. Jones he has purported to direct the clerk of this court to refer every odd-numbered case in bankruptcy to the said Alexander C. Birch, and, if the interposition of this court is not invoked, that the said odd-numbered cases, which would otherwise be referred to this petitioner, who is entitled to the emoluments thereof, will be referred to the said Alexander C. Birch, and that the said Birch is not a referee of this court in truth and in fact."

Copies of the orders referred to in the petition are made exhibits thereto.

The fact that such purported order or orders, as above set forth, were made by a United States district judge claiming to be a judge of this court, necessarily surrounds the questions presented with some embarrassment not generally arising in courts of justice, when called upon to modify, revise, or reverse the decisions of other judges or courts. More especially is this the case when the matter has reference to an officer of the court, for whose conduct the judge is at least morally responsible. However this may be, the Constitution and laws of the United States necessarily place the responsibility to act upon all judges to whom parties feeling aggrieved have the right by law to apply. I cannot under my oath of office decline to assume the responsibility which the law places upon me. I cannot delegate my jurisdiction to any other judge. I cannot divide my jurisdiction with any other judge. I cannot, with due respect to the office I hold, decline to act when it is my duty to act; nor can I yield this duty to others, however eminent they may be. I cannot silently permit another to assume the jurisdiction in my court which the law places upon me. The law defines my jurisdiction, the law defines my right

and authority, and the law alone shall be the beacon to guide my footsteps in seeking rightfully to determine this matter.

As shown by the facts stated in the petition, an effort is made by the learned judge to create another referee in bankruptcy in this court, without the knowledge or concurrence of the court itself. This is sought to be done, first, by an order purporting to have been made while that learned judge was holding court in another district; and, second, by filing that order, thus purporting to have been made, in this district on Sunday night, May 31, 1908; and then, finally, by entering an order about 8 o'clock Monday morning, June 1, 1908, ratifying the making of the previous order in another district. These various efforts at effecting the appointment of a referee and designating the manner in which the business of this court shall be referred to him were all made, or attempted to be made, at a time when the judge of this court was engaged in holding a regular term of this court in another division of this district and at a time fixed by law.

It is unnecessary, in so far as the decision of the questions presented by this petition is concerned, to pass upon the question of whether or not the learned judge making the orders above referred to is still a judge of this district. It is unnecessary to decide whether the act of Congress, creating the judge of the Northern district of Alabama and designating his place of residence as the city of Birmingham, in said district, makes him the sole judge of this court or not. It is unnecessary to decide in this proceeding whether or not Congress, in carrying out the general provision of the federal statute that "a district judge shall be appointed for each district," did in fact and in law provide for one judge of the Northern district of Alabama. Any expression of opinion here upon that question would be mere dictum. However that matter may be determined finally, the jurisdiction and authority of this court are expressed in no uncertain terms in the act of Congress. Act Feb. 25, 1907, c. 1198, 34 Stat. 931 (U. S. Comp. St. Supp. 1907, p. 187). The language of that statute is that the district judge for the Northern district of Alabama "shall possess and exercise all the powers conferred by existing law upon the judges of the District Courts of the United States, * * * and the same powers and perform the same duties within the said Northern judicial district of Alabama as are now possessed by and performed by the district judge of the United States in any of the judicial districts established by law." Thus it will be seen that by the very terms of the statute the judge of the Northern district of Alabama possesses ample power and authority to appoint or remove a referee in bankruptcy, if any other "district judge of the United States in any of the judicial districts established by law" has such power. That district judges generally possess such power cannot be seriously questioned.

The principle in this case is not materially different from the case of *In re Steele* (D. C.) 156 Fed. 853. The opinion in that case was rendered by the judge of this court on the 9th day of November, 1907, and has remained to this day the law of the case, so far as this district is concerned. That decision has not been overruled, ques-

tioned, denied, or modified by any judicial authority. In that case it was decided that the court of bankruptcy is not a migratory court, with one judge sitting in one place and another judge sitting in another place, but it is a court whose domicile and territorial limits are fixed by law, and that both time and place are essential constituents of the organization of such court, and, further, that in order to constitute such court the officer must be present at the time and place appointed by law. In the case at bar the place fixed by law is within the territorial limits of the Northern district of Alabama, where the judge of this court was presiding in fact at the time fixed by the statute. It was also held in the Steele Case, *supra*, that any order made by the learned judge, affecting the Northern district, while holding his court in the Middle district, was *coram non judice* and absolutely void, in so far as its binding effect upon this court is concerned. The court of bankruptcy is a statutory court. Its jurisdiction, personnel, and territorial limits are prescribed by statute. So much of the statute as applies to the question now under discussion is as follows:

"Sec. 2. That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several states, * * * are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms, as they are now or may be hereafter held. * * *" Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420).

The wording of this statute, *ex vi termini*, makes plain and uncontrovertible two facts: First, there is created one court of bankruptcy in each judicial district in the United States, composed of the "District Courts" therein; second, these "courts of bankruptcy" are invested with jurisdiction at law and in equity "within their respective territorial limits" only. It will be noted that nowhere does the statute fix the number of judges which shall comprise the court; and, construing this statute in connection with the general provision for the organization of District Courts, viz., that "a district judge shall be appointed for each district, except in cases specially provided" (4 Fed. St. Ann. § 551, p. 216 [U. S. Comp. St. 1901, p. 446]), it would seem plain that the bankruptcy law also provided for only one judge of the bankruptcy court in each judicial district. A different construction from this might be made, perhaps, in districts where there is created "an additional judge," required to possess "the same powers and perform the same duties and receive the same salary as the present district judge of said district," as is the case in five of the judicial districts in the United States; but upon this question I express no opinion. Such, however, is not the case here, where the powers and duties of the judge of this court are not limited to the powers and duties conferred upon any other judge in this district, but are coequal and coexistent with those of "the judges of the District Courts of the United States." Act Feb. 25, 1907, *supra*. Hence the power of the judge of this court of bankruptcy must be coequal and

coexistent with the powers and duties of the judges created under the general provision, under which "a district judge is appointed for each district." 4 Fed. St. Ann. p. 216.

In so far as the District Courts of the United States are referred to in the bankruptcy law, it is plain that not alone is there created one court of bankruptcy, and one only, for each district, but there is only one judge provided for each district. The court of bankruptcy is frequently mentioned in the law, and so is the judge, and without exception, wherever "judge" is referred to, it is always as "the judge." The singular noun is used, and never the plural. Under chapter 4 of the act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), which is devoted to "courts and court procedure," it is provided (1) that "the judge" shall direct the process; (2) "the judge" shall determine the issues presented by the pleadings; (3) "the judge" shall make the adjudication or dismiss the petition; (4) "the judge" shall refer the case to the referee, unless he is absent from the district or the division in which the petition is pending; (5) "the judge" may cause the trustee to proceed with the administration of the estate; and so on throughout the whole act wherever it is necessary to refer to the judge of the court of bankruptcy. Clearly, if it were intended that there should be more than one judge of the court of bankruptcy, reference would have been made to "any of the judges," or "the judges," rather than "the judge"; or, if it were the intention of Congress to confer jurisdiction in certain cases upon more than one judge, the statute would have read "the judge or judges."

The first alleged order made by the learned judge, appointing Birch a referee, was made at Montgomery, Ala., in the Middle judicial district, while the learned judge was presiding as judge of the court of that district, and while the judge of this court was presiding in the Northern district. In so far, therefore, as concerns the question here presented, it is immaterial whether there is one or two judges of the bankrupt court for the Northern district of Alabama. It may be admitted, then, for the purposes of this decision, that the court is composed of two judges, with equal jurisdiction and authority. As above stated, the territorial limits of the court of bankruptcy are strictly defined by the statute whenever reference is made thereto. The limits are also strictly defined with relation to the appointment of referees. Section 34 of the act of Congress relating to bankruptcy provides as follows:

"Sec. 34. Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction: (1) Appoint referees, * * * and may in their discretion, remove them because their services are not needed or for other cause."

It is evident, therefore, that the power to appoint is limited within the territorial limits of the court.

It is too plain to require argument that the "court" must appoint the referee, and not "the judge." This was admitted by the learned judge himself at the time he made the alleged order removing referee

Steele from office in November last. It was decided in the Steele Case, *supra*, that time and place is an essential element of all courts, and more especially is this the case where the territorial limits of the court are prescribed by statute, as is the case here. Can it be contended seriously that, while holding the court of the Middle district in Montgomery, the learned judge was, either in fact or in law, the court of bankruptcy for the Northern district? Says the court in *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570:

"A judge alone does not constitute a court. Proceedings at another time or place or in another manner than specified by law, though in the personal presence and under the direction of the judge, are *coram non jndice* and void."

In the case of *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448, it is held that:

"The proceedings of a court at a time and place other than that prescribed by law are void. It is not the act of a court at all."

See, also, on this point *White County Commissioners v. Gwin*, 136 Ind. 562, 36 N. E. 237, 242, 22 L. R. A. 402, and *In re Steele* (D. C.) 156 Fed. 853.

In the case of *People v. Village of Haverstraw*, 151 N. Y. 75, 45 N. E. 384, it was held, that:

"A court is a tribunal organized according to law and sitting at fixed times and places for the administration of justice not an individual holding a judicial office."

Again, the bankruptcy law (section 1, subd. 7) prescribes that "‘court’ shall mean the court of bankruptcy in which the proceedings are pending." Were the proceedings pending in the Northern district, where the judge of this court was holding at the time a regular term of this court, or were they pending in the Middle district? If they were pending in the Middle district, then the learned judge was holding two courts at one and the same time and in two different districts. By what statute, rule of law, or judicial decision can this be sustained or justified? I confess I have searched the books in vain for an answer. The conclusion, therefore, is inevitable that this order, or alleged order, complained of, was absolutely void. But it may be contended that the filing of this order, or alleged order, with the clerk of the court for the Northern district of Alabama on Sunday night gave life and legal effect thereto. The mere filing of a paper cannot add life or validity to a void and illegal act. To hold otherwise would be to clothe the clerk who filed it with judicial power.

I now come to the consideration of the further action of the learned judge in proceeding to the Government Building in the city of Birmingham on the morning of June 1st at about 8 o'clock, and signing and filing what purports to be an order of this court appointing Alex C. Birch a referee in bankruptcy, and specifying that his term of office shall begin on May 30th, two days preceding. An effort is made therein to ratify the first appointment, made in Montgomery, May 30th, and the filing of the same on Sunday night, May 31st. It is evident, from reading the order of June 1st, that an attempt is made

therein to relieve the order made by the learned judge on May 30th from an application of the rule of law settled and decided in the Steele Case, *supra*, and the many authorities cited herein. The act of the learned judge in seeking to make an order of this court on June 1st, while the judge of this court was at the time engaged in holding a term thereof in another division of this district, presents a strange and anomalous situation, as is shown by the records of this court and by the decision and opinion of the learned judge himself. On the 1st day of November, 1907, I appointed Nenian L. Steele, Esq., a referee in bankruptcy for the Southern division of the Northern district of Alabama, and on the 5th day of November, 1907, the learned judge had an order entered removing said Steele and revoking and annulling the former order made by me appointing him. At the time this order of removal and revocation was made the learned judge handed down a written opinion, in which he said:

"Where there are more district judges than one in a district, which is frequently the case, the majority of the judges constitute the court, and they alone have authority to speak for the court in the matter of the appointment of a permanent officer of the court, though, when one judge is absent and nothing is said in the minutes as to the wishes of the other, it is legally presumed that the order speaks the will of both. One judge cannot make an appointment unless he is the sole judge of the district. If there be another judge, as is the case here, where both are of equal authority and neither judge is an associate judge, one judge cannot, without the consent of the other judge properly make an appointment to which his colleague objects, and thus, in a collateral way, attack the authority of his colleague. The judge whose jurisdiction is thus attacked must by silence and inaction waive or abandon his jurisdiction in the district or defend it, and it seems to me that the most proper way to deal with the revoked order is to pursue the course which has been taken."

Regardless of the conclusions reached in this opinion, and applying—in this particular case, and only in so far as this particular case is concerned—that deliverance of the learned judge himself, if for no other reason, I am justified in revoking and annulling the alleged order or orders appointing Alex C. Birch a referee in bankruptcy of this court. Adopting the language of the learned judge expressed in that same opinion:

"Each judge must act upon his own convictions of the law. * * * No fault can be found with either in this respect."

With the exception of a short term of court held by me in the state of Florida, I have been almost continuously upon the bench in this district since my appointment and qualification on the 10th day of April, 1907. The learned judge has not held court a single day in this district during that time, nor has he tried a single case. His only presence in the district was to order the removal of Nenian L. Steele, Esq., a referee in bankruptcy appointed by me, as set forth above, and to attempt to make the appointment of Alex C. Birch as referee by entering the orders complained of in this petition. On assuming the duties of my office, I found the dockets of every division of my district greatly crowded, and, save in the Southern division, I have by persistent work succeeded in catching up with the business of the

court in all its branches. The business of the court of bankruptcy in the Southern division of this district is large and important. The referee in bankruptcy, under the bankruptcy law, may be a part of the court itself. In order, therefore, properly and promptly to dispose of this large amount of important business, it is absolutely essential that the referee should not be a person hostile or offensive in any way to the court. It is also essential to the orderly and speedy transaction of the business of the court that the orders made by me shall remain as made. If the learned judge can leave his district and court, and come into my district, as may suit his purpose or desire, and change, without my knowledge or consent, orders and rules in bankruptcy made by me, then the public business will be seriously disturbed; and I cannot and shall not sit by idly and permit such things to be done, when my attention is directed thereto in due form. If the learned judge is permitted by me to come within my district and make an order, which requires one-half of the bankruptcy cases to be referred by the clerk of my court to such person as may suit his fancy, and that, too, even when I am in the division, which order is in direct conflict with the very letter of section 18 of the bankruptcy law, then I must confess myself utterly impotent to discharge the duties which the law imposes upon me. Whether the learned judge is a judge of this district or not is immaterial. At least, while I am within the district and he is without the district, my decrees and orders are supreme, subject only to review by an appellate court, and the law confers upon me the power to set aside any orders in bankruptcy made by him, whether they are valid or void.

The clerk will enter the order I now file upon the minutes of this court, and he must proceed without delay to refer all such matters as are designated by the order to Nenian L. Steele, Esq., the referee in bankruptcy of this court for the Southern division of the Northern district of Alabama, except when I am within this division, when the same will be referred by me, as provided by section 18 of the act of Congress establishing a uniform system of bankruptcy throughout the United States.

The order made by the learned judge, seeking to appoint Alex C. Birch a referee in bankruptcy for this court, was improvidently made, and the same is set aside and annulled, as being without authority of law and absolutely void.

In re HATEM.

(District Court, E. D. North Carolina. March 26, 1908.)

1. BANKRUPTCY—ALLOWANCE OF CLAIMS—RIGHT OF CREDITOR TO OBJECT—
“PARTY IN INTEREST.”

An unsecured creditor of a bankrupt is a “party in interest,” within the meaning of Bankr. Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), and may, as well as the trustee, object to the allowance of a claim of another unsecured creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 526. For other definitions, see Words and Phrases, vol. 4, pp. 3702, 3706.]

2. SAME—FINDINGS OF REFEREE—REVIEW.

The finding of a referee in bankruptcy as to the validity of a claim, where it depends on questions of fact and the credibility of witnesses examined before him, will not be overruled by the court, except on convincing proof that he was wrong in his conclusions.

In Bankruptcy. On review of rulings of referee.

W. O. Howard and J. F. Lyles, for petitioning creditors.

PURNELL, District Judge. On the petition of creditors, B. Hatem was adjudicated a bankrupt on the 26th day of December, 1907, and January 7, 1908, fixed as the day for the first meeting of creditors. Joseph Hatem proved or filed a claim for \$3,000, evidenced by three promissory notes of \$1,000 each, two bearing date as of January 19, 1907, and the other October 7, 1907, and sworn to on one of the prescribed forms for the proof of an unsecured debt. The proof of this debt by Joseph Hatem was objected to on several grounds in a paper writing, not verified, signed by W. O. Howard and J. F. Lyles, attorneys for petitioning creditors. After argument the referee finds “that the accounts of Joseph Hatem are not true, and that he is not entitled to any part of the estate of B. Hatem,” and therefore expunges same from the list of claims proved. From this ruling the bankrupt and Joseph Hatem appeal to the district judge.

The only question argued here is, “Can an unsecured creditor object to the proof of claim by another unsecured creditor?” there being a receiver and a trustee in bankruptcy, and it not being shown the trustee has been applied to and refused to act. The general doctrine is that, where there is a trustee, *cestuis que trust* must act through or by the trustee, and when they assume to act in *propria personæ* they must show the trustee has, upon application duly made to him, refused to act. This is not “new” law, but old, well-settled law. It has been so held time out of memory. Where a trustee or any creditor shall desire the examination of a claim filed against the bankrupt estate, he may apply by petition to the referee for an order for such examination. Where a trustee has been appointed, he must file the petition for re-examination of a creditor’s claim, and not another creditor. Loveland, p. 342, § 140; *In re Lewensohn*, 121 Fed. 538, 57 C. C. A. 600.

But does this rule obtain in bankruptcy? Is there not a statutory provision to the contrary? Section 57d (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) provides:

"Allowance of Claims.—Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest," etc.

True, the trustee is a party in interest; but this provision for objection to their allowance by parties in interest clearly indicates the purpose of Congress to abrogate the rule as to proceedings in bankruptcy, and provide for objections being made by parties in interest, other creditors. As before said, this was the only exception argued on the appeal from the referee, and this exception is overruled.

As to the finding of fact, the court would be loath to overrule the decision of a referee who has heard the witnesses testify, looked into their eyes, and observed their deportment on the stand, especially in a matter like this, largely local, and will not do so, except on convincing proof that the referee is wrong in his conclusions. No proof was offered to this effect on the hearing. It is not every man who testifies—takes an oath to tell the truth, the whole truth, and nothing but the truth—who observes his oath, or tells any part of the truth. Lying is easy to a man so disposed, and it is the part of attorneys by cross-examination to expose untruthfulness and of a judicial officer to note the exposure. The bankrupt and claimant both testified as to this pretended indebtedness. They produced notes signed by the one and held by the other. There may be some prejudice against them because they are Syrians; but there was evidence on the face of the notes that, notwithstanding they have different dates, they were written at the same sitting, with the same ink, and were fraudulent. The referee did not believe either the bankrupt or claimant, and no evidence has been produced which tends to satisfy this court the referee was wrong in not believing them.

The decision of the referee that the account of Joseph Hatem is not true, and that he is not entitled to any part of the estate of B. Hatem, and therefore expunges same from the list of claims filed, is therefore affirmed.

CONKLIN et al. v. R. P. & J. H. STAATS CO.

(Circuit Court of Appeals, Third Circuit. May 18, 1908.)

No. 24.

WHARVES—SUNKEN PILES—INJURY TO SCOW AT UNFINISHED PIER—NEGLIGENCE OF CONTRACTOR.

Respondent, as contractor, was constructing the piers of a steamship company at Hoboken to replace others which had burned, and had contracted with libelant to furnish crushed stone delivered on scows. The new piers were not in the same place as the old, and respondent had removed all stubs of the old piles extending above low water, while an independent contractor had dredged the bottom, and supposedly removed all those below. By agreement libelant left scows loaded with stone which was to be used by respondent during the winter, and respondent caused one of them to be removed from one side of a slip to the other, and there tied up to one of the new piers, where others were also made fast. A strong wind from the west caused an unusual fall of the tide, and as such scow settled she was pierced by the stub of an old pile and injured. The place alongside the pier had been used during the work with safety, and respondent had caused it to be dragged for obstructions. *Held*, that the liability of respondent was not that of a wharf owner, the piers being unfinished and not in commercial use, but that its duty was only to exercise due care, and that under the facts shown it did not fail in such duty and was not liable for the injury, which was chargeable to an accident not reasonably to be anticipated.

Appeal from the District Court of the United States for the District of New Jersey.

For opinion below, see 155 Fed. 818.

Walter L. McDermott, for appellants.

Robert E. Hudspeth and Merritt Lane, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the appellants, Conklin and others, filed a libel against the R. P. & J. H. Staats Company, a corporation, to recover damages to their scow Sarah. On final hearing the court dismissed the libel. Its opinion is reported in 155 Fed. 818, where the facts are fully stated. Thereupon the libelant took this appeal.

The Staats Company was engaged in rebuilding piers of the North German Company at Hoboken, which had been destroyed by fire. It was a large undertaking, and took six years, from 1900 onward, for its completion. The fire destroyed the superstructure and left the stumps of piles standing. Such piles as showed above water were removed by the Staats Company, but the dredging and removal of the stumps below low water was done by a third company. The piers were relocated and were being constructed by the Staats Company at the time of the injury complained of. In such reconstruction they had been for some time furnished by the libelant with scow loads of broken stone. On December 13, 1901, the Staats Company wrote libelant as follows:

"Confirming our conversation to-day with reference to the delivery to us of several scow loads of broken stone for use in our work at Hoboken during

the winter, we understand that you will send us five scow loads of such stone, containing about 3,000 cubic yards in all, and will deliver the same alongside the North German Lloyd docks at Hoboken within the next few days, allowing them to remain there during the winter months; also that we may use the stone from these scows as occasion requires, without charge for demurrage to us until such time as a scow is taken from the lot for our use, and demurrage shall only accrue on that scow after sufficient time has elapsed in which to unload the scow at a minimum rate of 75 yards per day (Sundays and holidays excepted). The scows while lying in the slip to be solely at your risk, and you will provide such men as may be needed to look after them, and when a scow shall have been unloaded by us you will remove it from the premises."

In accordance therewith the Sarah, with four other scows laden with stone, was towed to the north side of pier No. 2 on December 29, 1901, where she lay until January 3, 1902, when the Staats Company desired her space to bring in a barge of other material, and requested the tug of the North German Lloyd Company, which did the towing for all parties, to remove her. During this interval the scows were treated as undelivered, for two of them were removed by libelants and others substituted for them without consulting the Staats Company, and there was no proof to show that in requesting the removal of the Sarah the Staats Company directed at what point she should be moored, or accepted her in any such way as under the foregoing letter thereafter subjected itself to demurrage. The tug moved the scow to the south side of pier No. 1, where she was tied by the scow's crew. The tide was then ebbing rapidly, aided by a strong westerly wind, which had been blowing for two days, and which caused the tide at the time of the accident to drop from 18 to 24 inches lower than usual. Pier No. 1 was then being constructed by the Staats Company. On its south side and at some distance therefrom there was piling extending parallel to the pier and through an opening in which the scow, as well as other craft, were warped to moor along the pier. What followed is stated in this extract from the opinion of the court below:

"The scow was moored on the south side of pier 1, breast off five feet, and was tied with two breast and two spring lines. The tide was ebbing rapidly, aided by a strong westerly wind, which had been blowing for two days, and which had caused the tide at the time of the accident to fall from 18 inches to 2 feet lower than usual. After the scow had laid at her mooring about three-quarters of an hour, she began to list away from the pier. Her captain sounded the water around her with a 16-foot pole, to see if the water were shallow; but he found no bottom. He then went down into the hold and heard water beginning to trickle slowly in. While he waited on the scow a pile broke through her bottom, and she careened over gradually to the port side. He then went up the pier to look for help, and when he came back, a few minutes later, the scow lay bottom up, with one corner on the pier and the other in the water. He tried to ease up the lines to see if she would slide off, but she did not. While she lay there, the watchman says he saw a jagged hole in her bottom, 16 or 17 inches wide by about 2 feet in length. The hole was about one-third of her length from the bow, and about 2 feet from her starboard side, which had lain next to the pier. Subsequent examination of the scow at a dry dock, to which she was taken for repairs, showed that the injury to her was in all probability caused by her bottom coming in contact with a sunken pile, which, owing to the weight of her load, was forced through and rammed up in her hold as far as it could go, about 9 feet, and then, when the scow capsized by the spilling of its load, was broken off, and a piece thereof, about 8 feet in length, left in her hold in a reclining posi-

tion between the stanchions and cross-pieces. The portion of the pile found in the scow was a little less than 15 inches in diameter, about 9 feet long, and was in good condition, although it had a few barnacles on it. At one end appeared what is called a 'battered break,' as though a heavy weight had rested on it. This break had an old appearance, while at the other end was a new and longer break. It is apparent from the evidence that the accident happened by reason of the fact that the scow had been moored over a hidden pile: but how or when the pile came there is not disclosed."

Assuming, for present purposes, the responsibility of mooring the scow is on the Staats Company, is it responsible for the damage it suffered? Of the duty of wharf owners to "exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths," there is no question. *Smith v. Burnett*, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756. But we think the standard of duty owing by the Staats Company was, under the circumstances, not exactly that required of a wharf owner in the usual course. This wharf was not in commercial use. It was unfinished. It and its surroundings were being used for construction purposes. A great fire had occurred. Piles were burned to the water's edge. Others below the surface had been dredged for. The location of the piers had been changed. All these were elements of danger, which were incident to this reconstruction work, and to which any one who used his craft in participating in such work would expect to subject them. When, for his own profit, the owner of such craft saw fit to use his vessels in forwarding such reconstruction, it is manifest he could not expect from the builder who was reconstructing the same measure of safety he could from one whose wharf was finished and held out as a safe place in which to moor. Clearly the obligation of the Staats Company to the libelant was simply one of due care under the circumstances. That the Staats Company was not guilty of willful lack of care is clear. A competent dredge company had dredged the site of this pier, and for from 25 to 40 feet along its sides, to the depth of 25 feet. Third parties, as well as the Staats Company, were using their boats in about these piers, and the latter subjected libelant's boats to no greater risks than its own. There was nothing to suggest to the Staats Company as prudent and careful men the existence of this submerged pile. The place had been dredged by a competent dredging company in a manner to give reasonable assurance that it was clear of such obstructions. In the hidden nature of such unknown obstructions there could be no absolute assurance of their nonexistence. The failure of an experienced dredging company to find them in going over the ground by sections, and then going over it in the same way in return, was well calculated to reasonably assure both the Staats Company and the libelant that the bottom was free from piles. In addition to the test of actual dredging to which the ground was thus subjected, drag tests of the ground certainly to a depth of 10 feet had been made. While the low water that caused the accident was not of such character to be classed as extraordinary, yet it certainly was out of the usual stage. The conditions and dangers incident to this work would naturally challenge the notice of the libelant as forcibly as they would that of the Staats Company, and in the nature of things

they could not expect that the Staats Company could or would be expected to provide them wharfage, hedged and safeguarded by the same standards the law would exact from a regular wharfinger; for the work of the Staats Company was in effect notice that the wharf was not a finished one or in shape for general commercial use. All these are elements to be considered in determining whether, under the circumstances in which libellant and the Staats Company were placed, there was an absence of due care on the part of the latter toward the libellant.

We find no such lack of care, but the mishap was evidently one of those accidents that occur by an unavoidable combination of unanticipated factors, and which the care called for by the circumstances did not prevent. The court below has found the Staats Company was not negligent. The Supreme Court of New Jersey in a trial of this controversy was of the same opinion, and nonsuited the plaintiff, and its judgment was affirmed by the Court of Errors and Appeals. *Conklin v. Staats*, 70 N. J. Law, 771, 59 Atl. 144. While those decisions are not binding, they are persuasive, and support the conclusion we have reached.

The decree of the court below is affirmed.

In re FAULKNER.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1908.)

No. 87.

BANKRUPTCY—PROOF OF CLAIM—SUFFICIENCY OF PROOF—AMENDMENT AFTER EXPIRATION OF YEAR.

Within a year after an adjudication in bankruptcy a creditor filed a paper, denominated an "application for sale of collateral," with the referee. Such paper was signed and sworn to, and set out certain notes given by the bankrupt to the creditor, alleged that they were due and unpaid, and also described certain securities given as collateral to such notes, and asked an order for their sale, which was granted. An order was subsequently made confirming the sale and applying the proceeds upon the notes. *Held* that, as such paper contained all the statements essential to a proof of claim, it was amendable after the expiration of the year for filing claims, when the amount due on the claims was ascertained by the sale of the collateral, and that, as so amended, the creditor was entitled to have it considered as his proof of claim for the balance due him.

Philips, District Judge, dissenting.

Petition to Revise Proceedings of the District Court of the United States for the District of Kansas, in Bankruptcy.

The question involved in this petition to revise is whether two certain claims of the petitioner, Faulkner, against the estate of Charles J. Devlin, bankrupt, should have been allowed and permitted to participate in the assets of the estate of the bankrupt. The referee and the judge of the District Court for the District of Kansas ruled adversely to the petitioner, and that is the ruling we are asked to revise. Devlin was adjudicated a bankrupt on July 7, 1905, and some efforts followed to secure a settlement with his creditors. These efforts proved ineffectual, and shortly before the year expired after the date of the adjudication within which claims could be proven against the estate

(Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), on June 20, 1906, the petitioner filed with the referee a paper, signed and sworn to by him, as follows:

"Application for sale of Collateral. Now comes E. O. Faulkner, and shows to this court that he is the holder of two certain obligations, one of seventy-five hundred dollars (\$7,500) indorsed by C. J. Devlin, of which a copy is hereto attached, with all indorsements thereon and made a part of this application, and which obligation was duly protested and C. J. Devlin held as an indorser thereon. Under the terms of the said obligation, marked 'Exhibit A,' the applicant was to receive \$7,500, payable February 17, 1906, with 7 per cent. interest payable semiannually. The said obligation was personally delivered by the said C. J. Devlin to this applicant, and at the time of the delivery the said Devlin, as collateral security for the said obligation, turned over to this applicant and placed in his possession 10 first mortgage gold bonds of the Marquette Third Vein Coal Company, being bonds 177 to 186, inclusive, upon which there were attached and still remain the coupons of July 1, 1905, and all subsequent coupons. Said bonds draw interest at 5 per cent. annually. This applicant has received no money from the said Marquette Third Vein Coal Company, J. S. Wylie, or from the said C. J. Devlin in payment of the said obligation marked 'Exhibit A,' and the same is wholly due and unpaid; nor has any interest been paid upon the said bonds. Applicant further says that the said obligation for which the said collateral was pledged was for an actual loan of money in the ordinary course of business, and was in all respects bona fide, and the deposit of the said collateral was made at a time when your petitioner had no reason to believe and did not believe that the said coal company or the said C. J. Devlin were insolvent, if, indeed, they were at that time. Your petitioner further says that at Topeka, Kan., on June 14, 1904, the bankrupt C. J. Devlin, made, executed, and delivered to him his own certain promissory note in the sum of twenty-five hundred dollars (\$2,500), a copy of which is hereto attached, marked 'Exhibit B,' and made a part hereof. At the time of the delivery of the said note to the applicant as collateral security for the payment of said note certificate No. 449 of the Bank of Topeka, Kan., representing 25 shares in said bank, of the par value of \$2,500, and also as further collateral certificate No. 278 of the First National Bank, Topeka, Kan., representing 5 shares in said bank, of the par value of \$100 each. Nothing has been paid upon the said promissory note marked 'Exhibit B,' and the same is wholly due and unpaid, and the applicant says that the said obligation marked 'Exhibit B' was for a sum of money actually loaned in the ordinary course of business, which was in all respects bona fide, and the deposit of the said collateral was made at a time when the applicant had no reason to believe and did not believe that the said Devlin was insolvent, if, indeed, he was at that time. The applicant further says that the value of the said Marquette Third Vein Coal Company bonds are 90 per cent. flat. The market value of the bank stock of the Bank of Topeka is worth 100 cents on the dollar or upwards. The bank stock of the First National Bank of Topeka is of unknown market value to this applicant. The applicant asks that he be given permission to sell the foregoing collateral at public sale under reasonable terms and conditions to the party who will pay the highest cash price therefor, and that if the proceeds of the sale exceed in amount the sum due on the said obligations that such surplus be applied to the payment of other obligations held by this applicant against C. J. Devlin, but which do not appear in the foregoing application, and your petitioner asks for such other relief as he may be entitled to in law."

On July 5, 1906, the referee made a finding and order, the concluding parts of which are as follows:

"(3) There is due to the said Faulkner from the said Devlin the following sums: \$7,500, with interest at 7 per cent. from February 17, 1905, and \$2,500, with interest at 7 per cent. from June 14, 1904. As a conclusion of law the referee finds that the said Faulkner is entitled to sell said collateral in payment of the obligations of the said Devlin. It is therefore ordered that E. O. Faulkner has permission to sell said collateral at a price not less than three-fourths of the value as above fixed, and apply the same upon the said indebtedness. It is further ordered that the said sales take place at the front

door of the Central National Bank of Topeka, Kan., upon Saturday, July 14, 1906, at 11 o'clock a. m., and that report be made of said sale for the purpose of confirmation and distribution of the funds, and that when said sale is confirmed the title to the said collateral so sold shall pass to the purchaser."

Pursuant to the terms of the order the collateral was sold for the aggregate sum of \$7,700, and a report of sale was made to the referee. On July 18, 1906, the sale was confirmed by the referee, and \$7,600 out of the proceeds were ordered to be credited upon the note of \$7,500 and interest, and \$100 were ordered to be credited upon the note of \$2,500. Afterwards, and on the same day, the petitioner filed with the referee his three affidavits, one of which is as follows: "At Topeka, in the county of Shawnee and state of Kansas, came E. O. Faulkner, of said county and state, and made oath and said: That the said Chas. J. Devlin, the above-named bankrupt, at and before the filing of the petition in said matter, was and still is justly indebted to the said deponent in the sum of seventy-five hundred dollars. That the consideration of said debt is as follows: Borrowed money drawing 7 per cent. interest from February 17, 1905, as shown by a note of which a copy is hereunto attached, marked 'A,' and made a part thereof. Judgment has been rendered thereon in this court. That no part of said debt has been paid, except by sale of collateral as hereinafter set forth, leaving due July 5, 1906, \$625, for which said sum, or any part thereof, this deponent says that he has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of satisfaction or security whatsoever, except as hereinafter set forth by the sale of said collateral."

There was another affidavit of like general tenor relating to the \$2,500 note and disclosing a balance due the petitioner thereon of \$2,660. The third affidavit so filed detailed the proceedings already referred to by which the collateral had been sold and the proceeds applied upon the notes, and, after setting forth the efforts made by creditors to bring about a settlement with the bankrupt, continues thus: "That affiant took no steps concerning his claim and collateral, expecting that some plan might be devised by the said creditors' committee to carry out the result they sought"—and he then prayed "that this application may be considered as amendatory and supplemental to his claim filed July 5, 1905, and that the residue of said claim against the estate of said C. J. Devlin be liquidated and allowed as above set forth." It further appeared in the affidavit that the bankrupt had died since the adjudication, and that no discharge had been granted to him, and no dividend declared in the estate.

The trustees objected to the allowance of the balance due the petitioner upon the claims, and moved to expunge them, for the reason that they were not filed within one year from the date of the adjudication. The referee sustained the motion of the trustees and made an order disallowing the claims, and the district judge, on a petition for review before him, approved his action and made an order accordingly.

Eugene F. Ware (Ralph Nelson and E. H. Ware, on the brief) for petitioner.

John S. Dean and A. A. Hurd, for respondent.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). Section 57 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561, [U. S. Comp. St. 1901, p. 3444]) provides that:

"Proof of claims shall consist of a statement under oath in writing signed by a creditor setting forth the claim, the consideration therefor and whether any and if so what securities are held therefor and whether any and if so what payments have been made thereon and that the sum claimed is justly owing from the bankrupt to the creditor."

It matters not what the paper filed with the referee on July 5, 1905, was styled. Scrutiny of it discloses that it contained every essential statement required by section 57 to constitute proof of a claim, and fully and accurately informed the court of the amount of petitioner's claims and the securities held for their payment. The referee by his order made a finding of the exact sums due the petitioner, as well as the amount of interest thereon, and ordered the collateral sold and the proceeds to be applied on "said indebtedness," and that report of sale be made to him for confirmation. All this was done within the year following the date of the adjudication, and it cannot be denied that it constituted a complete scheme by the execution of which the balance due the petitioner after application of the proceeds of sale of the collateral could be ascertained from the court records. No further act on the part of the petitioner was necessary to definitely fix the balance due him. Notwithstanding this, however, he, after the year expired, out of abundant precaution made a résumé of the proceedings taken and the result thereof, and definitely stated the same, and formally asked for an allowance of the balance so found to be due him, in order that he might participate pro rata with other unsecured creditors in the assets of the bankrupt's estate. This was denied, and his claim was expunged. We think this was wrong. The limitation of time within which proofs of claim should be made must necessarily be observed. Such disposition of bankruptcy cases that creditors may expeditiously realize what they may is important and necessary; but the substance of things, and not the forms merely, should be observed. Bankruptcy proceedings are equitable in their nature, and should be as far as possible conducted on broad lines to accomplish the ultimate purpose of distributing the assets of a bankrupt pro rata among his creditors. *Atchison, T. & S. F. Ry. Co. v. Hurley*, 82 C. C. A. 453, 153 Fed. 503, 508.

In this case everything necessary to determine the balance due the petitioner was done before the year expired within which proof of claims could be made. All the statements required by section 57 had been made, the debt had been judicially determined and stated, the collateral had been ascertained, an upset price fixed, a sale ordered, and provision had been made for the application of the proceeds of sale to the satisfaction of the debt pro tanto. The working out of this scheme necessarily and accurately resulted in the amount due the petitioner. "*Id certum est quod certum reddi potest.*" Assuming, however, but not deciding, that the proceedings taken and orders made did not constitute technical proof of petitioner's claims within the year, as required by section 57, we have no doubt they constituted such substantial showing of it as warranted the amendment of the original proof of claim as made by the petitioner in his affidavits filed July 18, 1906. *Love-land on Bankruptcy* (3d Ed.) § 92, where many supporting authorities are cited, lays down as an accepted principle that the courts should be liberal in awarding amendments to subserve the ends of justice, and says that:

"An amendment may be allowed at any stage in the proceedings as justice may require."

This court held, in *Re Plymouth Cordage Co.*, 68 C. C. A. 434, 135 Fed. 1000, that the fact that the petition contained no averment that the alleged bankrupt was not a wage earner or farmer is remediable by amendment, and in *Taft Co. v. Century Savings Bank*, 72 C. C. A. 671, 141 Fed. 369, 372, that even jurisdictional facts may be supplied by an amendment of the petition after an appeal to this court. The Court of Appeals for the Second Circuit, in *Re Roeber*, 62 C. C. A. 122, 127 Fed. 122, held that a petition filed within a year after adjudication, containing averments that there was due and owing to the petitioner a certain sum of money for the payment of which a certain fund then in court was security, which was obviously intended to secure an appropriation of that fund only, contained the substance of a proof of claim, which was amendable after the year expired, although the petition as filed was not sworn to by the claimant and was otherwise technically defective. Judge Lacombe, speaking for the court, said:

"Bankruptcy courts have the usual power of courts of justice, upon motion and for good cause, to allow amendments. All parties were advised of the claim within the year. There is no dispute that the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice, and within a legitimate exercise of the power of amendment, under the authorities."

In *Buckingham v. Estes*, 63 C. C. A. 20, 128 Fed. 584, the Court of Appeals for the Sixth Circuit considered a case where a petition had been filed within a year after the adjudication of bankruptcy to establish a resulting trust in some land standing in the name of the bankrupt, and also for an accounting concerning rents received by him. The case resulted in a decree as prayed for, but the rents were not ascertained until after the year expired when proof was made in usual form. Objection was made to its allowance on the ground that the proof was made too late, but the court held that the original petition stated the substance of a claim, and that it was amendable after the year expired, when the amount actually due had been ascertained. Judge Lurton, speaking for the court, said:

"It would be a narrow construction of sections 57 and 57n which would not regard a claim so presented and litigated in a bankrupt proceeding as 'proven' within the limitation of the section. A claim 'proven' within the year is amendable after the lapse of the year, and the court below probably regarded her petition as a 'statement under oath, in writing, signed by a creditor, setting forth the claim,' etc., and therefore subject to amendment, to comply with the further formalities of section 57. In this the court did not err."

Hutchison v. Otis, 190 U. S. 552, 555, 23 Sup. Ct. 778, 47 L. Ed. 1179, is cited.

None of the cases, *supra*, presented so complete a proof of debt, such an accurate compliance with the requirements of section 57 within the permissible year, as is disclosed by the record in this case. Both reason and authority we think unite in favor of permitting Faulkner to make formal proof of the balance due him as undertaken by him. The learned district judge erred in not permitting him to do so. Accordingly the orders of the referee disallowing the claims, and the order of the district judge made on September 16, 1907, approving and con-

firming the orders of the referee, must be set aside, with directions given to the bankruptcy court to consider the amended claims as made, and, if found valid, to allow them.

It is so ordered.

PHILIPS, District Judge, dissents.

SWAN et al. v. WILEY, HARKER & CAMP CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 159.

SHIPPING—CHARTER PARTY—DEMURRAGE.

Under a charter party requiring the charterer to discharge the vessel at New York with "customary dispatch" the lay days for discharging began to run when the vessel reached the berth designated by the charterer, although she was obliged to wait her turn to enter, there being no proof of any custom of the port to require her to wait her turn or that the charterer should be allowed any particular time in case the berth was full.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 582.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of New York.

Hyland & Zabriskie (Nelson Zabriskie, of counsel), for appellants.

Wing, Putman & Burlingham (James Forrester, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a libel for demurrage by the owners of the barkentine *Herbert Fuller* against the charterers. The charter party, made between the master of the first part and the charterers of the second part, contains the following clause:

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the vessel is ready to receive or discharge cargo. For loading, thirty-five thousand feet per day, Sundays and holidays excepted and customary dispatch discharging, and that for each and every day's detention by default of the said party of the second part or agent \$69.70/100 dollars per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent."

We are saved the necessity of inquiring what is customary dispatch in discharging by the admission in the answer that it is at the rate of 35,000 feet per day, which would make the time for discharging, having reference to the amount of lumber carried, 15½ days. Nothing is said about excepting Sundays and holidays, but the parties appear to have acted on the theory that they should be excepted during the running of the lay days. The effect of the provision in the charter party is that the charterer agrees to receive the cargo as delivered within reach of the vessel's tackles within the period of 15½ days, and

that he will pay demurrage day by day for any delay beyond that time, caused by his own default. Carver on Carriage of Goods by Sea, § 608.

The first question is, when was the vessel ready to discharge cargo so that the lay days began to run? Was it on March 10th, when she was ready to go into her berth had it been clear, as the libellant contends, or March 14th, when she actually did get in, as the respondents claim? March 8th the vessel arrived at Red Hook, reported, and was ordered to a slip at 149th street, Harlem. She proceeded the next day to that place, but was obliged to lie outside another vessel at the bulkhead until March 14th before she could get into her berth. Although the vessel only undertook to deliver at the port of New York, no particular place being named, still it was her duty to discharge at such a berth as the charterer might designate. It was likewise the duty of the charterer to name a proper berth—that is, one into which she could get—and, if delay was caused by its not doing so, the loss should fall upon it. No custom was proved that a vessel should wait her turn if the berth were full, or that any particular time should be allowed the charterer in that case, and the weight of testimony on that subject is against the existence of any such custom. For these reasons we think the lay days began to run March 10th.

The charterer was entitled to 15½ days, Sundays and holidays, upon the apparent understanding of the parties, being excepted, before incurring any liability for demurrage. The District Judge found that the discharge was delayed during the running of the lay days by the blocking of the wharf, but held that the vessel was not at fault on this account, so that no further consideration need be given the subject. In addition to the exception of Sundays and holidays, he gave the charterer the benefit of time lost by bad weather (although nothing was written or said about such exception) five days in all, making the lay days terminate in the first half of March 31st. From that time the charterers' liability for demurrage began. The discharge continued uninterrupted either by bad weather or by blocking of the wharf until April 8th, and the libellant was rightly awarded demurrage for each of these days.

The decree is affirmed, with interest and costs.

ANDERSON v. NEWHALL.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 146.

1. CUSTOMS DUTIES—BAY RUM—PORTO RICO.

Foraker Act April 12, 1900, c. 191, § 3, 31 Stat. 77, authorized, on articles from Porto Rico, coming into the United States, the imposition of a tax equal to the internal revenue tax imposed in the United States "upon the like articles of merchandise of domestic manufacture." *Held as to* Porto Rican bay rum that, as there is no internal revenue tax, *eo nomine*, upon domestic bay rum, it is not subject to this provision, notwithstanding that a tax is provided for "distilled spirits."

2. SAME—"DISTILLED SPIRITS"—BAY RUM.

Bay rum is not within the enumeration of "distilled spirits," defined in section 3248, Rev. St. (U. S. Comp. St. 1901, p. 2107), as "ethyl alcohol, * * * including all dilutions and mixtures of this substance."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2129, 2130.]

In Error to the Circuit Court of the United States for the Southern District of New York.

These proceedings were brought in behalf of Charles W. Anderson, United States internal revenue collector for the Second district of New York, plaintiff in error and defendant below, against E. Harold Newhall, defendant in error and plaintiff below. The case involves the following provisions of law:

"That on and after the passage of this act, all merchandise coming into the United States from Porto Rico * * * shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied * * * upon like articles of merchandise imported from foreign countries; and in addition thereto, upon articles of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." Extract from Foraker Act April 12, 1900, c. 191, § 3, 31 Stat. 77.

"Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, * * * including all dilutions and mixtures of this substance." Extract from section 3248, Rev. St. (U. S. Comp. St. 1901, p. 2107).

"There shall be levied and collected on all distilled spirits on which the tax prescribed by law has been paid, a tax of seventy cents on each proof gallon." Extract from section 3251, Rev. St. (U. S. Comp. St. 1901, p. 2108).

"All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits." Section 3254, Rev. St. (U. S. Comp. St. 1901, p. 2111).

The opinion filed by the court below reads as follows:

HOUGH, District Judge. It is provided by the act of April 12, 1900, c. 191, § 3, 31 Stat. 77, commonly known as the "Foraker Bill," that "upon articles of merchandise of Porto Rican manufacture [there shall be assessed] a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." The plaintiff, having imported from Porto Rico certain bay rum, has been compelled, after due protest, to pay a tax, not upon the bay rum, but upon the alcohol therein contained, the Treasury Department holding that, while no "internal revenue tax is imposed on bay rum as such, a tax is imposed upon the spirits therein contained." Int. Rev. Dec. 404, of 1901. The statutes imposing the tax here in question are asserted to be Rev. St. § 3248 (U. S. Comp. St. 1901, p. 2107), and section 48 of chapter 349 of Act Aug. 27, 1894, 28 Stat. 563 (U. S. Comp. St. 1901, p. 2109), amending Rev. St. § 3251 (U. S. Comp. St. 1901, p. 2108). It being admitted that there is no internal revenue tax upon bay rum as such, and that bay rum is an article of merchandise, and also a manufactured article of merchandise, it appears to me that the plain language of the Foraker bill requires a direction in favor of the plaintiff.

The act first above quoted from is the last statute on the subject, and what it plainly requires must be observed. It may be true that it was the purpose of that act to produce equality between American and Porto Rican producers; but, if apt words have not been used for that purpose, the assumed existence of the purpose furnishes no reason for straining the meaning of the words that were employed. The words are to be taken not only in their plain, but in their commercial, meaning; and it is not to be doubted that when a merchant speaks of bay rum he means a thing which is commercially wholly different from the "distilled spirits, spirits, alcohol and alcoholic spirits" attempted to be defined by Rev. St. § 3248. It follows that as there is no in-

ternal revenue in the United States upon bay rum as "bay rum," there is no tax upon the like article when of Porto Rican manufacture, and imported into the United States from that island.

Turning to the contention of the defendant, I cannot agree that bay rum is either a dilution or a mixture of distilled spirits, within the meaning of section 3248. If it is, it would follow that a long list of other articles commercially known by distinctive names should be regarded as "mixtures" of distilled spirits because liquor in some form is found in them.

As to section 3251 as amended, the operative words are that "there shall be levied * * * on distilled spirits that * * * may be * * * produced in the United States" a certain tax. It is certainly straining this statute to make it applicable to the alcohol in Porto Rican bay rum. It is fully satisfied by considering as taxable the article commercially known as "distilled spirits" which may be produced by any process from, for example, bay rum. It is no answer to say, as has been asserted by the commissioner of internal revenue, that the discovery of such practices would be "obviously difficult and in many cases impossible." The question is not whether discovery of unlawful transactions is difficult, but what is the law. It is sufficient to add that I entirely agree with the remarks of Thomas, J., in *Newhall v. Jordan* (C. C.) 149 Fed. 586, E. D. N. Y., opinion filed December 6, 1906.

Verdict is directed for the plaintiff in the sum of \$506.22, with interest thereon from May 8, 1906, to May 21, 1907.

Winfred T. Denison, Asst. U. S. Atty. (Francis W. Bird, Asst. U. S. Atty., on the brief), for plaintiff in error.

John David Lannon, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The sole question presented by this writ of error is whether bay rum manufactured in Porto Rico and imported from that island, in April, 1906, was liable to taxation as distilled spirits under the provisions of section 3 of the Foraker Act (Act April 12, 1890, c. 191, 31 Stat. 77), taken in connection with sections 3248, 3251, and 3254 of the United States Revised Statutes.

The Foraker act provides that "articles of merchandise of Porto Rican manufacture" coming into the United States and withdrawn for consumption or sale shall be subject to "a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." It would seem that under this provision of the law the duty of the internal revenue collector was plain, namely, to ascertain what tax was imposed on domestic bay rum, and, if none were imposed, permit the Porto Rican bay rum to be withdrawn free of tax. Instead of doing so, the collector ascertained the constituent ingredients of the importation, found that alcohol predominated, and imposed a tax thereon as "distilled spirits." It is conceded that bay rum is an old and well-known article of commerce used exclusively as a toilet preparation, wash, or cosmetic, and is never sold or used as a beverage. It is also conceded that there is no internal revenue tax, eo nomine, upon bay rum of domestic manufacture. No fraud is charged or suggested regarding the importation in controversy, which was brought here to be used as bay rum has always been used—as a cosmetic or toilet water.

The fact that the alcohol in the bay rum may be used for other purposes, if true, would not justify a construction of the law which is

plainly antagonistic to its express provisions. We think, however, that the contention that distilled spirits imported from Porto Rico may evade the tax under the guise of bay rum, is more apparent than real. It is true that by an elaborate process the alcohol may be separated from the other ingredients composing bay rum, but there is testimony that it retains the odor of bay, and cannot be used as ordinary alcohol is used.

Again, the segregating process involves redistillation, which would subject the product to the internal revenue tax, if not to forfeiture. If the law is to be strained to cover all articles from which alcohol may be obtained by distillation, it would be a hazardous undertaking to import molasses from Porto Rico—rum being a distilled spirit made from fermented molasses.

As is pointed out in the brief for defendant in error—"The remedy for fraudulently distilling alcohol from bay rum is the identical remedy for fraudulently distilling it from rye, corn, molasses or anything—it is the criminal prosecution of the alleged distiller." It is unnecessary to pursue the subject further, as it was discussed in all its aspects in the opinion delivered in the case of *Newhall v. Jordan*, 149 Fed. 586, which was approved and followed by the judge of the Circuit Court in the case at bar.

The judgment is affirmed.

THE BENCLIFF.

(Circuit Court of Appeals, Third Circuit. May 11, 1908.)

No. 34.

1. SHIPPING—STEVEDORES' WAGES—CHARTER PARTY—CONSTRUCTION.

A charter provided that the charterer had the option of providing stevedores for discharging cargo at port of discharge, steamer paying for the same at current rate of 40 cents, and to provide cranes and winches with full necessary steam or hand power to work the same if required by the charterer, ship to load and discharge as rapidly as possible by night as well as by day when required to do so by charterer. The unloading was done by the charterer's nominees by day and night; brokers representing both the ship and the charterer. In the account rendered the brokers charged the ship 40 cents a ton for unloading and an additional bill of \$210.90 for night work by the stevedores; the celerity of the discharge being such as to also entitle the charterer to \$1,000 for discharge money. *Held* that, if the charterer elected to discharge both by day and night, the ship was only bound to furnish steam for the winches and pay the day discharge rate, and was not liable for extra pay to the stevedores for night work.

2. ADMIRALTY—LIBEL—AMENDMENT.

Where a libel in form ad personam was answered, defended, and decided as such, it was not error for the court to refuse to permit respondent to shift his ground of defense after decision so as to claim that an action in rem was the proper remedy.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Henry Flanders, for appellant.

Convers & Kirlin, Henry R. Edmunds, and Charles R. Hickox, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This was a libel in personam filed by the owners of the steamship Bencliff, the appellee, to recover back from Samuel, the appellant, a bill for stevedore wages which the Bencliff had paid him under protest. The parties entered into a charter party, whereby the Bencliff was to proceed to Bilbao, Spain, and there load for Samuel a cargo of ore for delivery at any one of four United States ports he might specify. The charter provided:

"Charterer has the option of providing stevedores for discharging the cargo at port of discharge, steamer paying for the same at the current rate of * * * 40 cents, if discharged at * * * Perth Amboy * * * steamer to provide cranes and winches with full necessary steam or hand power to work same both in loading and discharging if required by charterer. * * * Ship is to load and discharge as rapidly as possible (if required) by night as well as by day, when required to do so by charterer. * * * The captain to apply to and employ charterer's nominees at * * * port of discharge."

On arrival at Perth Amboy, the selected port of discharge, the unloading was done by Pim, Forwood & Kellock, the charterer's nominees, by day and night. In an account rendered, the brokers charged the ship the current rate of 40 cents per ton stipulated for in the charter and an additional bill of \$210.90 for night work by the stevedores. The celerity of discharge was such that Samuel was allowed about \$1,000 for discharge money. The captain of the Bencliff paid the \$210.90, and on his libel to recover the same the court below entered a decree in his favor. From such decree Samuel appealed.

After careful examination we find no reason to differ from the conclusion reached by that court. While it is true that, as provided by the charter, both charterer and vessel had the same brokers, yet under the proofs we are satisfied that they acted as Samuel's agent in discharging this cargo. The charter, which was of Samuel's own draft, gave him the option to discharge and fixed the price the ship should in such case allow him at 40 cents per ton. This rate per ton was in no way different than if a lump sum had been named. Whether Samuel discharged by day or by night, what he paid stevedores, and whether his bargain with them was for a lump sum or per ton, was no concern of the ship. The mode of discharge, if Samuel exercised his option, was for him to determine. If he chose to discharge by night, he could require the ship to permit such night discharge and furnish steam for the winches. If he incurred greater expense by night work, he could recoup his expenses by the discharge money he thereby earned. The option to discharge being manifestly inserted by Samuel for his own benefit, and the discharge having been so conducted as to inure to his gain, the brokers who directed the work are presumed to have acted therein as his agents. The Turgot, 11 Pro. Div. 21.

The Bencliff's captain testifies he did not authorize the employment of the stevedores at night, and the brokers' clerk says that:

"Samuel instructed us to require the ship to discharge at night as well as by day and instructed us to deduct the extra charge for stevedores' night work from the freight."

Moreover, the account rendered by the brokers indicates it was for disbursements made by them as Samuel's agents. As stated, the ship, if required, was bound to provide winch facilities, but the account shows the stevedore firm of Brady & Gioe, who furnished the night work, also furnished winchmen, and for them the ship was charged in the account stated. Now, if this account was one rendered by the ship, through its broker, against the charterer, a charge for a winchman, which the ship was bound to furnish, would not have entered therein. The fact that such charge is in the account shows that Samuel, and not the ship, hired and paid the winchman, and in the account rendered by his broker against the ship he demanded and received allowance therefor from the ship. The court made no mistake in holding that the brokers in discharging the ship were acting as Samuel's agents.

Nor do we think it committed error in refusing, after its opinion was rendered, to allow the respondent to shift his ground of defense. The libel was in form *ad personam*. It had been answered, defended, and decided as such. If this amendment, whereby the defense was sought to be raised that an action in rem was the proper remedy, had been allowed and succeeded, all the time used and expense incurred by the libellant through the respondent's misleading course would have gone for naught. Had this been done, the power of amendment which courts of admiralty concededly have (*The Charles Morgan*, 115 U. S. 75, 5 Sup. Ct. 1172, 29 L. Ed. 316) would have been misapplied.

The decree of the court is therefore affirmed, at appellant's cost.

PENNSYLVANIA CO. v. SCOFIELD et al.

(Circuit Court of Appeals, Third Circuit. May 18, 1908.)

No. 11.

1. DEATH—ACTION FOR WRONGFUL DEATH—PENNSYLVANIA STATUTE.

Under the Pennsylvania statutes of 1851 (P. L. 674, § 19) and 1855 (P. L. 309), giving a right of action for wrongful death, as construed by the Supreme Court of the state, the expectation of pecuniary benefit from the life of the deceased gives a right of recovery to the relatives named in the statute, and it is not necessary that the plaintiff should have been dependent upon or have had a legal claim upon the services of the deceased.

2. COURTS—JURISDICTION OF FEDERAL COURT—ACTION FOR WRONGFUL DEATH.

Whether a nonresident is entitled to maintain an action for wrongful death under a state statute is a question which goes to the defense of such an action, and does not affect the jurisdiction of a federal court therein.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

See 149 Fed. 601.

J. Ross Thompson and Samuel G. Thompson, for plaintiff in error.
J. R. McQuigg and J. B. Cessna, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Scofield and wife, citizens of Ohio, sued for damages sustained by them by the death of their son, caused by the railroad's alleged negligence. The plaintiffs based their claim on the Pennsylvania statutes of 1851 and 1855, viz.:

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." P. L. 674, § 19.

"The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." P. L. 309.

The case resulted in a verdict and judgment for the plaintiffs, whereupon the railroad sued out this writ of error.

The decedent was an unmarried adult, and made his home with his parents. He and his father were architects. The son worked for his father, and at the time of his death and for some years previously had, beyond withdrawing a small part for his personal expenses, given his earnings to his father. There was evidence in his declarations that he purposed continuing this course. The parents were possessed of means, and the son's earnings neither went to nor were required by the parents for support. The court below refused a point of the railroad that if "the jury find from the evidence that the plaintiffs have ample means of their own for their support, not depending on the deceased son, Donald C. Scofield, for maintenance or support, he being of full age, and the plaintiffs not having the right to claim loss of service per quod amisit servitium, the plaintiffs cannot recover," and affirmed a point of the plaintiffs that:

"It is not necessary, in order to recover in this case, for the plaintiffs to show a legal claim on their son for support; neither is it necessary for them to show that they are dependent upon him for support. Their right to recover, if at all, depends upon the pecuniary loss they have sustained, and not upon a legal claim for support or upon dependency."

In so doing, the court below committed no error, for it followed the construction given the acts in question by the Supreme Court of Pennsylvania. That court has held that the existence on the part of plaintiff of a reasonable expectation of pecuniary benefit from the deceased, and not necessarily support and maintenance, was the ground of recovery under the statute. This construction of the statute, first announced in *Pennsylvania R. R. v. Adams*, 55 Pa. 499, has been followed in later cases, among which we may refer to *North Penn Company v. Kirk*, 90 Pa. 17, and *Stahler v. Reading Ry. Co.*, 199 Pa. 383, 49 Atl. 273, 85 Am. St. Rep. 791. That construction is briefly summarized by that court in the statement that:

"The words 'parent' and 'children' in the act of 26th April, 1855, are used to indicate the family relation in point of fact, as the foundation of the right of action, without regard to age; and 'if there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action.'"

On the question whether a right of action was conferred by the Pennsylvania statute on the plaintiffs, who were citizens of Ohio, it suffices to say it was not raised in the court below and is not properly before us on any assignment of error. The question is one of defense, and not of jurisdiction (*Venner v. Great Northern Ry.*, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. —; *Illinois Central R. R. Co. v. Adams*, 180 U. S. 34, 21 Sup. Ct. 251, 45 L. Ed. 410), and upon it we express no opinion.

Finding no error in the action of the court below, this judgment is affirmed.

HELLMAN v. GOLDSTONE.

(Circuit Court of Appeals, Third Circuit. May 14, 1908.)

No. 4.

BANKRUPTCY—DISCHARGE—EFFECT—ENFORCEMENT OF JUDGMENT—INJUNCTION.

Whether a judgment against one who is thereafter adjudged bankrupt is thereby discharged is properly raised by pleading the discharge in a proceeding to enforce the judgment, and not by petition in the bankruptcy court to enjoin the judgment creditor from enforcing it.

Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey, in Bankruptcy.

David E. Goldfarb, for appellant.

Hays & Hirshfield and Horace Stern, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges

BUFFINGTON, Circuit Judge. This is a petition of Henry Hellman to review an order in bankruptcy made by the District Court of New Jersey. On June 2, 1904, one Goldstone recovered a judgment against Hellman in a municipal court, which by the filing of a transcript thereof in the Supreme Court of New York on June 3, 1904, became a judgment therein. On June 28, 1904, Hellman was adjudged bankrupt in the court below, and on October 24, 1904, obtained from said court his discharge. On October 12, 1906, he petitioned the Supreme Court of New York to cancel Goldstone's judgment by reason of his having obtained such discharge in bankruptcy. On October 30, 1906, that court, after hearing, denied the defendant's motion to cancel the judgment. Of such order Hellman sought no review, but on February 19, 1907, petitioned the court below to enjoin Goldstone from proceeding to enforce the judgment. This the District Court, by its order of April 3, 1907, declined to do, and to review its order dismissing such proceeding Hellman petitioned this court.

We are of opinion the court below was right. The question whether a judgment against one who is thereafter adjudged bankrupt is

thereby discharged is properly raised by pleading the discharge in a proceeding to enforce the judgment. In *re Wright*, 2 Ben. 509, Fed. Cas. No. 18,065. Presumably the court in which such discharge is thus pleaded will accord it due legal effect, and if it does not the bankrupt's remedy lies in a review of such action by the proper appellate tribunal, or ultimately in the federal court for denial to him of a right under a law of the United States. *Dimock v. Revere Copper Company*, 117 U. S. 565, 6 Sup. Ct. 855, 29 L. Ed. 994.

The petition in the present case is therefore dismissed, at petitioner's cost.

VOLLMER et al. v. McFADGEN.

(Circuit Court of Appeals, Third Circuit. May 14, 1908.)

No. 36.

BANKRUPTCY—PRIORITY—CLAIM FOR RENT:

Where property of a bankrupt, a part of which was subject to a landlord's lien and a part not, was sold together in gross without objection, the proceeds cannot be apportioned, so as to entitle the landlord to priority of payment from any part thereof.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 156 Fed. 715.

Adrien W. Vollmer, for appellants.

W. Horace Hepburn, William A. Carr, Sidney L. Krauss, and W. Horace Hepburn, Jr., for appellee.

Before MOODY, Circuit Justice, and DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the landlord claimed priority for rent accrued before the filing of the bankrupt's involuntary petition. That court sustained the refusal of the referee to so award, whereupon the landlord appealed to this court.

The fund for distribution arose from the gross sum of \$7,000, the purchase price of the fixtures of the bankrupt's bar, a term of years for his premises, and the license to sell liquors thereat. The referee found as a fact, and the court adopted such finding, that the landlord gave notice at the sale to the purchaser that he would hold him responsible for the rent in arrear. The sale in gross of these different items was made and confirmed on notice to the landlord and without objection. He now contends that a license to sell liquors is a personal privilege and cannot be legally sold, and therefore the fund must be treated as the proceeds of the fixtures and of the term of years, upon both of which he claims a lien. Upon these questions we express no opinion. The gross price for which these items were sold constitutes such a commingling of the three items as brings the case within the ruling in *Keyser v. Wessel*, 12 Am. Bankr. Rep. 126, 128 Fed. 281, 62 C. C. A. 650, where on a commingling of like items this court held it was impossible "to determine the proportional value of the particular part bound by the liens to the gross purchase price."

The order of the court below is affirmed.

WEISSENTHANNER v. DODGE METALLIC CAP CO.

(Circuit Court of Appeals, Third Circuit. May 4, 1908.)

No. 12.

PATENTS—INVENTION—BOTTLE STOPPER.

The Weissenhanner patent, No. 801,281, for a sheet-metal closure for bottles, etc., is void for lack of invention.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Charles L. Jones, for appellant.

Herbert Howson, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. The court below held invalid patent No. 801,281, granted October 10, 1905, to Alfred L. Weissenhanner for a sheet-metal closure for bottles, etc. It committed no error in so holding. In view of the description of the device and the full discussion of the patent in the opinion of the court below, reported in 156 Fed. 365, we confine ourselves to narrow limits.

The device was one to rupture the metal cap of a bottle. It consisted of extending the metal at one side of the cap into a downwardly projected tongue, and near the head of the tongue piercing the cap by two inverted shaped slits. The result was, when the tongue was pulled upwards, the cap was easily ruptured and removed. But patent No. 708,528, to Calleson, showed the use of a downwardly projecting tongue and at its head two circular-shaped, diverging slits to facilitate rupture. Assuming the change from Calleson's circular slits to the present patentee's right-angled ones was an improvement, yet it was one of such mere mechanical character as to involve nothing inventive. In our judgment the grant of a patent upon such a device and the allowance of 22 claims thereon involves a misunderstanding of the function of a patent, for "to grant to a single party a monopoly of every slight advance made, except when the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in consequences." Unless the Patent Office itself is satisfied of the patent's validity, the public should not be burdened with a monopoly, with the expectation that the courts will invalidate it.

The judgment of the court below is affirmed.

CONSOLIDATED LOOPS CO. v. BARNUM & BAILEY, Limited.

(Circuit Court, S. D. New York. June 5, 1908. On Rehearing, June 12, 1908).

PATENTS—INVENTION—AMUSEMENT APPARATUS:

The Eggers patent, No. 757,375, for an amusement apparatus comprising an inclined track adapted to be traversed by a vehicle, an upwardly inclined ledge at the bottom, a gap, and means for arresting the flight of the vehicle after it has passed the gap, is void for lack of patentable invention, in view of the prior art.

In Equity. Suit to restrain alleged infringement of United States letters patent No. 737,375, dated August 25, 1903, to Calvin C. Eggers, assignor to Arthur T. Prescott, for amusement apparatus, and for an accounting.

O. Ellery Edwards, Jr., for complainant.
Holmes & Rogers, for defendant.

RAY, District Judge. All the claims of the patent to Prescott, assignee of Calvin C. Eggers, No. 737,375, granted August 25, 1903, application filed March 25, 1903, for an amusement apparatus, are in issue except the first and last, narrowest and broadest. Claims 2, 3, 8, and 9 are sufficiently illustrative. They read as follows:

"2. An amusement apparatus, comprising an elevated track structure embodying therein a downward incline, a starting-platform at the top of said incline, means whereby access is had to said platform and a ledge extending at an obtuse angle from the lowest point of said incline adapted to be traversed by a vehicle or conveyance, and means for arresting the flight of a vehicle or conveyance after it has left said ledge; a gap being left between said ledge and said arresting means.

"3. An amusement apparatus, comprising an elevated track structure embodying therein a downward incline, a ledge extending at an obtuse angle from the lowest point thereof and an upwardly-inclined lip on said ledge adapted to be traversed by a vehicle or conveyance, and means for arresting the flight of a vehicle or conveyance after it has left said lip; a gap being left between said lip and said arresting means. * * *

"8. An amusement apparatus, comprising a portable elevated track structure embodying therein a downward incline and a ledge extending at an obtuse angle from the lowest point thereof adapted to be traversed by a vehicle or conveyance, and means for arresting the flight of a vehicle or conveyance after it has left said ledge; a gap being left between said ledge and said arresting means.

"9. An amusement apparatus, comprising a portable elevated track structure consisting of a downward incline composed of a plurality of separable abutting sections, supports therefor and means for securing said sections to said supports, and a ledge extending at an obtuse angle from the lowest point of the lowest section of said incline adapted to be traversed by a vehicle or conveyance, and means for arresting the flight of a vehicle or conveyance after it has left said ledge; a gap being left between said ledge and said arresting means."

It will be observed that we have the following elements in combination, forming an elevated track structure and which embodies: (1) A downward incline, which may be made of metal or wood or any suitable material; (2) a starting-platform at the top of said incline; (3) means whereby access is had to said platform; (4) a ledge extending upward at an obtuse angle from the lowest point of said incline adapted to be traversed by a vehicle or conveyance; (5) means for arresting the flight of the vehicle or conveyance after it has left the ledge; and (6) a gap left between the ledge and said arresting means. Claims 8 and 9 differ, in that the apparatus is portable; that is, constructed in sections, so as to be taken apart and down and transported conveniently, and then erected again by placing the sections in position. No novelty is suggested in the mode or manner of constructing the sections or holding them in position.

We have a sort of tower for the upper end of the incline to rest upon, or against, and means, such as a ladder or steps, to reach its

platform or top; then the incline and its supports; then the upwardly-inclined ledge at the lower end of the incline, which incline is elevated from the ground. This is all there is to this part of the structure, and it presents no novel feature whatever. Then comes the open space. Then the means for arresting the flight of the vehicle or conveyance after it has left the incline and ledge. So far as the language of the claims is concerned these arresting means may be a stone wall to strike upon or against, an upright structure of planks or cushions to strike against, or a platform or cushion to strike upon. Either sort of structure would arrest the downward "flight," but only the upright structure would arrest the forward flight of the performer. The idea is that a person with some sort of easily running vehicle, such as a bicycle, mounts to the top of the platform and then mounts his vehicle and moves down the incline with great and increasing velocity until his vehicle reaches the upwardly-inclined ledge forming a part of such incline. The speed—that is, the momentum gained—carries the vehicle up this ledge, and vehicle and rider pass diagonally upward and onward through space over the gap. Momentum is now gradually lost, and the law of gravitation brings them downward, and, if there were no artificial means for arresting this downward flight, both vehicle and rider would go to the ground and the concussion would break the vehicle, and perhaps the neck or back of the rider, or do him other injury. Hence an obstacle, "arresting means," are provided, which, as shown, consist of a platform on the far side of the open space or gap, but little lower than the lowest end of the incline. It is a straight road down the side of an artificial hill, with an elevated ridge in the road and a ditch on the other side thereof over which the rapidly moving vehicle or conveyance passes before it rejoins mother earth. Cover the road with frozen and packed snow, or with ice, use a sled as the conveyance, slide down, strike the ridge, surmount it on the up curve, and pass on through the air until gravitation brings sled and rider to the road again. The length of the jump or flight through the air will depend on the speed of the conveyance when it strikes the ridge.

In view of our common knowledge of the laws of dynamics and gravitation, I can see no novelty amounting to patentable invention in this structure. The idea of a gap for rider and conveyance to jump over is suggested by every ditch and ravine and fissure in the earth, and by the prior art as published and well known. The idea of an elevated platform to strike upon is suggested by common knowledge and common sense. The sight of a rapidly moving bicycle or conveyance with a rider passing the open space is somewhat spectacular, but not new. So the sight of a man jumping a gully or fissure in the earth, etc., is spectacular. But such inclines were old; such towers were old; mere spaces or openings between one platform or object and another were old, whether left unoccupied or filled with animals. Any carpenter would have provided everything, except the conveyance and a rider daring enough to take the flight and skillful enough to keep right side up. But these are not elements of this combination. So placing animals or other objects in the gap, or open space, adds per-

haps to the spectacular effect. But this was old, as shown and conceded by the complainant. The defendant has introduced in evidence the very old tower, with elevated downward incline leading therefrom, the lip or ledge, consisting of a springboard, the opening or gap, in which is placed animals, and arresting means beyond for arresting or breaking the flight of the performer. See "Defendant's Exhibit M," showing complainant's apparatus and the old circus apparatus and act, with which we all have been familiar since boyhood. In "the old circus act" illustration, the arresting means consist of a cushion for the performer to light upon after completing his flight or jump over the animals and across the open space. A platform would do as well, except it would lessen the spectacular effect.

Substitute a man on a bicycle, or in a small automobile, and we have substantially the same apparatus and performance. In "the old circus act" the performers ran down the incline, struck the springboard, and by the momentum and spring were carried upward and forward over the space to the landing place. In the Scientific American Supplements of April 21, 1900, and April 20, 1895, Complainant's Exhibit 6 and Defendant's Exhibit G, we have illustrations of "Ski" or "Skee" racing and jumping. Here we have a steep decline, or side hill road, with a springboard obstruction at some convenient point. The performer goes to the top of the hill, mounts his "skees" or conveyance, comes rapidly down, partly by his own exertions and partly by gravity, strikes the springboard, which is inclined upwardly, and is carried and thrown upward and onward, coming to the ground at a distance beyond the obstruction or springboard. Would it constitute invention to construct an elevated downward incline indoors, and leave a space or gap just beyond the springboard, and provide a landing place beyond, down which the "skee jumper" might continue his course to the ground? This is all that defendant has done. In patents to Idlar, No. 548,256, October 22, 1895, "pleasure lake and slide course and conveyer therefor," we have these track structures elevated above the ground "by suitable means" and down which the conveyance or vehicle goes carried by gravity. The track may be curved, straight, or undulating. If undulating, the conveyance takes to the water at the lowest end of the structure by a skip motion or "skip action"; that is, it is carried upward and forward, so as to ride upon, instead of plunging into, the water. Idlar says:

"Through which undulating chute the boat or car is precipitated by gravity into and over the body of water or artificial lake, B, by a skip action, without wetting those participating in the sport."

This up curve at the lower end of the runway or downward incline is not old. We have it in fire escape chutes for people to slide down in. O'Brien shows and describes it. U. S. letters patent, No. 139,416, of May 27, 1873. I fail to find in this structure of the patent in suit any patentable novelty, any new idea or conception, aside from the particular use to which it was put; that is, it was designed for a bicycle and its rider, or other similar conveyance, and was the adaptation of the old art, with such necessary modifications as would occur to the ordinary mechanic, to that particular use. I do not discover any

such great utility or benefit to mankind in this structure as to call for the violation of the rule, declared by the Supreme Court of the United States in many cases, that there must be a mental conception, invention—not merely an old structure adapted to a new use. If the old structure is adapted, with necessary changes, to meet a new and novel exigency, and such adaptation demands more than ordinary mechanical skill, there may be and is invention. But such is not this case. What was wanted was a bicycle rider brave and daring and skilled enough to jump the open space. The downward incline, with the platform at the top, with steps for gaining access thereto, and the ledge extending at an obtuse angle from the lowest point of said incline, are not a patentable combination, and such a structure is not patentable. Nor is the platform for arresting the fall of the vehicle and rider. And to leave a gap between the one and the other for the performer to jump over did not make the alleged inventor a bold and daring inventor. Such gaps and ravines have existed since the world was formed and rent and broken by its internal heat.

There will be a decree dismissing the bill, with costs.

On Rehearing.

The solicitor for the complainant files petition for a rehearing, asserting that claims 1 and 10 were in issue, but that no decision was rendered as to those claims, and that no decision was rendered on the motion to strike out. As the motion to strike out was decided on the argument, and denied, the court did not regard it necessary to refer to the matter in the opinion. The motion to strike out is denied.

As to claims 1 and 10 it was stated on the argument, and assented to, that claims 1 and 10 were not in issue on the final hearing, and I think it so appeared in the brief. However, as this court thoroughly examined all the claims, and was and is satisfied that claims 1 and 10 are invalid, disclosing no patentable invention in view of the prior art, the court now holds them invalid, and also holds that, conceding their validity, infringement is not shown.

There will be an order and a decree accordingly.

UNITED STATES v. UNION STOCK YARDS CO. OF OMAHA.

(District Court, D. Nebraska. February 21, 1908.)

COMMERCE—INTERSTATE COMMERCE—STOCK YARD—SAFETY APPLIANCE ACT— “COMMON CARRIER.”

The defendant, the Union Stock Yards Company of Omaha, in connection with the business of furnishing facilities for stock yards, operates 35 miles of railroad, over which are hauled all the cars offered for shipment by any industry located on the line of said railroad, and all cars consigned to any such industry, and also cars from one railroad to another in course of shipment from one state to another, for which an arbitrary switching charge is made. *Held*, that defendant, in operating such railroad, is a common carrier, engaged in interstate commerce within the safety appliance acts. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), amended April 1, 1896, c. 87, 29 Stat. 85,

and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1313, 1319; vol. 8, p. 7607.]

(Syllabus by the Court.)

Charles A. Goss, U. S. Atty., A. W. Lane, Asst. U. S. Atty., and Luther M. Walter, Special Asst. U. S. Atty.

Frank B. Ranson, for defendant.

T. C. MUNGER, District Judge. This is an action wherein the United States seeks to recover from the defendant penalties for two alleged violations of the acts of Congress, known as the safety appliance acts. The first count of the petition charges that the defendant at a certain date used on its line of railroad its own locomotive engine in moving a car containing interstate traffic, consigned from a point in Iowa, to South Omaha, Neb., and that the engine was out of repair and inoperative on account of the uncoupling levers being missing from the ends of the locomotive. The second count charges that the defendant hauled on its line a certain railroad car used in moving interstate traffic, consigned from a point in Iowa to South Omaha, Neb., while the coupling apparatus was inoperative and out of repair.

The question presented by the answer and arising under the evidence is whether or not the defendant is a common carrier, or was engaged in interstate commerce by railroad. The case has been submitted under an agreed statement of facts. It appears therefrom that the defendant is a corporation organized under the laws of the state of Nebraska, and among its chartered powers are the right "to construct, maintain, and operate a railroad with tracks of other railroad companies, which shall be operated for the purposes of its business as set forth, as well as also of carrying passengers and freight for the general public." The defendant was organized for the further purpose of conducting stock yards and certain business in connection therewith. The defendant owns a large tract of land at South Omaha, Neb., on which it has constructed buildings and sheds and pens of the general nature of stock yards. Adjoining defendant's grounds and located on the margin thereof are five large slaughtering and packing houses wherein stock is slaughtered and the product packed and prepared for shipment to market. The defendant for many years has had railroad tracks leading over its premises from a transfer track connecting with the other railroads which enter South Omaha, and which lead to the buildings and sheds and pens on its premises, and to the slaughtering and packing plants mentioned, and to certain other industries located along the defendant's railway tracks in South Omaha. The defendant has locomotive engines of its own which it operates upon these tracks, and has three flat cars and one box car. The flat cars are used for the purpose of picking up and hauling refuse and cinders over its tracks, and the box car is used as a tool storage car. None of these cars are carried beyond the defendant's premises. The defendant receives on this transfer track cars

that are loaded with live stock and other freight, whether shipped from points within the state or from points in other states, and attaches its own locomotive to such cars and moves them as follows: Cars that are loaded with live stock are hauled by the defendant's locomotive to the packing houses or other place of ultimate destination in South Omaha along the defendant's tracks. Cars loaded with freight consigned to other industries than the packing houses are likewise hauled to such industries or such place of destination. As to freight originating at South Omaha at these industries or packing houses, the defendant attaches its engine to such cars and hauls the cars, if they are loaded with packing house products, to the transfer track, and there delivers the same to the railroad designated by the persons operating the packing plant, and it receives from the industries other than packing houses cars that are loaded by them and likewise hauls them to the transfer track, where they are delivered to the railroad company designated by the persons operating the industries. The defendant company also hauls empty cars in the same manner as these loaded cars are hauled. All of the railroad companies whose tracks enter South Omaha, or who reach the transfer track, are common carriers, and are engaged in moving interstate commerce. About 45 per cent. of the live stock so received annually from these other railway companies by the defendant is shipped from states other than the state of Nebraska, and about 87 per cent. of the live stock loaded into the cars at the defendant's yards and delivered to the railroad companies on the transfer track is destined to points in states other than Nebraska. The defendant also receives cars from these railroad companies on its transfer track to be carried to the stock yards of the defendant, where the stock may be emptied into the stock pens, and also receives empty cars to be likewise hauled to the stock yards, where they may be loaded with live stock, and thereupon hauls such cars back to the transfer track to be likewise delivered to the railroad companies. Live stock is loaded and unloaded at the yards by the defendant company; other freight is loaded and unloaded by the persons to whom the cars are consigned. There are about 35 miles of railroad tracks belonging to the defendant, situated on its premises and connecting with the eight or ten railroads mentioned by means of this transfer track. The defendant transfers upon its transfer tracks cars for the different railroad companies from one railway company to another, whenever requested by the said railroad companies connecting with its track so to do, and the defendant is paid a fixed and definite charge for so doing. The road requesting the transfer requests that certain cars designated be transferred upon the defendant's transfer tracks, stating to what tracks or other road they are to be transferred. The defendant handles all cars offered to it by the railroads connected with its tracks, and transfers cars from one industry to the other on request of such industries. These charges are based on a car basis. These charges for handling cars for the railroad companies are collected on the first of each month. It does not issue slips or way-bills to the consignor or consignee for any car received or moved by it. When the owner of live stock in the defendant's yards desires to ship

the same out of the yards, he makes a written order, and files it with the defendant for a certain number of cars, giving the name of the consignee and the destination, and requesting the delivery of the cars to the railroad designated. This is called a "shipping order." The defendant also receives at the same time what is called a "billing order," naming the railroad, the consignor, the consignee, and the destination of the shipment, and these are delivered to the agent of the railroad company named in such orders, and upon its receipt the railroad company issues a bill of lading to the shipper, and delivers the number of cars requested upon the transfer track. Thereupon the defendant company takes the cars into its yards, and loads the live stock of the consignor into the cars, and then the cars are set back on the transfer track for the railroad company to carry to destination. The railway companies pay the defendant a fixed charge under the terms of an agreement between the stock yards company and the different railroad companies. The manner of receiving freight destined to points in the defendant's yards is for the railway company to deliver to the stock yards company a waybill and to set the cars upon the transfer track. The waybill shows the point of origin and the point of destination. As to manufactured products and dead freight coming from the industries located on the defendant's premises and tracks and to be carried out of the yards on orders from the railroad companies, the defendant does not know the destination of such cars and issues no bill of lading or waybill or other memorandum with reference to the shipment of these cars, and the same is true as to all dead freight received for any of the industries to be carried to any point on defendant's premises. The defendant quotes no rates for the carriage of freight, whether live stock or dead freight, but collects all of the freight charges on incoming live stock, when not prepaid, as an accommodation to the railroad companies, and it pays this amount over weekly to the railroad companies. The defendant collects no freight charges on outgoing live stock or dead freight. The charges of the defendant to the railroad companies for service rendered the railroad companies are paid for by the railroad company requesting the service to be performed. These charges are fixed and definite, under a contract with the railroad companies. The charges for taking in empty cars and taking out loaded cars are always the same, and these charges are not fixed with reference to the distance outgoing freight is to be carried or incoming freight has been carried, but are simply arbitrary charges fixed by the contract between the railroad companies and the defendant. Defendant does not join with any of the railroad companies in fixing the amount of charges for carrying freight out of the yards to points outside of the yards, nor as to freight carried from outside of the defendant's yards into its yards, nor does the defendant join with any railroad company in making any tariff charges for the carriage of freight at all, nor does it receive any portion of the money due from freight bills for carrying freight in or out of the defendant's yards. Live stock which is consigned to points in the yards is generally consigned to a live stock commission agent, to whom it is delivered by the stock yards company. The live-stock agent sells the

shipment for the owner, and if the freight charges have not been prepaid to the railroad company he pays those freight charges to the stock yards company, which collects it for the railroad company and pays it over weekly to the railroad company. For the purpose of informing the stock yards company what the freight charges due to the railroad company for live stock coming into the yards are, if they have not been prepaid, a memorandum is furnished to the stock yards company. The defendant pays over to the railroad companies all the freight charges it receives, deducting no portion of the same on any account, but presents its bills for switching service to the railroad companies monthly and is paid by them. The defendant receives no broken freight, but handles only empty and loaded freight cars. It handles about 625 cars daily of live stock over its railroad. The charges made for handling the cars in the method above described are arbitrarily fixed at 50 cents, \$1, and \$2 per car. It is stipulated that the cars alleged in the petition were received and hauled by the defendant company, and that they had been consigned by shippers in another state than Nebraska to be delivered to the consignees at South Omaha, Neb., at some point in the defendant's yards or at one of the packing plants hereinbefore mentioned. Each of these cars was loaded with coal, and in order to reach the consignee at its destination it was necessary for the defendant company to haul the car from its transfer track to the consignee, and the contract of shipment covered the delivery at the ultimate point of destination in the defendant's yards, or to one of the packing plants. It was also stipulated that the cars were out of repair, as alleged in the petition.

The defendant contends that it is not subject to the acts of Congress relating to safety appliances, approved March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. 1901, p. 3174), amended April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), for the reason that it is not a common carrier, and is not engaged in interstate commerce by railroad. It may be questioned whether a railroad company must be a common carrier in order to bring it within these acts, since the amendment approved March 2, 1903, makes the provisions and requirements of that amendatory act, as well as of the original act as amended, apply to all "cars and similar vehicles used on any railroad engaged in interstate commerce."

A railroad has been defined as a road or way on which iron rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. *Dinsmore v. Racine M. R. Co.*, 12 Wis. 649. Such a track is a railroad independently of the use made of the track in the hauling of cars over it, as was pointed out in *L. S. & M. R. Co. v. U. S.*, 93 U. S. 442, 23 L. Ed. 965.

In this case the road is not a mere switch maintained for the private purpose of the defendant, nor are cars delivered to the consignees when they are set upon the transfer track, and therefore an essential part of the transportation of the cars and freight therein contained is unfinished. Over the 35 miles of track of the defendant is hauled all the live stock consigned to commission agents and others who supply

the five meat packing houses of South Omaha, one of the greatest centers of that industry in the United States. All the products of the packing houses are hauled away over this road as the initial carrier, in the routes to the destination of such products. In addition, the defendant road operates as a connecting carrier between all the 8 or 10 trunk line railroads entering South Omaha, and transfers cars from any road to any other road upon request. For instance, cars that may be consigned from shippers in Colorado or Dakota to consignees in Missouri or Illinois are regularly switched over the defendant's railway from one carrier to another as a part of the interstate transportation of the freight in such cars, the defendant using its own engine and servants in hauling such cars. The defendant also receives freight for other industries upon its lines. The live stock hauled over the defendant's road amounts to about 625 cars per day.

The defendant has not built nor maintained its railway as a private track for its own use, but has devoted it to a public use. Not only is this true of the greater portion of the track, but it is especially true of the transfer track. That track is used by all the railway companies entering South Omaha as a track upon which to switch cars. This transfer track is undoubtedly a railroad, and the defendant hauled the cars in question over a portion of this track. If the methods adopted by the defendant relieve it from the obligations of a common carrier by railroad, no reason is perceived why subsidiary companies could not own the switch yards or belt railroads of each city or village, and by the device of making all deliveries upon a transfer track monopolize the carriage of all freight traffic between the main line railroads and the shippers and consignees in such city or village, and thus escape the obligation of common carriers. The defendant, having chosen to devote its railroad tracks to a public use, must be held to be a common carrier. *Norfolk v. Commonwealth*, 103 Va. 289, 49 S. E. 39; *State ex rel. v. Willmar & S. F. Ry. Co.*, 88 Minn. 448, 93 N. W. 112; *Mo. Pac. v. Wichita*, 55 Kan. 525, 40 Pac. 899; *Peoria R. R. v. Chicago R. R.*, 109 Ill. 135, 50 Am. Rep. 605; *Peoria R. R. v. United States R. S. Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; *Penn. R. R. Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559.

In this case the defendant must be held to be a common carrier for another reason. The Constitution of Nebraska, art. 11, § 4, declares that "railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. * * * The liability of railroad corporations as common carriers shall never be limited." Under this section it is one of the duties of the defendant company, as a common carrier, to receive and transport over its line of road cars of other companies, if the gauge of the road is suitable and the cars are not defective or out of repair, or of such unusual and peculiar construction as to be unreasonably hazardous or dangerous to work with or handle. *C., B. & Q. R. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456.

The second contention of the defendant is that it was not, at the time charged in the petition, engaged in interstate commerce. Since the submission of this case, this question has been settled by the Circuit Court of Appeals in this circuit, in the case of *United States v. Colorado & Northwestern R. R. Co.* (decided November 25, 1907) 157 Fed. 321, 342. See, also, *United States v. Nor. Pac. Terminal Co.* (D. C.) 144 Fed. 861.

For these reasons judgment will be entered in favor of the government and against the defendant upon each count.

CENTRAL OF GEORGIA RY. CO. et al. v. RAILROAD COMMISSION OF ALABAMA et al.

(Circuit Court, M. D. Alabama. March 21, 1908.)

1. COURTS—JURISDICTION OF FEDERAL COURTS—"SUIT AGAINST STATE."

A suit in equity against individuals to enjoin them as officers of a state from enforcing an unconstitutional enactment to the irreparable injury of the property rights of the complainant is not one against the state within the meaning of the eleventh constitutional amendment; and it is immaterial whether such officers are specially charged with the enforcement of the statute, or whether such duty devolves on them under the general laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 844, 844½.

Federal jurisdiction of suits against states, see note to *Tindall v. Wesley*, 13 C. C. A. 165.

For other definitions, see *Words and Phrases*, vol. 7, p. 6778; vol. 8, p. 7809.]

2. CONSTITUTIONAL LAW—VALIDITY OF STATUTES—CONTROLLING FACTORS.

In whatever language a statute may be framed, its purpose and its constitutional validity must depend upon its natural and reasonable effect upon the right involved.

3. SAME—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—COURTS TO BE OPEN—ALABAMA STATUTES REGULATING RATES—CONSTITUTIONALITY.

The group of statutes enacted by the Legislature of Alabama at the special session called in 1907 (Laws 1907, p. 711) relating to railroad rates, which fix maximum freight and passenger rates on intrastate business and provide that for each overcharge or refusal to accept such rates a railroad company shall be subject to an action for penalties, and its officer, agent, or employé acting for it to a criminal prosecution in any county of the state through which its line runs, both proceedings to be instituted by the shipper or passenger affected, and which, if enforced, effectually deprive any railroad company affected of the right to test their validity in the courts without subjecting itself to such a number of suits and prosecutions and such heavy penalties each day it fails to comply with their requirements as to stop its business and bankrupt it, are unconstitutional and void, as depriving such companies of their property without due process of law, and of the equal protection of the laws, and also as in violation of the provision of the state Constitution that "all courts shall be open and every person for any injury done him * * * shall have a remedy by due process of law."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 701, 847.]

4. SAME—EQUITY—RIGHT TO INVOKE JURISDICTION—EFFECT OF STATE STATUTE.

Under the Constitution and laws of the United States, as well as the Constitution of Alabama, a property owner who is not given an adequate

remedy at law cannot be shut off by a legislative enactment from the right to a seasonable resort to a chancery court for the exercise of its usual preventive remedies, when necessary to protect a property right from destruction.

5. SAME—VALIDITY OF STATE STATUTE—MODE OF ENFORCEMENT.

A state statute, the effect of which is to deprive owners of their property without due process of law, or to deny them the equal protection of the laws, is no less a violation of the fourteenth constitutional amendment because it expressly provides that no action for its enforcement shall be taken by the law officers of the state, but gives to private individuals the right to institute both civil and criminal proceedings for its violation, and to invoke the process and powers of the courts to that end under other and valid statutes; such proceedings being in fact as much acts of the state as though directly instituted by it.

6. COURTS—UNITED STATES COURTS—SUITS AGAINST STATES.

Where a state statute deprives the owners of their property without due process of law, or denies them the equal protection of the laws, the federal courts have power to enjoin the officers of the state courts from issuing or serving process in any such proceeding, and the eleventh constitutional amendment cannot be invoked to defeat their jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 844, 844½.]

7. STATUTES—SUITS TO ENJOIN ENFORCEMENT OF STATUTE—EFFECT OF REPEAL OF STATUTE.

In a federal court suits were instituted by railroad companies against the Railroad Commission of Alabama and the Attorney General to enjoin the enforcement of a statute fixing railroad rates and to test its constitutionality, and as provided for by the statute itself injunctions were granted suspending its operation on the giving of bonds by the complainants to repay to shippers any sums collected above the statutory rates in case they should be sustained. Pending each suit, and after claims had been filed by shippers for recovery on the bonds of excess charges, the statute was repealed and substitutes enacted, which were subject to the same constitutional objections, but which expressly deprived the Commission and the Attorney General of any power to take action for their enforcement, leaving it to private parties to bring actions and prosecutions for their violation. *Held*, that such repeal did not abate the suits, and that supplemental bills might be filed therein to enjoin the enforcement of the new acts.

8. CRIMINAL LAW—PROHIBITION OF EXCESSIVE FINES—VALIDITY OF STATUTES.

The provision of the Constitution of Alabama that "excessive fines shall not be imposed," while addressed more directly to the courts, also imposes limitations on the exercise of legislative power, and the railroad rate acts of 1907 (Laws 1907, p. 711), which subject any railroad company failing to conform to such rates, even pending a suit to determine their validity, to fines and penalties amounting to several hundred dollars for each separate transaction, are void as in violation of such provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3305.]

9. CONSTITUTIONAL LAW—EXERCISE OF POLICE POWER.

The provision of one of the Alabama railroad rate acts of 1907 (Acts Sp. Sess. 1907, p. 60) that it shall be unlawful for any railroad company which fails to keep tickets for sale at its stations at the rates prescribed therein to maintain any fence or gates to prevent intending passengers from reaching the trains, under penalty of fines from \$200 to \$2,000, is void, as not a legitimate exercise of the police power; the purpose of fences and gates, when maintained in populous localities, being to guard the public from danger, as well as for the benefit of the companies, and the provision having no reasonable relation to the punishment for failure to sell tickets.

10. SAME—ATTEMPT TO NULLIFY JUDGMENT OF COURTS.

The fact that a railroad rate statute gives persons who are refused tickets at the rates fixed therein the right to sue the railroad company to recover a penalty in the name of the state does not make the state in fact a party to the suit, and a provision that it shall be no defense to such suit that a court of equity has temporarily enjoined the enforcement of the rates is void for want of constitutional power in the Legislature to nullify orders of the courts, federal or state.

11. JUDGMENT—PERSONS CONCLUDED—ACTIONS AGAINST PUBLIC OFFICERS.

The judgment or decree of a court in a suit against public officers to determine the reasonableness of railroad rates as fixed by the state is binding on all persons; the public in such suit being parties by representation.

12. CARRIERS—STATE REGULATION OF RATES—POWERS OF RAILROAD COMMISSION OF ALABAMA.

Under section 243, Const. Ala. 1901, which confers power and authority on the Legislature to regulate freight and passenger tariffs, the Legislature cannot delegate such power, and the Railroad Commission of the state, authorized by statute to determine and declare what are reasonable rates, and to fix schedules of rates which shall be the lawful rates, acts under such authority as an administrative, and not a legislative, body, and a court may enjoin pendente lite the promulgation by it of any particular schedule whenever essential to the ends of justice.

13. CONSTITUTIONAL LAW—DELEGATION OF POWER TO FIX RATES—CONSTITUTIONALITY.

The provision of the Alabama rate statute of August 7, 1907 (Laws 1907, p. 711), that any rates prescribed by statute may be changed by the state Railroad Commission "from time to time as conditions may in its judgment render it expedient so to do," is void as an attempt to delegate to the Commission legislative power over rates, which by section 243 of the state Constitution is vested solely in the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 100.]

14. CARRIERS—PRELIMINARY INJUNCTION TO RESTRAIN ENFORCEMENT OF RATES—DISCRETION OF COURT.

Where from the evidence it appears probable that railroad rates prescribed by a state on intrastate business will not afford to the carriers a just or reasonable return on the property devoted to the service, but that such rates will be confiscatory, a federal court has discretionary power to grant a preliminary injunction restraining the enforcement of such rates pending a final hearing.

15. SAME—CONFISCATORY RATES—REASONABLE RETURN ON INVESTMENT.

Railroad companies doing business in Alabama held entitled to earn a net profit of 8 per cent. on the value of the property employed by them in intrastate business, so long as the business is done without unjust discrimination and at just and reasonable rates, and to a preliminary injunction to restrain the enforcement of rates established by state authority which, as appeared from the showing made, would prevent them from earning such net profit, upon giving bonds to reimburse shippers and passengers for any excess rate exacted in case the rates suspended should be finally held reasonable and just.

16. STATES—SOVEREIGNTY—EFFECT OF ENFORCEMENT OF RIGHTS UNDER FEDERAL CONSTITUTION.

The action of a federal court, in the exercise of the powers conferred and the performance of the duties imposed upon it by the Constitution of the United States, established as the supreme law of the land by the voluntary act of the people of all the states, in enjoining officers of a state from enforcing a state law which violates rights secured by such Constitution, involves no question of state rights or of the right to local self-government.

In Equity.

These are supplemental bills by the several complainants to arrest the execution of certain statutes passed at the called session of the Legislature of Alabama in November, 1907, particular mention of which is made hereafter. It will conduce to a better understanding of the cases to recite briefly the history of the original bills and the events happening after they were at issue which are made the basis of the supplemental bills.

On the 25th of March, 1907, the Atlantic Coast Line Railroad Company, the Kansas City, Memphis & Birmingham Railroad Company, the Southern Railway Company, the Central of Georgia Railway Company, the Nashville, Chattanooga & St. Louis Railway Company, and the Louisville & Nashville Railroad Company, all foreign corporations and the Western Railway of Alabama, the Alabama Great Southern Railroad Company, the Mobile & Ohio Railroad Company, the Seaboard Air Line Railway Company, and the South & North Alabama Railroad Company, domestic corporations, all operating railroads in this state, filed their bills for injunction in the Circuit Court of the United States for the Middle District of Alabama against the Railroad Commission and the Attorney General of Alabama. These bills alleged that the four acts of the Legislature of Alabama hereafter mentioned are unconstitutional, in that they deny to the complainants the equal protection of the law and deprive them of property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and like provisions in the Constitution of the state. These statutes, ipso facto, forfeited the right of any foreign corporation to do intrastate business if it filed a bill in the federal court to test the reasonableness of rates; fixed the maximum intrastate passenger rates at 2½ cents a mile; made the rates in force on the 1st of January, 1907, the maximum intrastate freight rates, except as curtailed by the statute, which classified and fixed the maximum rates for intrastate transportation on 110 commodities or articles of freight. The statutes, at the time the original bills were filed, charged the Railroad Commission and the Attorney General with the duty of enforcing the rates, and provided that any railroad company might test the reasonableness of any rate or rates, by making the Commission and the Attorney General defendants in a suit in equity, in which event, if the court saw proper, it might, upon exacting bonds for the indemnity of passengers and shippers, suspend the rate laws pending final hearing.

Upon the filing of the bills five days' notice was given to the Attorney General and the Railroad Commission that a motion would be made for a restraining order on March 30, 1907. A restraining order was made that day, and the hearing for a preliminary injunction went over at the request of the respondents until the 19th day of May, 1907. On that day the matter came on again for hearing upon the allegations of the sworn bills. Respondents offered no opposing evidence of any kind, and made no objection to the granting of a preliminary injunction, stating in open court they did not intend to appeal therefrom. Thereupon the court, exacting bonds to refund any excess to passengers and shippers, if complainants were cast in the suits, issued a preliminary injunction against the enforcement of the rate statutes and the statute forfeiting the foreign railroad company's license to do intrastate business because of the filing of the bills to test the rates, and also made an order, as the state statute authorized, suspending the rate statutes. The court, in the progress of the litigation, declared unconstitutional the act which ipso facto forfeited the right of any foreign railroad corporation to do intrastate business, if it resorted to the federal court to test the reasonableness of the rates. Seaboard Air Line Railway Co., et al. v. Railroad Commission of Alabama et al. (C. C.) 155 Fed. 792. Among the statutes mentioned in the original bills, but as to which no relief was asked or granted, was one which forfeited the right of a foreign railroad corporation to do intrastate business if it removed any cause from a state court to the federal court. The Southern Railway Company, in August, 1907, removed a case from the state court at Talladega to the federal court, and thereupon the state authorities proclaimed that it had forfeited its right to do intrastate business, and avowed a purpose to arrest its operatives and indict

that company for every act of intrastate transportation which it did thereafter, until its right was restored in the manner prescribed by the statute.

The state officials, although they had acquiesced in the preliminary injunctions on the original bills, then began to threaten to arrest the officials and servants of all other railroad companies for nonobservance of the rate statutes, notwithstanding they had been suspended, and the court had declared unconstitutional the act which forfeited the right of a foreign carrier to do intrastate business if it resorted to a federal court to test the reasonableness of the rates. At the instance of the Louisville & Nashville Railroad Company the court on September 4, 1907, enjoined the several solicitors and sheriffs of the state in the counties its road traversed from taking any steps whatever to enforce against that company or its servants the statutes complained of in its original bill. *Louisville & Nashville Railroad Co. et al. v. Railroad Commission of Alabama et al.* (C. C.) 157 Fed. 944.

In consequence of the attitude of the state authorities towards the Southern Railway Company, that company agreed to abandon its litigation and to put in force a schedule of rates which the Governor demanded, if the state authorities revoked the forfeiture of its license to do intrastate business. Shortly thereafter the Mobile & Ohio Railroad Company, the Atlantic Coast Line Railroad Company, the Kansas City, Memphis & Birmingham Railroad Company, the Alabama Great Southern Railroad Company, and the Atlanta & Birmingham Air Line Railway Company followed the example of the Southern Railway Company, and agreed with the state authorities upon a tariff of rates and to abandon their contest. The Louisville & Nashville Railroad Company, the Central of Georgia Railway Company, the South & North Alabama Railroad Company, the Nashville, Chattanooga & St. Louis Railway Company, and the Western Railway of Alabama, however, refused to agree with the state authorities, and continued to prosecute their original bills and to insist upon the protection of the injunctions issued therein. Thereupon a special session of the Legislature was called by the Governor to deal with the recalcitrant railroad companies. At the called session, many of the laws regarding tariffs for freight and passenger rates and reasonableness of rates were repealed, and other statutory rates prescribed, as well as another mode of testing the reasonableness of the rates. The nature and extent of these changes is hereinafter fully stated. The five railroad companies last named, after the passage of the legislation complained of, filed their supplemental bills, to arrest the execution of these laws, against the Railroad Commission, the Attorney General, the circuit solicitors, and clerks and sheriffs of the several counties in which the railroads were operated, and against certain classes of shippers and passengers, who had threatened to invoke the penalties the laws prescribed if the freight and passenger rates were not put into effect.

In all essential particulars the statements of fact in each of the bills is the same, except as to the value of the different properties and the income therefrom and the legal validity of the provision authorizing the commission to change statutory rates. The bills set out the respective gross earnings and net earnings of the several companies, how much was derived from interstate commerce and from intrastate business, and the cost of conducting the same. They also set forth in detail the facts and figures upon which they claimed that the reduced rates were confiscatory and denied to the complainants adequate compensation upon the value of the property devoted to intrastate commerce. As the supplemental bills are substantially alike as to the questions arising on the preliminary hearing, only one of the cases, that of the Central of Georgia Railway Company, is reported. That bill, after stating prior events in the litigation and the orders made in the beginning thereof, alleges:

"VII. Not a complaint was made, from any responsible source, at least, that the court has exceeded its jurisdiction or interfered with the rights of the state of Alabama and the rightful authority of any of its officials for a period of at least four months, when an agitation was started by his excellency, Braxton B. Comer, Governor of the state of Alabama, and other officials of the state of Alabama, to break down the jurisdiction of this honorable court in this case and in the equity cases which were then being prosecuted in this

honorable court by the 11 other railway companies hereinbefore mentioned, and to thwart the injunction of this court issued in said cases which are hereinbefore described. Gov. Glenn, of North Carolina, had a short time previously, as is now a matter of public history, through the employment of the criminal processes of the state of North Carolina, and by arresting, intimidating, and coercing the officers, agents, and employes of the Southern Railway Company, forced that railway company to seek the dissolution of an injunction which it had obtained from the Circuit Court of the United States for the Western District of North Carolina, on a bill filed by it to restrain the Railroad Commission of the state of North Carolina from enforcing certain passenger rates made effective on its railroad in the state of North Carolina by the statutes of that state.

"During the early part of August, 1907, the Southern Railway Company removed a damage suit from a state court of Alabama to a federal court in Alabama, contrary to the act of the Legislature of Alabama approved March 4, 1907, entitled 'An act to further regulate the doing of business in the state of Alabama by foreign or nonresident corporations, or corporations organized under or by virtue of the laws of any other state or government than the state of Alabama, and to fix a punishment for a violation thereof,' which provides that, should any corporation, after the 1st day of July, 1907, doing business in the state of Alabama, and having a license to do business therein, being sued in any of the courts of the state of Alabama, file or caused to be filed in said court any petition for removal to any federal court, or cause or procure the removal of said case to federal court, the judge of said court shall forthwith certify a copy of said petition or removal proceeding to the Secretary of State, who shall thereupon immediately cancel said license, and make and enter upon the stub thereof an order of cancellation; and the act further provides that, upon the cancellation of said license, any contracts, agreements, undertakings, or engagements with or by or to corporation shall be null and void. The act further provided that, should any officer, agent, or employe of such corporation having its license revoked make or attempt to make any contract, agreement, undertaking, or engagement for, with, by, or in its name, shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$100, nor more than \$1,000, and may also be imprisoned in the county jail, or sentenced to hard labor in the county, for not more than 12 months, either or both, at the discretion of the jury trying the case. Whereupon, in accordance with the terms of said act, the license of the Southern Railway Company was immediately canceled by the Secretary of State. In this situation of affairs his excellency, Braxton B. Comer, Governor of the state of Alabama, in emulation of the example of Gov. Glenn of North Carolina, conceived the idea and purpose to break down, frustrate, render ineffectual, and destroy the force and effect of the injunction issued by this honorable court in the original bill in this cause, and in the original bills in the causes filed by the 11 other railway companies hereinbefore referred to.

"The Southern Railway Company operates in the state of Alabama, according to the Annual Report of the Railroad Commission of Alabama for the year 1904 (which is the latest available), 1,157 miles of main line; the Alabama Great Southern Railroad Company operates in Alabama 258 miles of main line; and the Mobile & Ohio Railroad Company operates in Alabama 279 miles of main line. These last two named railroad companies are affiliated with and controlled by the Southern Railway. The total mileage operated by these lines in Alabama is 1,694 miles of main line. This system of railways competes at many points in Alabama with this complainant, and with the other railways which filed bills to enjoin the statutory rates of the state of Alabama. Therefore, if the Southern Railway, and its allied and affiliated lines, could be forced to put the rates enacted by the state of Alabama into effect on their lines of railway in Alabama, this would be persuasive upon the other lines of railway operating in Alabama. The Governor of Alabama threatened to enforce upon the Southern Railway Company, its officers, agents, and employes, the harsh and drastic penalties prescribed by the eighth section of the act hereinbefore described, which prohibited it from removing a case from a state court to a federal court, but proposed, without any warrant or authority of law whatever, that the Southern Railway Company, and its

officers, agents, and employes should receive immunity from the penalties and conditions of the said act, under which its license to do business in the state of Alabama had been canceled, provided the Southern Railway Company would dismiss its bill heretofore filed in this cause to enjoin said rates and would put said rates into effect. Whereupon the Southern Railway Company and its allied and affiliated lines entered into negotiations with his excellency, the said Braxton Bragg Comer, governor of the state of Alabama, looking to the settlement of the issues between them, and this negotiation culminated in a contract between the Southern Railway Company, the Mobile & Ohio Railroad Company, and the Alabama Great Southern Railroad Company, of the one part, and his excellency, Braxton B. Comer, Governor of Alabama, of the other part, a true copy of which is as follows:

"Memorandum of Agreement by and between the Honorable B. B. Comer, Governor of, and acting for, the state of Alabama, and W. W. Finley, president of the Southern Railway and the Alabama Great Southern Railroad, and E. L. Russell, vice president and acting for the Mobile & Ohio Railroad:

"First. It is hereby understood and agreed by and between all the parties to this agreement that the Southern Railway, Alabama Great Southern Railroad, and Mobile & Ohio Railroad shall have the right and authority, on and from the 1st day of December, 1907, to establish and maintain a straight local or intrastate passenger rate of two and three-quarters ($2\frac{3}{4}$) cents per mile on each of the railroads of the railroad companies herein named.

"Second. In the case of persons riding on the trains of said railroads, or either of them, who have not provided themselves with regular tickets, the said railroad companies shall have the right and authority to charge and collect from such persons at the rate of three cents per mile over their respective lines.

"Third. It is further understood and agreed that if any one of said companies shall hereafter voluntarily, or as the final result of litigation, put into effect in Virginia, North Carolina, South Carolina, or Georgia a first-class intrastate straight local passenger fare of less than two and three-quarters ($2\frac{3}{4}$) cents per mile, the said company putting in such less rates shall put in the same rates as the straight local or intrastate passenger fares on its line in the state of Alabama, an intrastate straight local rate for the transportation of persons less than two and a half ($2\frac{1}{2}$) cents per mile.

"Fourth. It is further understood and agreed by the parties hereto that the putting in, in any of the states herein named, of a rate less than two and three-quarters ($2\frac{3}{4}$) cents per mile, brought about by the institution of suit or suits or pending litigation in any one of the said states, or order of any Railroad Commission, is not to be understood and considered as the putting in of such rates voluntarily, or as the final result of litigation, unless such rate or rates so put in are afterwards agreed to be maintained permanently for any cause. It is further understood and agreed that the putting in of special rates, such as excursion rates, second-class rates, or of mileage books, at less than two and three-quarters ($2\frac{3}{4}$) cents per mile in any of the states named, shall not, under any circumstances, be understood or considered as the putting of a rate in any of said states which shall require the two and three-quarters cents ($2\frac{3}{4}$) per mile intrastate straight local rate in Alabama to be reduced.

"Fifth. It is further understood and agreed that the Southern Railway Company, Alabama Great Southern Railroad, and Mobile & Ohio Railroad, in consideration of the rates authorized to be charged and collected as hereinbefore described, shall issue and put on sale books of the denomination of 500 miles at the rate of two and one-half ($2\frac{1}{2}$) cents per mile, to be used by the immediate families of the purchaser of such books, or the members thereof, living in the state of Alabama, the names of the members of such families to be inserted in such books, and books in the denominations of 1,000 and 2,000 miles, respectively, at the rate of two and one-quarter ($2\frac{1}{4}$) cents per mile, good only for the use of the purchaser thereof.

"Sixth. It is further understood and agreed between the parties to this agreement that, effective 1st day of December, 1907, the railroad company parties hereto have the right and are authorized to charge and collect, and will charge from points on their respective lines in the state of Alabama, on

the commodities described by the Alabama statute approved March 2, 1907, known as the "110 Commodity Rate Act," not more than the same mileage rates that the railroad companies are at present respectively authorized to charge and collect from points to points on its lines in the state of Georgia.

"Seventh. It is, however, further understood and agreed that if, on trial, any one of the commodity rates named in the said "110 Commodity Rate Act," or the passenger rates named in this agreement, one or all, should be found to be unreasonably low, the Railroad Commission of Alabama shall give adequate relief by raising, or permitting to be raised, any such rate or rates as may be found to be unreasonably low to what will be found to be reasonable after such trial. If, after such trial, said Railroad Commission should fail or refuse for 30 days to give the relief to which the railroad companies parties hereto, or either of them, then consider it or they are entitled to receive, neither of said companies shall be deemed to have in any way waived or surrendered any of its legal rights to relief in any court of competent jurisdiction; and its rights to such relief shall not be impaired, or in any way prejudiced, by this agreement, or by the fact that said rates had been put into effect and had been given a trial under this agreement. It is further understood and agreed that, if the said companies shall keep the said commodity and passenger rates in effect for six months from the 1st day of January, 1908, the trial thus given shall constitute a reasonable trial as to either or both. It is further understood and agreed that nothing in this agreement shall in any way affect or prejudice the rights of either of said railroad companies, parties hereto, in respect to obtaining any relief as to any other freight rates than the said commodity rates, now or hereafter of force, either before the Railroad Commission of Alabama, or in any court of competent jurisdiction.

"Eighth. It is agreed and understood that no right or interest of the railroad companies herein named shall be affected adversely in respect to the rates and matters covered by this agreement by any legislation to be enacted at any extra session of the Legislature of Alabama held prior to the next regular session of the Legislature, and that the Governor and Railroad Commission will do all things necessary on the part of the state to protect the companies herein named in respect to the rates and matters covered by this agreement.

"Ninth. It is further understood and agreed that in the making of this settlement and the dismissal of the pending litigation, according to the terms of the verbal agreement between the parties hereto made contemporaneously with this instrument, there is to be no liability upon any of the companies herein named growing or arising out of the bonds said companies were required to give on securing the injunction heretofore issued in the pending litigation. It is further understood and agreed that the companies herein named shall under no circumstances incur any liability on their bonds heretofore given, or incur liability for damages on account of their failure to put into effect the disputed rates covering the time from the issuance of said injunction up to the 1st day of October, 1907, when said companies, by an agreement with the state of Alabama heretofore, put into effect the disputed rates, rates involved in the pending litigation, and, further, that the defendants in the rate bills filed by said railroad companies in the federal court at Montgomery will consent to, and aid to have entered, such decrees as may be necessary in the premises.

"In witness whereof, the parties to this agreement have caused the same to be executed in triplicate by the representatives heretofore named of the state of Alabama and the railroad companies.

"State of Alabama,

"By B. B. Comer, Governor.

"Southern Railway Company,

"By W. W. Finley, President.

"Alabama Great Southern Railroad,

"By W. W. Finley, President.

"Mobile & Ohio Railroad,

"By E. L. Russell, Vice President."

"The Seaboard Air Line Railway and the Atlanta & Birmingham Air Line Railway entered into precisely a similar agreement in writing with his ex-

cellency, B. B. Comer, Governor of Alabama, on November 19, 1907, with the exception that the rates therein provided were to go into effect on January 1, 1908, and that it was provided that said two railroads should be put and maintained in at least as favorable a class as the Southern Railway with respects to rates, and that the Railroad Commission should so provide by appropriate orders and regulations.

"VIII. Neither the Railroad Commission nor any of its members were signatories to the above-stated agreements with the Southern Railway Company and with the Seaboard Air Line Railway; but nevertheless they were actual parties thereto, and consented to the agreement thereby made with the Governor of the state of Alabama. The Attorney General of the state of Alabama, the Honorable A. M. Garber, publicly stated in an interview published in the *Montgomery Advertiser* of October 2d as follows: 'This agreement, of course, is based upon good faith. It means that the Governor, the Railroad Commission, and the Attorney General will do all in their power to carry it into effect.'

"A part and one of the controlling considerations of the agreement on the part of the Southern Railway Company was that the Governor of the state of Alabama and the other officials of the state would not enforce against it the provisions of the statute which is hereinbefore referred to under which its license to do business in the state of Alabama was canceled for removing a personal injury suit to the federal court. While the Governor of the state and all other officials of the state of Alabama are generally charged with the enforcement of her statutes, in this instance the Governor and other officials of the state of Alabama have consented and agreed that they would not enforce against the Southern Railway Company the penal provisions of said statute, and that provision of said statute under which the license of the Southern Railway Company to do business in the state of Alabama was revoked should be ignored and considered of no effect. This statute is still of force, and has never been enforced either by the Governor or any authority of the state of Alabama in any respect. Under the said statutory rate acts as originally passed, the Railroad Commission of Alabama had no power to increase the rates made by said statutes, but an act was passed at the summer session of the Legislature of Alabama, approved July 19, 1907, entitled 'An act to prescribe the powers of the Railroad Commission of Alabama, and to authorize it to change any classification of railroads or of any articles of freight or any rates or charges for the transportation of freight or passengers which have been or which may hereafter be prescribed by statute, or any prevailing rates or charges for such transportation which have been or which may hereafter be by statute made the maximum rates.'

"The special session of the Legislature of Alabama adjourned on Saturday, November 23, 1907. On Monday, November 25, 1907, the Railroad Commission of Alabama, exercising the power conferred upon it by the above-mentioned act, and in part execution of the agreements made by his excellency, B. B. Comer, Governor of the State of Alabama, on its behalf, with the Southern Railway Company and its allied lines, and with the Seaboard Air Line Railway Company and the Atlanta & Birmingham Air Line Railway, passed an order, effective December 1, 1907, putting into effect on the lines of railway of the said Southern Railway Companies, between points in the state of Alabama, a passenger rate of two and three-quarters ($2\frac{3}{4}$) cents per mile, a rate of two and one-half ($2\frac{1}{2}$) cents per mile for families purchasing tickets in denominations of 500 miles, and a rate of two and one-quarter ($2\frac{1}{4}$) cents per mile for mileage books of 2,000 miles; the order of the Railroad Commission being as follows:

"The Legislature of Alabama having passed an act entitled 'An act to prescribe and regulate passenger rates on all railroads, other than street railroads, carrying passengers between points in the state of Alabama,' approved February 14, 1907, wherein the passenger rate was fixed at $2\frac{1}{2}$ cents per mile for adults, and the Commission having been enjoined by the principal railroads operating in Alabama against the enforcement of said statutes, and afterwards said injunction having been withdrawn by the Southern Railway, Alabama Great Southern Railroad, Mobile & Ohio Railroad, North Alabama Railway, Mobile & Birmingham Railroad, Seaboard Air Line Railway, Atlantic Coast Railroad, Atlanta & Birmingham Air Line, and St.

Louis & San Francisco, they putting in operation a $2\frac{1}{2}$ cents a mile fare, pending the result of the litigation in the federal court, and afterwards the Southern Railway, Alabama Great Southern, Mobile & Ohio Railroad, Northern Alabama, Mobile & Birmingham, Seaboard, and Atlanta & Birmingham Air Line, representing that said passenger fare was too low, and proposing to the state authorities to put in operation a two and three-quarter ($2\frac{3}{4}$) cents local passenger fare for adults, a 500-mile family ticket at $2\frac{1}{2}$ cents, a 2,000-mile ticket at $2\frac{1}{4}$ cents, and dismissing all litigation instituted against the Commission and state officers charged with the duty of enforcement of said statute, therefore, in the spirit of concession the Commission approved said compromise rate; and, it is hereby ordered the above-mentioned lines shall not charge a greater rate for the transportation of adult persons than $2\frac{3}{4}$ cents per mile, nor a greater for the transportation of children of 5 years of age and under 12 than one-half of the adult rate, and that the aforesaid carriers shall issue a book or ticket containing 500 miles or good for the transportation over 500 miles of road, to be known as "a family ticket book," for the transportation of such persons named thereon, and that the charge for such family ticket shall not be greater than $2\frac{1}{2}$ cents per mile; that the aforesaid carriers shall issue a book containing tickets to the amount of 2,000 miles to be known as a "mileage book or ticket," good for the transportation only of the persons named thereon, and the charge for such book shall not be greater than $2\frac{1}{4}$ cents per mile. It is also ordered that the aforesaid carriers shall not be required to accept a single fare for less than 5 cents, and in case of an odd mile shall pay 3 cents for the last mile or fraction of a mile, and that said carriers shall keep and sell at their regular stations tickets not in excess of rates prescribed in this order. This order to become effective December 1, 1907.

Charles Henderson,

"President Railroad Commission of Alabama."

"The Railroad Commission of Alabama will duly carry out the balance of the agreement made on its behalf by the Governor of the state of Alabama with the Southern Railway Company and its allied lines, and with the Seaboard Air Line Railway and the Atlanta & Birmingham Air Line Railway. The act of the Legislature hereinbefore referred to as the 'Passenger Rate Act,' has by virtue of the order of the Railroad Commission last above recited been modified and amended, and the rates as applied to the railroad companies referred to in the order have been written into said 'Passenger Rate Act.'"

"IX. The Southern Railway Company had, previous to its agreement with the Governor hereinbefore referred to, put into effect the freight and passenger rates prescribed by statute some time in the early part of August, 1907. At this time it was the purpose and intention of his excellency, the said Braxton B. Comer, Governor of the state of Alabama, to cause the orders of this honorable court in the above-described injunction suits to be frustrated and rendered ineffectual by requiring and instructing the solicitors and other prosecuting officials of the several counties through which ran the railroads of this complainant and other railroad companies in Alabama, and their officers, agents, and servants, to be arrested, indicted, prosecuted, and imprisoned, should they or either of them, under the protection of the orders made by this honorable court, and pursuant to the terms thereof, charge, demand, or receive for the transportation of passengers or freight more than the several rates fixed by the statutory rate acts above described, or should they or either of them refuse to receive any article when offered for transportation at the rate of compensation established by statute. His excellency, the said Braxton B. Comer, was at the time of the filing of the original bill of complaint in this cause Governor of the state of Alabama, and is still such Governor, and as such Governor is charged with the duty of seeing that the laws of the state of Alabama are enforced. He knows and is familiar with the bill of complaint in this cause, with the allegations contained therein, with the objects and purposes thereof, and knows of the restraining order heretofore made by this honorable court in this cause, and is familiar with the terms thereof, and as Governor of the state of Alabama he employed special counsel to assist the defendant the said A. M. Garber, Attorney General of the state of Alabama, in defending said cause, and the said Attorney General and the said special counsel have appear-

ed in said cause under said employment, and are representing the defendants therein, and yet his excellency, the said Braxton B. Comer, Governor as aforesaid, has recently on various occasions and in varying language, since the filing of the original bill of complaint in this cause, and since said injunctive order suspending said rates and restraining said parties, openly and publicly repudiated the right of this honorable court to make said order, and has declared that the said order did not operate to suspend the several rates fixed by said several statutes, and has openly and publicly declared that the making of said order by this honorable court is in violation of the sovereign rights of the state of Alabama, and has declared, in spite of the suspension of said rates by said order of this honorable court in this cause, and in spite of the fact that the enforcement of said rates has been restrained and enjoined as aforesaid, that every time a railroad has, since the order was made, charged a greater rate than that prescribed by the statutes, and its officers, agents, and servants have charged, demanded, or received said greater charge, it and they have been guilty of a criminal offense, and that every time any such railroad, or either of its officers, agents, or servants, hereafter makes such a charge, it and they are guilty of a criminal offense, and that they should for each offense be arrested, indicted, and convicted and punished by the courts of the state, and that it is the duty of the solicitors and of the other prosecuting officials of the several counties in which any of said railroads, including the complainant Central of Georgia Railway Company, is operated, to indict and prosecute said railroads and their officers, agents and servants for making such charges in excess of said rates, and that it is the duty of the several courts of the state of Alabama to convict and punish such railroads, their officers, agents, and servants, therefor, without regard to or respect for the order of this honorable court made in said cause, restraining and enjoining the enforcement of the several rates prescribed by the said several statutes heretofore recited, and he has publicly and openly declared his purpose to advise and instruct the several solicitors and other prosecuting officers of said several counties to ignore said order of this honorable court in said cause, suspending said rates and enjoining and restraining the enforcement thereof, and cause to be arrested, indicted, and prosecuted the said several railroads, including the complainant, and their officers, agents, and servants, for each charge made by them in excess of any of the rates prescribed in said statutory rate acts. Among other things, his excellency, the said Braxton B. Comer, has declared that every time a ticket is sold for more than 2½ cents per mile the railroads violate the law, and the person selling a ticket commits a misdemeanor, and it is the duty of every court to so charge the jury, and the duty of every solicitor to make out a case.

"X. All of the railroads of Alabama who filed their bills of complaint in this honorable court to enjoin the enforcement of said rates, with the exception of the complainant, Louisville & Nashville Railroad Company, the South & North Alabama Railroad Company, the Nashville, Chattanooga & St. Louis Railway Company, and the Western Railway of Alabama, have succumbed to the threatening attitude of his excellency, the Governor, and of the prosecuting officers of the state of Alabama, and have put into effect the rates prescribed by the said statutory rate acts. Referring to the putting into effect of said rates by the Southern Railway in the state of Alabama, the Governor openly and publicly stated in substance as follows: 'I think the Southern Railway management was very wise in accepting in good faith the reasonable enacted laws of the state and giving them a fair trial, and it is difficult to understand how any corporation, whether domestic or foreign, can see it to their business interests to place themselves crosswise of the expressed will of the people, and place themselves in defiance of the laws of the state, and seek by injunction of the federal court to place themselves outside of the sympathy of the laws of the state. I wish to thank the Southern Railway officials for their accession to what I am sure is the just demand of the people, and an agreement to obey their laws, and will simply add that a negro crap shooter would be arrested in a minute for any violation of the law, and I shall charge every officer of the state that any violation of our criminal laws, whether by an individual or trust, no matter how small the individual, or how great the trust, is a violation of the law, and must be so charged, and alike made amenable. I am sure

that some of our public service corporations do not fully understand that Alabama is a sovereign state and must dominate its intrastate affairs. I am sure that there is scarcely a citizen of Alabama so scalawag in his views as to wish to help secure the contrary to this. I am sure that the people of Alabama, practically as a unit, demand that the state control its own affairs, and whenever any of our laws, civil or criminal, are violated, the offender must be punished.' He further said in substance as follows: 'I can conceive of no greater mistake than for a public service corporation to attempt to ignore, through an injunction of the federal courts, a state's rights to regulate their business within the state. I think it is a great mistake for local federal courts to attempt to set aside the state's jurisdiction, of its own affairs.'

"XI. Subsequently his excellency, the Governor of Alabama, becoming convinced that the complainant and the Louisville & Nashville Railroad Company and the other four railroad companies hereinbefore mentioned would not yield to the threatening attitude of the officials of the state of Alabama, openly and publicly declared himself in a newspaper interview, which he caused to be published in the Montgomery Advertiser of August 22, 1907, in which, among other things, he said substantially as follows: 'I wish to say, however, that I have not yet lost hope that these public service corporations, which have not yet fallen into line with the purpose of trying the reduced rates, and have assumed an attitude of opposition to state harmony and state regulation, will yet reconsider and will consent to give the new laws a fair trial. I shall use every effort to persuade and induce them to mitigate the friction which is being engendered in the state by co-operation which is in their power to give. It is perhaps needless to say that under section 120 of the Constitution of Alabama, by which I am bound by my oath of office, and which declares that the Governor shall take care that the laws be faithfully executed, I shall endeavor at all times to use all lawful and proper means to secure the enforcement of the laws of Alabama, and during my term of office I shall certainly adopt all lawful and proper means to secure the domination by the state of its domestic affairs. If the statutes already enacted are insufficient, or need modification or amendment, or if legislation is necessary to accomplish the said purpose, I will not hesitate, as often as may be necessary, or from time to time, to call the Legislature together in extraordinary session. Furthermore, if the statutes upon the subjects of freight and passenger charges on intrastate and domestic business are not being observed by October 1, 1907, by all the railroads, under the terms and upon the conditions agreed on with those roads hereinbefore mentioned—that is, the Southern and allied lines, and the Frisco, Seaboard, Birmingham & Atlantic, and Coast Line, and if it shall appear that under the existing laws the state in its just effort to regulate rates is thwarted by any superior power, I will at that time call the Legislature in extra session, to deal with the whole subject and for the purpose of passing such laws as may secure the full regulation by the state of its public service corporations.'

"XII. Complainant, and the other railway companies in Alabama in the same situation with it, not having yielded by the 1st of October, the Governor of the state of Alabama, on the 9th of October, 1907, called a special session of the Legislature of Alabama to assemble on the 7th day of November, 1907. This special session of the Legislature was called in pursuance of the threat hereinbefore stated, mainly for the purpose of passing such legislation as would defeat the jurisdiction of this honorable court in this pending case, and in the other similar cases now pending in this honorable court, brought by other railroad carriers operating in the state of Alabama, and to arrange a scheme or device of legislation so that complainant and the other common carriers by railroad in the state of Alabama could bring a bill in the federal court to test the constitutionality of the laws of the state of Alabama imposing freight and passenger rates, which were to be so framed that the carriers operating in the state of Alabama could not afford to test the validity of said laws, because of the harsh penalties to be inflicted on the common carriers by railroad operating in that state, their officers, agents, and servants.

"XIII. Upon the assembling of the said special session of the Legislature of Alabama, his excellency, the Governor, transmitted a message to the Legislature which dealt mainly with railroad regulation and with the scheme hereinbefore referred to. Special attention is called to the following extracts from

the said message, to wit: 'It is evident that the question at issue is, not so much freight rates or passenger rates, but whether or not the state shall dominate and control its own affairs by limiting the rules and charges of the public service corporations, or whether the railroads shall have the liberty to deny your right to regulate within the state and to ignore your laws and regulations, and every attempt on the part of the state to control them or limit their charges. This proposition I consider so dangerous that, following the advice of your counsel, the Attorney General, and the counsel employed by the state to assist the Attorney General in the presentation of the cause, I recommend and advise the passage of certain bills which the state's attorneys have drawn for the purpose of strengthening the state's position to aid in settling whether or not the people of Alabama have the right to dominate their intrastate affairs and make laws regulating them. I will caution you again that these bills are prepared by the state's attorneys, upon which the state will go to trial, and this legislation is advised because it will be helpful in securing compliance with your statutes fixing passenger and freight rates. You, of course, understand that the railroad interest will be opposed to these acts, and the question will be squarely before you: Whose advice shall we take, the advice of the railroads which are defying your laws, or the advice of the attorneys employed by the state to represent the state in the interest of the people? Whom shall we let dominate and control us, the people or the railroads? * * * The statutes which I recommend are in no sense of the word punitive or destructive. The public service corporations under your laws will be protected and encouraged in every right. Only the dangerous use of power, a condition which is now recognized by every state as dangerous to its citizens, to the property of the state, and to the corporations themselves, is sought to be limited and controlled. These statutes, then, which I advise, and which are recommended by the state's attorneys, are so framed as to be more effective in securing obedience to your statutes regulating rates and regulating the powers of public service corporations. I suggest the passage of these bills as drawn. The changes are amendatory in nature to your former bills and are suggested by further study of the course of events in the litigation now pending. These amendments are made in the same way that an attorney amends his pleadings and brief as his case progresses. Just as in an individual legal contest you would trust your attorneys and follow their suggestions and advice, so in the great legal contest of the state you will observe the same trust and confidence, as the part of prudence and wisdom, for the attainment of a successful issue.'

"XIV. The legislation which was enacted was the legislation which was prepared and submitted to the Legislature by the Governor, with the assistance of the Attorney General of the state of Alabama and other counsel for defendants under the original bill, and constitutes as a whole a scheme or device intended to accomplish the following purposes, to wit:

"(1) The taking away from the Railroad Commission and the Attorney General of all power and authority to enforce the statutory rate acts, so that the present causes of action will be abated as to them and the injunction against them will be *functus officio*.

"(2) To make the charging by complainant of higher rates than those prescribed by the statutes of the state of Alabama punishable by heavy fines for each offense, which shall be enforceable by civil suits against the complainant herein and other railway companies similarly situated, for forfeitures in the name of the state; the theory of this being that, the suits being brought in the name of the state, their prosecution cannot be enjoined by the federal courts.

"(3) To make the charging or exaction of higher rates than those prescribed by the statutes of the state of Alabama, by the officers, agents, and servants of the complainant, a misdemeanor, punishable by heavy penalties for each offense, so that the enforcement of these provisions of the laws may be set in motion by undisclosed persons, by indictments, or by prosecutions in numerous different jurisdictions of the state.

"(4) To provide actions for damages by shippers and passengers who are charged higher rates of freight or passage than are prescribed by statute, which damages are to be assessed by jury, and may be brought in any county

in the state through which the railroad company operates, and which shall not be barred until the lapse of many years.

"(5) To make the penalties and forfeitures in actions for damages so large in amount, and so numerous, and enforceable at the same time in so many different jurisdictions, that this complainant and others similarly situated will be forced to submit or wager all of their property on the result of the litigation, and so that they shall be embarrassed by the enormous amount of litigation encouraged and instituted by the statutes, that they will be forced to put the rates into effect without a judicial determination as to their constitutionality and validity.

"(6) To repeal existing laws, which provide for a remedy, and to substitute in their place a law which purports to give a remedy in the state court, but which gives the remedy only by appeal from an order of the Railroad Commission increasing or reducing rates, or refusing to increase or reduce rates, and gives it in such a manner as to practically make submission to the rates pendente lite a condition precedent.

"(7) To repeal the rate statutes which are attacked by the original bill of complaint in this cause, and to enact in their places statutes which purport to enact different rates (but which, in reality and effect, are but re-enactments of the old statutes, with immaterial modifications); the theory being that by this method the cause of action of the original bill of complaint in this cause, and of other similar bills, will be abated thereby, and the jurisdiction of this honorable court defeated and destroyed.

"(8) At all events, to defeat the jurisdiction of this honorable court in these present cases, and make it impossible for the complainant, and others similarly situated, to proceed at all in the federal courts of Alabama.

"XV. The following are the statutes which were passed at the special session of the Legislature of Alabama which convened November 7, 1907, and which constitute the scheme or device previously described:

"(1) An act approved November 23, 1907, entitled 'An act to exclude from the Railroad Commission and the members thereof and the Attorney General all power, authority or duty to enforce any rates, fares, or charges for the transportation of property or passengers which have been or which may hereafter be prescribed by statute, or the making the maximum rates by statute or any law now existing or which may hereafter be enacted prescribing such rates, charges or fares, or any rates, fares or charges which have been or may hereafter be established by the Railroad Commission's orders establishing the same, and all power and authority to instruct, direct or request the Attorney General to institute any legal proceedings to enforce such rates, fares, charges, statutes or orders.'

"(2) An act approved November 23, 1907, entitled 'An act to repeal sections 18, 36, 37, 38, 39, 40, 42, 43 and 45 of an act of the Legislature of Alabama entitled "An act to create the Railroad Commission, to be known as the Railroad Commission of Alabama, to define its duties and powers and provide for its mode of procedure, and prescribe penalties for violation of its orders."' Section 18 of said act charged the Railroad Commission with the enforcement of all statutory freight and passenger rates, and with the power to prevent and punish any violation of the statutes establishing such rates. Sections 36, 37, 38, 39, and 40 provided the method for contesting in the courts the statutory freight and passenger rates, and the rates made by the Commission, or orders of the Commission making rules and regulations. Section 42 provided that in the trial of any cause provided for or arising under said act, or any cause in which was involved the validity, fairness, or reasonableness of rates or charges or orders of any kind made and established by the Railroad Commission, such rates or charges or orders shall be prima facie presumed to be valid, fair, and reasonable until the contrary shown, and the burden shall be on the party attacking said rates or orders to show that same are invalid, unfair, or unreasonable. Section 43 of said act provided for a revocation of the license to carry on business in this state of any foreign corporation which should institute a case in the federal court, or remove one there, involving rates made by statutes of the state of Alabama, or by the Commission, or involving the rules or regulations made by order of the Commission. Section 45 provided a penalty of not less than \$50 nor more than \$1,000 for the viola-

tion of rates made by the Commission, and provided for the institution of suits to recover the same through the Attorney General or the solicitors.

"(3) An act approved November 23, 1907, entitled 'An act to amend sections 5, 29, 35, 41 and 52 of the act entitled "An act to create a Railroad Commission," etc. Section 5 relates to a matter which is not necessary to refer to in this connection. Section 29 is amended so as to cut off all reference therein to evidence on complaints under the provisions of the thirty-sixth section of the act, which latter section relates to suits to contest the validity of rates and their reasonableness. Section 35 is amended so as to eliminate from this section reference to section 36 of the act. Section 41 is so amended as to take away from the Railroad Commission the power of applying for mandamus with respect to its rules and regulations. Section 52 is so amended as to take away the power of the Attorney General to represent the Railroad Commission in any proceedings with reference to rates, but preserves his power to represent them in proceedings in matters other than those relating to rates.

"(4) An act approved November 23, 1907, entitled 'An act to repeal an act entitled "An act to provide the manner in which any person, company or corporation owning or operating as a common carrier any railroad in whole or in part in this state may contest the validity or reasonableness and fairness of any maximum rate established by statute to be charged by railroads for the transportation originating and terminating within the state of articles, and have the same annulled or the enforcement thereof enjoined or restrained."' This act, which was repealed, provided that any person, company, or corporation should have the right to contest the validity or fairness or reasonableness of and the right of the Railroad Commission of Alabama to enforce any rate or rates of compensation established by statute for the transportation of freight within the state of Alabama, by filing a petition or complaint, if such contest be instituted in a state court, in the circuit court or chancery court of Montgomery county, Ala., or other court in said county having a concurrent jurisdiction with said circuit court or chancery court, making the Railroad Commission of Alabama defendant therein, and in said petition the validity, fairness, or reasonableness of said rates may be contested. It was further provided that the rates might be suspended upon complying with certain conditions with reference to giving bond, and it was particularly provided that 'no preliminary injunction or interlocutory order or decree suspending or restraining any of the rates established by statute, or the enforcement of said rates, or any of them, should be granted by a judge, except upon hearing after not less than five days' notice to the Railroad Commission of Alabama, and no judge shall grant such injunction or interlocutory order or decree without requiring as a condition precedent to the issue thereof the filing of bond under certain conditions referred to in the act.' Under the provisions of this statute the freight rates were suspended by the interlocutory order of this honorable court in the original bill in this cause.

"(5) An act approved November 23, 1907, entitled 'An act to provide for and authorize appeals from any action or order of the Railroad Commission of Alabama, affecting or relating to, or reducing or increasing, or refusing to increase any rates, fares or charges by common carriers, for the transportation of property, freight or passengers specifically prescribed by statute, or made the maximum rate by statute, or established by said Railroad Commission.' This act provides a method of contesting the final action or order of the Railroad Commission of Alabama, reducing or increasing, or refusing to reduce or increase, any rates of freight or passenger either made by statute or by the Commission by appeal 'to the chancery court or other court having chancery jurisdiction of Montgomery county, Alabama.' This act does not permit of any contest of rates made by statute until there is some final action or order of the Railroad Commission upon said statutory rates. This act provides that an appeal shall be taken within 30 days from the date of the order of the Commission, and that the appeal shall be granted as a matter of course, and that within 60 days from the perfecting of the appeal the Railroad Commission, shall certify to the appellate court a complete transcript of all the proceedings, and that the trial of the appeal in the appellate court shall be de novo. The second section provides that no appeal shall suspend the order of the Commission until the appellate court shall, after consideration of the

testimony taken before the commission, so direct. The act is so arranged that, before the railway company can get the benefit of it, some application must be made to the Commission to increase the rates made by the statute, or the Commission must reduce the statutory rates. The Commission can consider the question as long as it pleases and make up the judgment at its pleasure, and in the meantime the statutory rates will be and remain in force. After the Commission has pronounced the judgment, and the appeal is taken, the Commission has 60 days within which to certify its proceedings to the appellate court, after which the appellate court must determine for itself, and then solely on the evidence certified by the Commission, the question whether the rates shall be suspended during the prosecution of the appeal. This act specially provides that, 'when the appeal is taken by the common carrier or railroad corporation, the Railroad Commission shall be the appellee.'

"(6) An act approved November —, 1907, entitled 'An act to amend section 2 of an act entitled "An act to prevent any officer, agent or employé of any person, company or corporation owning or operating as a common carrier any railroad, in whole or in part in this state, from charging or receiving for the transportation originating and terminating within the state of any article a greater or higher rate of compensation than that established by statute where a rate for the transportation of such article has been established by statute, or from refusing to receive such article for transportation at the rate established by statute."' This amendatory act provides that the agents of a corporation violating the statutory freight rate act shall be guilty of a misdemeanor and for each offense shall be fined a sum not exceeding \$500. The section amended provided for a penalty of not more than \$1,000 nor less than \$200 and in addition for imprisonment in the county jail for a period of six months. The amendatory act also provided that superior officers of the company might be called to account in any county in which the inferior officers violate the act, and that the inferior officers called for witnesses will get indemnity from prosecution for testifying. The act by its terms goes into effect 10 days after its passage and approval.

"(7) The act approved November 23, 1907, entitled 'An act to prohibit common carriers and their officers, agents and employés from publishing, exacting, charging and receiving any higher or greater rate of compensation for the transportation of property or passengers than that specifically designated and prescribed by statute, or made the maximum rate by statute, or than that established by the Railroad Commission, and from refusing to receive property or passengers for transportation at such rates; to provide penalties for a violation thereof and fix a period within which proceedings may be instituted for the recovery of such penalties, and the procedure to recover the same.' Section 1 of this act makes it unlawful for a common carrier to publish, exact, or charge a higher rate for freight or passengers than that prescribed by statute or by the Commission. Section 2 provides that the corporation shall forfeit to the state of Alabama a sum not exceeding \$2,000 for each offense to be determined by the court. Section 3 makes each publication, exaction, or charge for the transportation of a passenger or for the carriage of freight in excess of the statutory rate or rates established by the Railroad Commission a separate and distinct offense. Section 4 provides that every officer, agent, or employé of the common carrier violating the act shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding \$500 for each offense, to be determined by the court. Section 5 provides that a civil action to recover forfeitures provided by section 2 may be brought in the name of the state of Alabama in any county in which the defendant does business in the state of Alabama, and that the forfeitures may be consolidated into one action in any county. This section further provides that no suit for such forfeiture shall be instituted by the Railroad Commission, the Attorney General, or solicitor; but any citizen of the state may institute and prosecute such suit in the name of the state of Alabama without his name appearing in the complaint; but such complaint shall be signed by the citizen instituting the suit, or for him and in his name by his agent thereunto authorized in writing, and by the attorney said citizen may engage to represent the state as plaintiff. 'One-half of the amount recovered in such forfeiture suits shall be paid to the person bringing the suit and the other half to the state.' It is further provided that

'such suit instituted by any citizen shall be and be deemed to be a suit by the state of Alabama against such common carrier or railroad corporation.' It is further provided that 'if on the trial of such suit the defendant should set up in defense in substance or effect, that it has been enjoined or restrained by a temporary or permanent order at the suit of any person or corporation from putting into effect or charging the rates or fares established by statute, or by order of the Railroad Commission, or from complying with the statutes or orders establishing such rates or fares, it shall be competent for the plaintiff to set up in reply, in substance and effect, that the procuring of the injunction was collusive or that the procuring or continuing thereof was not in good faith resisted, and upon the trial of such issue or issues the burden shall be on the common carrier or railroad corporation to show to the reasonable satisfaction of the jury, or the court, if the cause be tried by the court, without the intervention of a jury, that said injunction was not obtained by collusion between the parties to the suit in which said injunction was granted, or that the procuring or continuing thereof had been in good faith resisted.' This act by its terms goes into effect 10 days after its passage and approval.

"(8) An act approved November —, 1907, entitled 'An act to prohibit railroads and other common carriers or terminal companies or other companies or persons controlling access to passenger trains from preventing access to regular trains carrying passengers by the use of fences, gates or by any means whatsoever by any person desiring to take passage on said trains between points within this state, when such person has offered to purchase a ticket at the rate prescribed by statute or fixed by the Railroad Commission, and the sale of such ticket at such rate has been refused; to prescribe the penalty for violations thereof, the period within which proceedings may be instituted to recover such penalties and the procedure for the recovery of the same.' Section 1 provides that whenever a railroad company fails to keep for sale, or to sell on demand at any of its regular stations, tickets at the prescribed rates, it shall be unlawful for such company, or any terminal company, or any person controlling access to passenger trains, to prevent by the use of fences, bars, gates, or any means whatsoever, intending passengers from taking passage on trains at such stations. Section 2 provides that every corporation violating this act shall forfeit to the state of Alabama a sum of not less than \$200 nor more than \$1,000 for each offense, to be determined by the court. Section 3 provides that the officers, agents, or servants of the company violating the act shall be guilty of a misdemeanor, and upon conviction fined not less than \$100 nor more than \$500 for each offense. Section 4 provides that a civil action to recover forfeitures provided by section 2 may be brought in any county in which the company does business at any time within 10 years from the commission of the acts prohibited by section 1. This section also provides for the institution and prosecution of suits, forfeiture suits, in identically the same language as used in the act referred to in the preceding paragraph, and also provides that a temporary restraining order or injunction pendente lite enjoining the enforcement of the rates shall be no defense to suits for recovery of such forfeitures. This act by its terms goes into effect 10 days after its passage and approval.

"(9) An act approved November —, 1907, entitled 'An act to make railroad and other common carriers liable in damages to passengers or persons desiring to become passengers for refusing to carry such persons between points in this state at which regular stops are made to take on and let off passengers at the rate which has been or may be hereafter prescribed by statute, or the rates which have been or may hereafter be established by the Railroad Commission; to authorize actions to recover such damages and prescribe the period within which such actions may be brought, and the procedure.' Section 1 of this act provides that any person who desires in good faith to become a passenger and is refused transportation at the rate of fare prescribed either by statute, or by the Commission, may maintain an action for damages against said railroad company or other common carrier, and recover such damages as the jury may assess at any time within ten years and in any county in which the railroad does business or in any county through which the passenger would have been carried to reach his destination. Section 2 provides that any person acting on behalf of the company within the scope of his employment

and refusing such transportation shall be the act of the railroad company. Section 3 provides that the refusal of the railroad company to sell a person a ticket at stations where tickets are kept for sale at the prescribed rates shall be prima facie evidence of a refusal to carry, and it shall not be necessary for such person to tender the exact amount of fare due for such transportation. When an excess charge is made by an employe through inadvertence or mistake, it shall not be construed as a refusal within the meaning of section 1 of this act. Section 4 provides that it shall be no defense to such action that a temporary restraining order or injunction pendente lite has been granted or issued in a proceeding in which the plaintiff is not named as a party, nor shall such action be continued on the ground that suit is pending in another court wherein is drawn in question the validity or reasonableness of the rates, or on the ground that such injunction or restraining order has been granted. This act by its terms goes into effect 10 days after its passage and approval.

"(10) An act approved November 23, 1907, entitled 'An act to authorize the recovery of damages by any person who has been ejected from any regular passenger train of any railroad in this state for refusal to pay a greater or higher rate of fare than that prescribed by statute, or by the Railroad Commission, and to prescribe the period within which such action may be brought.' This act provides that under the circumstances referred to in the title a person ejected may recover such damages as the jury may assess, which action may be instituted at any time within 10 years from the date of the accrual of the cause of action.

"(11) An act approved November 23, 1907, entitled 'An act to further regulate railroads and other common carriers, to secure reasonable rates, and to prevent unjust discrimination in their public service, and to further prescribe the powers, duty and authority of the Railroad Commission with respect to said railroads and other common carriers, and to fix the penalties for violations of regulations and of the orders of said Railroad Commission.' This act provides for the further regulation of railroads in various matters relating particularly to furnishing facilities and to furnishing information to the Commission on a variety of subjects. Section 13 of the act provides that the printed reports of the Railroad Commission published by its authority shall be admissible in evidence in any court in Alabama without further proof, and that any schedule or rates or order of the Commission shall be admissible in evidence upon the certificate of the Commission, or any member thereof, or of the Secretary of the Commission. Section 14 provides that, when a shipment of freight passes over the whole or part of two or more railroads, the Commission shall have the power to prescribe their continuous mileage rates or joint rates as it may in its judgment see fit. Joint rates are the sum of two local rates less 10 per cent., and as the rate per ton per mile decreases with the distance joint rates are much lower than the continuous mileage rates. Section 15 provides that 'the domicile of the Railroad Commission is hereby fixed at the capital of the state in Montgomery, Montgomery county, and no courts other than those of Montgomery county shall have or take jurisdiction, in any suit or proceeding brought or instituted against said Commission.'

"(12) An act approved November 23, 1907, entitled 'An act to repeal an act of the Legislature of Alabama, entitled "An act to fix and establish the maximum rates to be charged by railroads now operating or which may hereafter operate as common carriers in whole or in part in the state of Alabama, for the transportation originating and terminating within the state of certain articles, and for this purpose to classify said articles and said railroads," approved March 2, 1907.' This act repealed the act hereinbefore referred to as the 'Old Commodity Rate Act.'

"(13) At the same special session of the Legislature of Alabama eight separate acts were passed, all approved November 23, 1907, each entitled 'An act to fix and establish the maximum rates to be charged by railroads now operating or which may hereafter operate as common carriers in whole or in part in the state of Alabama, for a transportation originating and terminating in the state of certain articles or commodities to be known as "Group ———," and for this purpose to classify railroads.' These eight acts are hereinafter referred to as the 'New Commodity Rate Acts.' The old commodity rate act,

which was repealed at the special session of the Legislature as stated in the paragraph immediately preceding this paragraph, covered about 110 different commodities. These eight acts cover substantially the same commodities as were covered by the old commodity rate act, with a few immaterial exceptions, to be hereafter noted. The 110 commodities included in the old commodity rate act were classified into eight groups, and each one of the eight new acts dealt separately with one of the eight groups; the said eight acts being identical in all respects, except with reference to the commodities grouped therein and the rates applicable thereto. The rates prescribed for the several commodities in the new commodity rate acts are substantially the same as those prescribed for the same commodities in the old commodity rate act, with some exceptions to be hereafter noted.

"XVI. Now that the acts have been passed at the special session of the Legislature of Alabama in pursuance of the proclamation and message of the Governor, and the scheme or device which is hereinbefore set forth has become crystallized, it is the purpose and intention of the Governor of the state and the other officials of the state charged with the execution of her laws to put the said scheme or device into effective operation. The design is that a multitude of actions for damages shall be brought against complainant by persons who intend to be or become passengers or shippers of freight, that a multitude of forfeiture suits shall be brought against complainant in different jurisdictions at the same time, and that its officers, agents, and employes shall be prosecuted for misdemeanors and fined, and that all the machinery provided by the laws of the state of Alabama shall be put in motion through the solicitors and sheriffs of the various counties through which complainant operates its railroad, and the process of the state courts will be employed to render ineffectual and frustrate the jurisdiction of this court and to coerce the complainant to put into effect the rates prescribed by the said statutory rate acts.

* * * * *

"XXVII. Complainant alleges and avers that the rates of freight and passenger traffic which it is now permitted to charge in its domestic business in the state of Alabama, and those which it is compelled to charge by reason of circumstances beyond its control, do not yield a fair return upon a fair valuation of its property. Complainant is vested, as a right incident to its ownership, with the lawful right to charge for such passenger and freight business rates which yield a fair return upon a fair value of its property, and also with the lawful right to charge for each class of business such rates as will yield a fair return upon a fair valuation of that portion of its property which is devoted to each particular service. The passenger rates imposed upon complainant by the said 'Passenger Rate Act,' and also the freight rates imposed upon complainant by the said eight freight rate acts, hereinbefore described as the 'New Commodity Rate Acts,' are unjust and unreasonably low, and are confiscatory of the property of complainant. And thereupon complainant alleges and avers that said 'Passenger Rate Act' and the 'New Commodity Rate Acts' are unconstitutional, null, and void, in that they deprive complainant of its property without due process of law and deny it the equal protection of the law, contrary to the fourteenth amendment of the Constitution of the United States.

"XXVIII. Under the Constitution of the state of Alabama (section 243) it is provided: 'The power and authority of regulating railroad freight and passenger tariffs, the locating and building of passenger and freight depots, correcting abuses, and preventing unjust discriminations, and extortions, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the Legislature, whose duty it shall be to pass laws from time to time, regulating freight and passenger tariffs, to prohibit unjust discriminations on the various railroads, canals and rivers of the state, and to prohibit the charging of other than just and reasonable rates, and enforce the same by adequate facilities.' Complainant alleges and avers that the rates imposed upon it by the said passenger rate act and by the said new commodity rate acts are unreasonable and unjust, and that, therefore, the said acts are unconstitutional, null, and void, in that they are contrary to the above-

recited section of the Constitution of Alabama, which is a limitation upon the power of the Legislature of the state of Alabama in this respect.

"XXIX. Article 4, par. 95, of the Constitution of the state of Alabama, provides: 'There can be no law of this state, impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the Legislature shall have no power to revise any right or remedy which may have become barred by the lapse of time or by any statute of this state. After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action or destroy the existing defense to such suit.' The scheme or purpose of the legislation hereinbefore set forth is to take away the cause of action of the complainant set forth in its original bill. This scheme is sought to be accomplished particularly by the following acts:

"(1) The act which excludes from the Commission and the Attorney General all power and authority to enforce rates, which act is more particularly set forth and described in article XV, paragraph 1, of this supplemental bill.

"(2) The act which repeals certain sections of the act entitled 'An act to create the Railroad Commission,' etc., and particularly section 18 of said act, which repealing act is set forth and more particularly described in article XV, paragraph 2, of this supplemental bill.

"(3) The act which repeals certain sections of the act entitled 'An act to create the Railroad Commission,' etc., which particularly repeals section 41 and section 52 of said act, which repealing act is set forth and more particularly described in article XV, paragraph 3, of this supplemental bill.

"(4) The act which repeals the old commodity rate act, which repealing act is set forth and particularly described in article XV, paragraph 12, of this supplemental bill.

"(5) The new commodity rate acts, which are set out and more particularly described in article XV, paragraph 13, of this supplemental bill. The new commodity rate acts are but a re-enactment in another form of the old commodity rate act, which has been repealed as aforesaid.

"Complainant charges and alleges that the above-recited acts, referred to in paragraphs 1, 2, 3, 4, and 5 of this article, constitute a scheme or device to take away the cause of action of this complainant, and that the said acts are each separately and collectively unconstitutional, null, and void, and contrary to article 4, § 95, of the Constitution of the state of Alabama, in that they seek to take away the cause of action of this complainant in its original bill in this cause.

"XXX. Three of the acts which were passed at the special session of the Legislature of Alabama, and which are respectively set forth and described in article XV, paragraphs 7, 8, and 9, of this supplemental bill, to wit: The act entitled 'An act to prohibit common carriers and their officers, agents and employes, from publishing, exacting, charging or receiving any higher or greater rate of compensation, for the transportation of property or passengers, than that specifically designated and prescribed by statute,' etc. The act entitled 'An act to prohibit railroads and other common carriers or terminal companies, or persons controlling access to passenger trains, from preventing access to railroad trains carrying passengers by the use of fences, gates, bars, or by any means whatsoever,' etc. The act entitled 'An act to make railroad corporations and other common carriers liable in damages to passengers or persons desiring to become passengers for refusing to carry such persons between points in this state,' etc. The first of these acts above recited in the fifth section thereof provides as follows: 'If on the trial of such suit the defendant should set up in defense, in substance or effect, that it has been enjoined or restrained by a temporary or permanent order, at the suit of any person or corporation, from putting into effect or charging the rates or fares established by statute, or by order of the Railroad Commission, or from complying with the statutes or orders establishing such rates or fares, it shall be competent for the plaintiff to set up in reply, in substance or effect, that the procuring of the injunction was collusive or that the procuring or continuing thereof was not in good faith resisted, and upon the trial of such issue or issues, the burden shall be on the common carrier or railroad corporation, to show to the reasonable satisfaction of a jury, or the court, if the cause be

tried by the court without the intervention of a jury, that said injunction was obtained by collusion between the parties to the suit in which said injunction was granted, or that the procuring or continuing thereof had been in good faith resisted.' The second of the above-recited acts provides in the fourth section thereof that, 'it shall be no defense to any suit to recover such forfeiture that temporary restraining order or injunction pendente lite has been granted or issued, which undertakes to enjoin or delay the enforcement of the rates prescribed by statute, or any of them, or the statute or order prescribing such rates, or that the common carrier or railroad corporation has been enjoined or restrained by temporary restraining order or injunction pendente lite, from putting in force such statutory rates or charges, or the rates or charges established by the Railroad Commission or the statute or order prescribing such rates, at the suit of any person or corporation.' The third of the above-recited acts provides in section 4 thereof that 'It shall be no defense to any such action that a temporary restraining order or injunction pendente lite has been granted or issued, in a proceeding in which the plaintiff in said action is not named as a party, in enjoining the enforcement of the rates prescribed by statute, or any of them, or the statutory rates established by the Railroad Commission, or any of them, or the statute or order prescribing such rates, or that the Railroad Commission or other common carrier has been enjoined or restrained by such temporary restraining order or injunction pendente lite in a proceeding in which the plaintiff in said action is not named as a party from putting in force such statutory rates or such rates established by such Railroad Commission at the suit of any person or corporation; nor shall any such action be continued (except by consent) on the ground that a suit is pending in another court, wherein is drawn in question the validity, fairness or reasonableness of the rates or fares prescribed by statute, or established by the Railroad Commission, or on the ground that such injunction or restraining order has been granted.' Complainant thereupon alleges and charges that the said three acts in this article heretofore specifically described are unconstitutional, null, and void, in that they each deny complainant due process of law and deny to it the equal protection of the laws, all contrary to the fourteenth amendment to the Constitution of the United States. The said three acts are unconstitutional, null, and void, in that they conflict with article 4, § 95, of the Constitution of the state of Alabama, which is hereinbefore recited, and which provides that after suit has been commenced on any cause of action the Legislature shall have no power to take away such cause of action.

"XXXI. The scheme of legislation is so arranged that such a multiplicity of acts and prosecutions will be brought against complainant and its officers, agents, and employes, and such an enormous amount of penalties will be inflicted upon them in that event, that if complainant does not comply with said statutory rate acts (notwithstanding the rates prescribed thereby are unreasonable and unjust and confiscatory) that complainant will be constrained and compelled either to put the said rates into effect or submit to confiscation of its property. The legislation is of such a character and so framed as to deny complainant the opportunity for a judicial review of its rights. The scheme or device to deprive complainant of a judicial review, by imposing upon it and its officers, agents, and employes enormous penalties, and harassing it with a multiplicity of suits, is sought to be accomplished with the following acts passed at the special session of the Legislature of Alabama:

"(1) The act making it a misdemeanor on the part of the officers, agents, and employes of complainant to charge a higher rate than prescribed by statute for articles offered for transportation. This act is more particularly described in article XV, paragraph 6, of this bill.

"(2) The act to prohibit railroads and their officers, agents, and employes from charging higher rates of passenger and freight than authorized by statute or rules of the Commission. This act is more fully set forth and described in article XV, paragraph 7, of this bill.

"(3) The act which prohibits railroads from preventing passage on their trains, by means of fences, gates, or bars, to passengers who have offered to pay the fare prescribed by statute. This act is more fully set forth and described in article XV, paragraph 8, of this bill.

"(4) The act which provides for an action for damages to passengers or persons who are refused transportation at the rate of fare prescribed by statute, which act is more fully set forth and described in article XV, paragraph 10, of this bill.

"The acts above referred to in paragraphs 2 and 3 of this article provide for each offense a forfeiture not exceeding \$2,000, to be determined by the court, and that this forfeiture shall be prosecuted by civil suit in the name of the state, one half thereof to be paid to the prosecutor and the other half to the state. The said acts also provide that for each offense the officers, agents, and employes of a railway company who shall charge or exact higher rates than prescribed by statute shall be guilty of a misdemeanor. The actions for damages provided for by the acts described in paragraphs 4 and 5 of this article leave the amount of damages to be determined by the jury, which means in substance that the jury may find punitive or exemplary damages against the defendant. All the acts provide that the forfeitures, suits, prosecutions for misdemeanors, and the actions for damages may be brought in any county in the state through which complainant operates its lines of railway, without regard to the locality in which the action originates; this being designed to permit prosecutors or plaintiffs, as the case may be, to select the most favorable jurisdiction to them. In the operation of the lines of railroad of complainant within the state of Alabama it receives and carries every day thousands of passengers, and also carries on its lines of railroad in Alabama thousands of shipments of commodities described in the 'New Commodity Rate Acts.' Therefore hundreds, and perhaps, thousands, of actions may be brought against complainant for damages and for forfeitures under the statutes above recited, and thousands of prosecutions may be brought against its officers, agents, and employes for misdemeanors. The forfeitures incurred by the complainant, and the liability to damage incurred by it, and the penalties and fines to which its officers, agents, and employes will be subjected, are unusual and unreasonable in number or amount, as that complainant is allowed to come into court and make its claim of defense, subject only to the condition that upon failure to make good its claim or defense the penalties for such failure either appropriate of its property or subjects it to extravagant and unreasonable loss. The said statutes place upon complainant as a penalty for its failure to make good its claim or defense a burden so great as to practically intimidate it from ascertaining that which it believes its rights. It is designed by the acts above recited in this article to so burden the challenge thereof in the courts that the complainant will be necessarily constrained to submit rather than to take the chances of the penalties imposed. No such penalties or conditions are imposed upon any other persons in the state of Alabama for testing their legal or constitutional rights in the courts.

"Complainant therefore alleges and avers that said acts of the Legislature of Alabama, set forth in this article, deny to it the equal protection of the laws and take its property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States. Complainant further alleges and avers that said acts recited in this article are unconstitutional, null, and void, in that they conflict with the following articles of the Constitution of the state of Alabama: Article 1, § 13, Bill of Rights: 'That all courts shall be open; and that every person, for an injury done him, in his lands, goods or person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.' Article 1, § 35: 'That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions, it is usurpation and oppression.' Article 1, § 36: 'That this enumeration of certain rights shall not impair or deny others retained by the people; and to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate.'

"XXXII. The 'Passenger Rate Act,' hereinbefore described, and the 'New Commodity Rate Acts,' do not provide for any method of contesting the validity, reasonableness, or constitutionality of the rates of passenger and freight thereby prescribed, and under the laws of the state of Alabama not only is no

method provided for a judicial review thereof, but the scheme or device of the law is such as to prevent a judicial review thereof, and especially to prevent a judicial review in the federal courts. The thirty-sixth, thirty-eighth, thirty-ninth and fortieth sections of the act entitled 'An act to create the Railroad Commission,' etc., which provide a method of contesting statutory freight and passenger rates made by the Commission, have been repealed by a repealing act, which is set forth and described in article XV, paragraph 2, of this bill. The act to provide for a method of contesting the validity and fairness of statutory maximum freight rates has been repealed; the repealing act being set forth and described in article XV, paragraph 4, of this bill. A new act has been enacted, which is set forth and described in article XV, paragraph 5, of this bill, and which provides a method for contesting rates; but this act does not apply to statutory rates unless said statutory rates have been either increased or reduced by action of the Railroad Commission, nor does this act provide for a suspension of rates pendente lite, except under conditions which are unfair, unreasonable, and unjust, and which are set forth more at length in article XV, paragraph 5, of this bill. Complainant therefore charges and avers that the said statutory rate acts are unconstitutional, null, and void, in that they deny to the complainant the equal protection of the law and take its property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States. Complainant further charges and avers that the said acts are unconstitutional, null, and void, and contrary to section 13 of article 1 of the Constitution of the state of Alabama, which provides 'that all courts shall be open, and that every person, for an injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law, and right and justice shall be administered without sale, denial or delay.'

"XXXIII. Complainant alleges and charges that the several acts passed at the special session of the Legislature set forth in article XV of this bill, with the exception of the act set forth in subdivision 11 of said article together and collectively constitute a scheme or device to deprive complainant and other carriers by railway in Alabama similarly situated of a right and opportunity to a judicial review of the question whether said rates enacted by the said 'Passenger Rate Act' and by the 'New Commodity Rate Acts' are reasonable and just, and to so burden the challenge of said rates that the complainant will be compelled to submit to said rates and put them into effect, and to take away the cause of action now pending in this court, and to abate the action as to the present defendants, and to deprive the federal courts of all jurisdiction in the premises in the future and force the complainant either to go into the state courts for its remedy or to put the rates into effect contrary to the fourteenth amendment of the Constitution of the United States, contrary to article 1, § 13, of the Bill of Rights of the Constitution of the state of Alabama, and contrary to article 4, § 95, of the Constitution of the state of Alabama.

"XXXIV. The 'Passenger Rate Act' hereinbefore set forth provides that all railroads in the state of Alabama more than 100 miles in length shall charge and receive for passengers not more than $2\frac{1}{2}$ cents per passenger per mile. Under the agreement between the Governor of the state of Alabama and the Southern Railway, the Alabama Great Southern Railroad, and the Mobile & Ohio Railroad, which is hereinbefore referred to, and to which agreement the Railroad Commission of Alabama are actual parties, although not signatories thereto, the railroad companies parties thereto will be permitted to charge on and after December 1, 1907, $2\frac{3}{4}$ cents per mile per passenger between points on their lines in the state of Alabama, $2\frac{1}{2}$ cents per mile for mileage books (for families) in denominations of 500 miles, $2\frac{3}{4}$ cents per mile for mileage books in denominations of 1,000 and 2,000 miles, and will be permitted to charge and collect from passengers who have not provided themselves with tickets at the regular stations 3 cents per mile. A few days ago, to wit, on November 18, 1907, his excellency, B. B. Comer, Governor of Alabama, made an agreement with Seaboard Air Line Railway and the Atlanta & Birmingham Air Line Railway in all respects similar to the agreement made with the Southern Railway Company and its allied lines, with the exception that on the Seaboard Air Line Railway and the Atlanta & Bir-

irmingham Air Line Railway the rates are to go into effect on the 1st day of January next. The Railroad Commission, having the power and authority, under the statute passed at the summer session of the Legislature, to either reduce or increase passenger fares or freight rates which may have been then prescribed or might thereafter be prescribed by statute, did on the 25th of November, 1907 (which is recited at length in article VIII of this bill), in accordance the arrangement and the agreement with the above-recited railroad companies, authorize and empower them to put into effect on their lines the rates of fare for passengers provided by their agreement with the Governor. The said order of the Railroad Commission, therefore, is written into and is a part of the statute hereinbefore referred to as the 'Passenger Rate Act' as modified and changed by order of the Railroad Commission hereinbefore recited, is discriminatory, unjust, and unreasonable, in that it fixes a higher scale of passenger rates for the Southern Railway Company, Alabama Great Southern Railroad, Mobile & Ohio Railroad Company, Seaboard Air Line Railway, and Atlanta & Birmingham Air Line Railway than said 'Passenger Rate Act' permits and authorizes this complainant to charge on its railroad, although the passenger traffic is carried on, on complainant's railroad and on the other railroads above named, under precisely the same or similar conditions, and complainant therefore charges and alleges that the said 'Passenger Rate Act' is unconstitutional, null, and void, and contrary to the fourteenth amendment to the Constitution of the United States, in that it denies to complainant the equal protection of the laws, and it is further unconstitutional, null, and void, and contrary to article 243 of the Constitution of Alabama, which limits the Legislature of Alabama 'to prohibit the charging of other than just and reasonable rates.'

"XXXV. The 'New Commodity Acts' classify the railways of Alabama in four classes. The railways in class 1 are permitted to charge the maximum tariff for the commodities named in the several acts, plus 5 per cent.; class 2 is permitted to charge the maximum rate, plus 20 per cent.; class 3 is permitted to charge the maximum rate, plus 25 per cent.; and class 4 is permitted to charge the maximum rate, plus 50 per cent. The 'Old Commodity Rate Act' also classified the railroads into four classes. Class 1 was permitted to charge the maximum rate; class 2 was permitted to charge the maximum rate, plus 20 per cent.; except in classes B, C, D, F, J, K, L, M, P, and R; class 3 was permitted to charge the maximum rate, plus 25 per cent., except in classes B, C, D, F, J, K, L, M, P, and R; and class 4 was permitted to charge the maximum rate, plus 50 per cent., except on classes C, D, F, J, L, and P. Both the 'Old Commodity Rate Act' and the 'New Commodity Rate Acts' classify complainant in class 2. The 'New Commodity Rate Acts' take the Alabama Great Southern Railroad from class 1, which it occupied under the 'Old Commodity Rate Act' and put it in class 3, thus increasing the rates it is permitted to charge on the commodities covered by the acts 25 per cent. The Southern Railway Company, under the 'Old Commodity Rate Act,' was classified in class 2. Under the 'New Commodity Rate Acts' it is put in class 3, thus increasing the rates it is permitted to charge on said commodities 5 per cent. The change of classification of the Alabama Great Southern Railroad and the Southern Railway permitted both of said railroads to charge commodity rates 5 per cent. higher than complainant. The Alabama Great Southern Railroad earns gross about three times as much per mile in the state of Alabama as complainant, and the Southern Railway Company earns gross in all lines in Alabama about \$1,000 per mile more than does complainant. It is provided, by the agreement heretofore referred to, entered into between his excellency, B. B. Comer, Governor of the state of Alabama, and the Southern Railway Company and its allied lines, the Alabama Great Southern Railroad and the Mobile & Ohio Railroad, and also in the agreement between his excellency, B. B. Comer, and the Seaboard Air Line Railway and the Atlanta & Birmingham Air Line Railway, that said railway companies shall have the right to charge and collect, on their respective lines in the state of Alabama, on commodities prescribed by the Alabama statute approved March 2, 1907, known as the '110 Commodity Rate Act' (which is referred to in this bill as the 'Old Commodity Rate Act') not more than the mileage rates that the said railroad companies are at

present allowed to charge and collect in the state of Georgia, and the latter agreement provides that the Seaboard Air Line Railway and the Atlanta & Birmingham Air Line Railway shall be put and maintained in at least as favorable a class of railroads as the railways of the Southern Railway Company. The Mobile & Ohio Railroad Company earns gross in the state of Alabama more than twice as much per mile than does the complainant. Both of the agreements hereinbefore stated commit the Railroad Commission thereto, and as the Railroad Commission has the power and authority, in pursuance of the act passed at the summer session of the Legislature, which is hereinbefore referred to, to increase or decrease the rates prescribed by statute, said agreements have been written into the said 'New Commodity Rate Acts.' Complainant alleges and charges that the 'New Commodity Rate Acts,' as modified and changed by the agreement hereinbefore recited, are discriminatory, unjust, and unreasonable, in that they fixed a higher scale of freight rates for the Southern Railway Company, Alabama Great Southern Railroad, Mobile & Ohio Railroad Company, Seaboard Air Line Railway, and Atlanta & Birmingham Air Line Railway than the said 'New Commodity Rate Acts' permit and authorize this complainant to charge on its railroad, and complainant therefore charges and alleges that the said 'New Commodity Rate Acts' are unconstitutional, null, and void, and contrary to the fourteenth amendment to the Constitution of the United States, in that they deny to the complainant the equal protection of the laws, and they are further unconstitutional, null, and void, and contrary to article 243 of the Constitution of Alabama, which limits the Legislature of the state of Alabama 'to prohibit the charging of other than just and reasonable rates.'

"XXXVI. The forty-third section of the act approved February 23, 1907, which section provides that if any foreign corporation operating any railroad in the state of Alabama, shall, without the consent of the adversary party, institute in any federal court any suit, action, or proceeding of any kind having for its object the annulment, suspension, injunction, or restraining of any rate or charge made by the Railroad Commission, or any rate or charge made by statute, or any rate or charge made the maximum rate by statute, or shall become a joint actor in such proceeding with any other person, company, or corporation, or shall voluntarily become a party therein, or shall, without the consent of the adversary party thereto, remove such cause to the federal courts, said acts or either of them of such foreign corporation shall ipso facto forfeit its right to engage in or carry on the business of transportation originating and terminating within this state of property or persons, and its license or right to engage in such business shall be ipso facto revoked, has been repealed by an act approved November —, 1907, entitled 'An act to repeal sections 18, 36, 37, 38, 39, 40, 42, 43, and 45 of an act of the Legislature of Alabama, entitled "An act to create the Railroad Commission to be known as the 'Railroad Commission of Alabama,' define its duties and powers, and provide for its mode of procedure, and prescribe penalties for violation of its orders.'" The forty-third section of the above-recited act, which has been repealed as aforesaid, is set forth in article XI of the original bill of complaint in this cause. But the act approved March 6, 1907, entitled 'An act to provide for the revocation of the license or right to engage in or carry on the business of transportation originating and terminating in this state of freight or passengers, of any foreign corporation, which is now engaged, or which may hereafter engage in such business or the business of a common carrier in this state, in the event said corporation shall, for any of the purposes specified in this act, institute in any federal court any suit or proceeding or shall remove or cause to be removed to any federal court any suit or proceeding instituted in any state court for any of the purposes stated in this act,' which is also set forth and described in article XI of the original bill of complaint in this cause, has not been repealed. The complainant, therefore, charges and alleges that the said act last above described is unconstitutional, null, and void, and contrary to section 10 of article 1 of the Constitution of the United States, in that it is a plain and manifest attempt to pass a law impairing the obligation of the contract heretofore made, and then and now existing, between complainant and the state of Alabama, and the said act is further unconstitutional, null, and void, and

contrary to the fourteenth amendment to the Constitution of the United States, in that it applies only to foreign corporations, and not to domestic corporations of the state of Alabama, and thus denies to complainant, a foreign corporation, the equal protection of the laws; and the said act is further unconstitutional, null, and void, and contrary to the fourteenth amendment to the Constitution of the United States, in that it deprives complainant of its property without due process of law. Complainant further alleges that the said act is unconstitutional, null, and void, and contrary to section 13 of the Constitution of the state of Alabama, which provides that 'all courts shall be open, and that every person, for every injury done him or his lands, goods, person or reputation, shall have a remedy by due process of law, and right and justice shall be administered without sale, denial or delay.' It is also contrary to section 240 of the Constitution of the state of Alabama, which provides 'all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.' Complainant further by special reference adopts and reiterates all of the allegations contained in article XII of its original bill in this cause, which is hereto attached and made a part of this bill.

"XXXVII. On November 25, 1907, the Railroad Commission passed an order, to become effective December 10, 1907, which order establishes joint passenger rates on all the railroads in Alabama, and requires the joint charge for such joint traffic to be at the rate of $2\frac{3}{4}$ cents per passenger per mile, the joint rate to be divided between the participating railroads according to their mileage. The said order is as follows:

"Railroad Commission of Alabama v. Southern Railway, Alabama Great Southern Railroad, Mobile & Ohio Railroad, Northern Alabama Railway, Nashville, Chattanooga & St. Louis Railway, Seaboard Air Line Railway, Atlanta & Birmingham Air Line Railway, Louisville & Nashville Railroad, Central of Georgia Railway, Atlantic Coast Line Railroad, Western Railway of Alabama, and St. Louis & San Francisco Railroad.

"First. Show cause why the Commission should not fix and establish joint passenger rates or fares to and from all points within the state and apportion each road its pro rata of such joint rates. Second. Why baggage should not be checked to and from all points within the state.

"This cause, coming on to be heard October 14th, was adjourned after taking testimony for a number of representatives of different railroads until October 21st, for the convenience of representatives of railroads who could not be present at the original hearing, and it appearing at the time that this citation was made that very few of the roads had joint passenger tariffs, or would sell tickets beyond the terminus of their respective lines, or check baggage beyond said terminus, but during the interim of the notice and hearing such joint rates had been promulgated by different roads, taking effect October 13th, and said tariffs having been filed with the Commission, the Commission, on investigation, finds that said joint rates have been established without uniformity or reference to the business of any particular road, but in many instances the flat rate of 3 cents was charged on some of the lines with the largest passenger travel, while others with a small amount of travel were based on $2\frac{1}{2}$ cents rate, and the Commission, unable to see the justice or equity of such a distribution of the revenue from these joint rates, hereby disapproves the joint passenger rates as filed by the railroads, and in their stead it is hereby ordered that joint rates be published and made effective December 10th, to and from all coupon points on the following roads (as above named), based on $2\frac{3}{4}$ cents per mile for adults, and children between the ages of 5 and 12 years at one-half fare, and that baggage shall be checked from such points as tickets are purchased to destination. But nothing in this order shall be construed to prevent longer lines meeting short line rates.

"Charles Henderson, President Railroad Commission of Alabama."

"The revenues of complainant from its passenger traffic as hereinbefore set forth do not now yield a fair return upon a fair value of its property, and any reduction thereof is unreasonable, unjust, and confiscatory. The joint rate prescribed by said order reduces the joint rates which now prevail on complainant's railroad one-quarter of a cent per passenger per mile. The

rate prescribed by the 'Passenger Rate Act' is 2 cents per passenger per mile. The incongruous result is thus produced that under the statute complainant is required to charge $2\frac{1}{2}$ cents per mile, while under the order of the Commission it is permitted to charge on joint passenger business one-quarter of a cent more. Complainant alleges and avers that said joint rates prescribed by the aforesaid order of the Commission are unreasonable, unjust, and confiscatory, and, therefore, that the order is unconstitutional, null, and void, and contrary to the fourteenth amendment to the Constitution of the United States, in that it deprives complainant of due process of law and denies it the equal protection of the law, and that said order is further unconstitutional, null, and void, in that it violates section 243 of the Constitution of Alabama.

"XXXVIII. Complainant further alleges that the defendants Charles Henderson, William D. Nesbitt, and John G. Harris, constituting said Railroad Commission, having since the institution of this suit by complainant threatened and given it out in speeches that they, as such Commission, had power and authority, notwithstanding the injunction pendente lite issued against them herein, to reduce complainant's freight and passenger rates between points in Alabama, or to fix the same at less than the rates charged and collected by complainant for the same service at the time of the institution of this suit March 25, 1907, and said defendants, constituting said Commission, unless restrained and enjoined herein, will further reduce complainant's freight and passenger rates, or fix the same at less than complainant charged and collected at the last-mentioned date, and now charges and collects between points in Alabama, and have already taken steps to do so, when under complainant's previous system of rates it does not and cannot receive or realize a fair, just, or reasonable return or income on the fair value of its properties or investments in Alabama devoted to intrastate traffic, and any reduction of either its freight or passenger rates, or of its rate for carrying any article of freight, or carrying passengers between points in Alabama, would be unjust and unreasonable, and operate to still further prevent complainant from receiving or realizing such return or income to which it is entitled, all of which fully appears from Exhibits B and C, filed and made a part of its original bill in this suit.

"XXXIX. It is made the duty of every circuit, county, city or other solicitor, in the circuit, county, or other territory for which he elected or appointed, by section 5516 of the Criminal Code of Alabama of 1896 'to draw all indictments, and to prosecute all indictable offenses, and prosecute or defend any criminal actions in the circuit or other courts, in the defense or prosecution of which the state is interested.' All misdemeanors, under Code, § 4891, are indictable offenses. Under Code, § 5537, the solicitors are authorized to appoint deputy solicitors to represent the state in the county courts. Under Code, § 3739, it is made the duty of the sheriff 'to execute and return the processes and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to him for that purpose according to law.' Under Code, § 934, it is made the duty of the circuit court clerks, and their deputies, 'to sign and issue all summons, subpoenas, writs, executions, and other processes under the authority of the court.' The duties conferred upon the clerks of the city courts are substantially the same.

"XL. Complainant shows that it is the purpose and intention of his excellency the said Braxton B. Comer, in accordance with his publicly expressed views, to instruct the several solicitors and prosecuting officers in the several counties through which complainant operates its railroad, or any part thereof, to ignore and defy the order of this honorable court issued upon the original bill in this cause, and in which injunction has been issued suspending and enjoining the enforcement of said freight and passenger rates, and will cause to be indicted, arrested, and prosecuted in their respective counties the complainant and its officers, agents, and servants for every charge made whereby a rate in excess of those prescribed by the said statutes is demanded or received, and for every refusal by them, or any of them, to receive any article offered for transportation at the rate of compensation prescribed by

statute, and that the several solicitors and their prosecuting officers will, under said instructions and directions, and in pursuance of the several statutes of the state of Alabama hereinbefore recited, conferring power and authority upon them in this behalf, cause the complainant, and its officers, servants, and agents, to be arrested, indicted and prosecuted for each of said charges and refusals and that the sheriffs of each of said counties will, in person or through their deputies or assistants, arrest and imprison the officers, agents, and servants of complainant upon said charges and indictments. Unless the defendant railway company, and its officers, servants, and agents, charge the rates for freight and passengers prescribed by the statutes of the state of Alabama hereinbefore referred to, numerous civil actions for forfeitures will be brought against complainant, and actions for damages by passengers and shippers of freight, and prosecutions for misdemeanors against its officers, agents, and servants, and the clerks of the circuit courts of the several counties through which complainant operates its railroad in the state of Alabama, and their deputies, and the clerks of the city courts, and their deputies, will, under instructions from the Governor of the state of Alabama and from other officials of the state of Alabama, sign and issue summonses, subpoenas, writs, executions, and other processes upon such civil actions as may be sued out in their several courts, and on such indictments as may be brought in their several courts. Complainant further alleges that its officers, agents, and employes will, if they charge, demand, exact, or receive any higher rates for freight or passengers than those prescribed by the said the 'New Passenger Rate Act' and the 'New Commodity Rate Acts,' subject themselves to prosecutions for misdemeanors and to fines for each offense, and, if they do not or cannot pay such fines or penalties, they will be imprisoned. As each charge for freight or passengers at a higher rate than that prescribed by the statutes is made a separate offense, a multitude of prosecutions will be brought against the officers, agents, and servants of complainant. Complainant further shows that many of its agents and servants are telegraphers, engaged daily and hourly in communicating by telegraph to other agents and servants of complainant the facts concerning the movements and operations of freight trains carrying both interstate and intrastate commerce, and of passenger trains carrying both interstate and intrastate passengers, as well as the United States mails, and are engaged also in receiving freight and passengers, as well as in the discharge of other necessary duties connected with the transportation of both interstate and intrastate commerce on the said trains, and many of the agents and servants of the complainant are conductors on its passenger trains, which carry daily both interstate and intrastate passengers, as well as said United States mails, and among their several duties is that of demanding and collecting from passengers cash fares, where they fail to purchase tickets at the stations at which they board said trains, and should the complainant's servants be arrested from day to day and time to time, and thus prevented from discharging their several duties to the public as well as to complainant, and which they are employed to perform, the public at large, as well as the complainant, will suffer and sustain great and irreparable loss and damage, and the interstate freight and passenger trains, as well as the United States mails which are daily carried thereon, will be greatly delayed and interfered with, if not altogether stopped, and complainant would be therefore unable to keep its said agents and servants in the discharge of their several duties, or to employ or keep in the discharge of their several duties other competent agents and servants to take the place and discharge the duties of those who may be arrested under prosecutions for misdemeanors. Complainant further shows that, by reason of the arrest, indictment, and imprisonment of the officers, agents, and servants of complainant, about to be done as aforesaid, the railroad properties of the complainant in Alabama will be ruined and destroyed, and the carrying of the United States mails over its lines of railway in Alabama will be prevented, unless the restraining order and injunction hereafter prayed for be immediately granted. Complainant alleges that the enforcement of the provisions of said acts against its officers, agents, and employes in the manner specified above will interfere with and stop commerce among the several states in which com-

plainant is engaged on the several lines of railway operated by it in the state of Alabama, all of said lines being used and employed in interstate commerce, and will stop the carriage of the United States mail, the said lines of railway being post roads of the United States, all of which is unconstitutional, null, and void, and violative of article 1, § 8, par. 7 of the Constitution of the United States, under which the power to establish post roads is conferred on Congress.

"XLI. The defendant I. Cellner, who is a representative of the class of passengers who use trains of the complainant for passage between points in the state of Alabama, and all the persons of his class and who are similarly situated, will, unless enjoined and restrained by this honorable court, bring civil actions for forfeitures against complainant, and will institute prosecutions for penalties against the officers, agents, and servants of complainant, and will institute actions for damages against complainant, as authorized and directed by the several acts passed at the special session of the Legislature of Alabama, which are hereinbefore particularly described, if complainant or its officers, agents, or servants charge or receive higher rates of fare for passengers than those prescribed by the 'Passenger Rate Act.' The defendant Greil Bros. Company, which is a representative of the class of shippers of freight who use the trains of the defendant railway company for the shipping of freight between points in the state of Alabama, and all persons of its class who are similarly situated, will, unless enjoined and restrained by this honorable court, bring civil actions for forfeitures against the complainant, and will institute prosecutions for penalties against its officers, agents, and servants, and will institute actions for damages against complainant, as authorized and directed by the several acts passed at the special session of the Legislature of Alabama, which are hereinbefore particularly described, if complainant or its officers, agents, or servants charge or receive higher rates of freight than are prescribed by the 'New Commodity Rate Acts.' The defendant I. Cellner has actually threatened and maintained that he would avail himself of the several acts hereinbefore recited, which were passed at the special session of the Legislature of Alabama, and bring actions for damages against complainant, and civil suits for forfeitures against it, and would prosecute its officers, agents, and employes for misdemeanors, if complainant or its officers, agents, and employes refused to carry him as a passenger on its lines of railroad in the state of Alabama, between points in the state, at the rate prescribed by statute. The said defendant Greil Bros. Company has actually threatened and maintained that it would avail itself of the several acts hereinbefore recited which were passed at the special session of the Legislature of Alabama, and bring actions for damages against complainant and civil suits for forfeitures against it, and would prosecute its officers, agents and employes for misdemeanors, if complainant or its officers, agents, and employes refused to ship its freight which comes within the scope of said 'New Commodity Rate Acts,' at the rates prescribed thereby. The persons who will become passengers and shippers of freight between points in the state of Alabama on the lines of railroad of the complainant, and who will be affected by the said 'Passenger Rate Act' and the 'New Commodity Rate Acts,' are so numerous that complainant cannot without manifest inconvenience and oppressive delay in the suit bring at this time all of such persons before the court as parties defendant in this bill, and, besides, it is impossible at this time to name such parties, because complainant cannot know definitely all persons who may in the future become passengers or shippers on its lines of railway. The said defendant I. Cellner is made party hereto to represent all the adverse interest of persons who may become passengers on complainant's lines in Alabama, and the said defendant Greil Bros. Company is made party defendant hereto to represent all the adverse interest of persons who may become shippers of the commodities described in the 'New Commodity Rate Acts' on the lines of complainant in Alabama.

"XLII. In the operation of the lines of railroad of complainant within the state of Alabama it receives and carries every day thousands of passengers affected by the rates made by the above-described 'Passenger Rate Act,' and also carries on its lines of railroad in Alabama thousands of shipments of the commodities described in the several commodity rate acts which are

hereinbefore described as the 'New Commodity Rate Acts': and under the 'Passenger Rate Act' complainant is required to charge passenger rates which are not higher than those imposed by the said act, and, however unreasonably low said rates may be, complainant acts at its peril if it charges any higher rates, and under said 'New Commodity Rate Acts,' hereinbefore referred to, complainant is required to charge rates of freight no higher than those which are imposed by said acts, and, however unreasonably low said rates may be, complainant acts at its peril if it charges rates higher than those imposed by the said acts. In the hundreds and perhaps thousands of actions that may be brought against complainant by the defendants herein, and by other persons in the state of Alabama, to recover forfeitures imposed by the several acts hereinbefore described, or by private individuals to recover damages, and in the hundreds and perhaps thousands of indictments which may be brought against its officers, agents, or employes for misdemeanors for violations of the said acts, the rates of passenger and freight imposed by the several acts hereinbefore referred to are deemed and taken as a sufficient evidence that the rates therein fixed are just and reasonable, and in all of the said actions for forfeitures, penalties, or damages, and in all the indictments for misdemeanors, the plaintiffs therein have nothing to do but to produce the said acts and to prove that the rates for passenger and freight charged are in excess of those fixed by the said acts, and if the defendants in said actions should be permitted to introduce any evidence in their defense the burden would be thrown on them to prove affirmatively that the rates of passenger and freight, as the case may be, charged by them, were just and reasonable, and that the rates imposed by the said acts were unjust and unreasonable. The question as to what are reasonable rates for freight and passenger traffic is an extremely difficult one, and requires for its determination inquiry into numerous facts, to prove which requires the presence of many witnesses, and the introduction of a great mass of statistical evidence. Under the terms of the penalty acts hereinbefore referred to, complainant, if it shall charge higher rates of passenger and freight than those which are imposed by the said 'Passenger Rate Act' and the said 'New Commodity Rate Acts,' will be subject to civil actions for forfeitures in every county in the state through which it operates its railroads, and such actions may be brought by a multitude of different persons. Complainant under the terms of said acts may incur a penalty of \$2,000 for each offense, and will subject itself to penalties and suits within the limit of a single day of such a large amount as to practically amount to confiscation of its property. All of the officers, agents, and servants of complainant, under the terms of the said acts, may be prosecuted for misdemeanors and fined in every county in the state through which complainant operates its lines of railroad, and the said officers, agents, and servants, by a violation of the said acts, subject themselves to prosecutions for misdemeanors for each and every offense. The same witnesses, the same books, and the same documents would be needed as evidence in all of these cases. The penalty suits, prosecutions, civil forfeitures, and actions for damages will be so large in amount, so numerous, and may be instituted in so many independent different jurisdictions at the same time, that it will be physically impossible for complainant, and its officers, agents, and servants to defend these actions, suits for damages, forfeitures, penalties, and prosecutions. The expense which complainant and its officers, agents, and employes would incur in defending said actions, prosecutions, and forfeiture suits would be enormous. Complainant and its officers, agents, and servants would also be subjected to great expense in employing counsel to defend such suits, and the loss of time of its officers, agents, and employes in giving the necessary attention and time thereto would prevent the operation of the railroad. The pendency of such suits, aggregating such an enormous amount, will have the tendency to depreciate the value of its property, and will result in great and irreparable loss and injury to the defendant railway company and to your orator and the bondholders represented by it.

"XLIII. In the multitude of actions referred to above the same question will be involved in all of them, and that question can be tried and the merits

fairly and fully determined in this case. The damages to accrue against complainant and the injury to complainant will be great and irreparable.

"XLIV. Complainant is remediless in the premises under the strict rules of common law, and can have adequate relief only in a court of equity, where matters of this nature are properly relievable, unless a writ of injunction, as hereinafter prayed, is immediately granted; and unless a restraining order is granted as hereinafter prayed, the damages to accrue against complainant and the injury to complainant will be irreparable."

Complainant prayed for a preliminary injunction, and on final hearing for a perpetual injunction against the execution of the several statutes heretofore recited, and that the Attorney General and the Railroad Commission, the clerks of the several courts, the solicitors, and sheriffs in the counties through which complainant's road is operated, be enjoined, respectively, from issuing any summons in any civil suits, the sheriffs from serving the same, or arresting any of complainant's officers, or servants or putting them in jail, and the solicitors from indicting its employes or servants, or from causing them to be arrested and imprisoned under any indictment or warrant, or otherwise, on account of any charge based upon any violation by the complainant, or its officers and servants, of the terms of said acts of the Legislature as to the rates and orders made thereon by the Railroad Commission; also that the individual shippers named and all other persons in the same class be enjoined from instituting or prosecuting in any court any civil actions for the forfeitures, and all actions for damages, and any criminal prosecutions against complainant or its servants, etc.; also enjoining the defendants above named, and all other persons, individuals, or corporations, from bringing or prosecuting any suit, either at law or in equity, or proceeding in equity in the nature of quo warranto, mandamus, or injunction, for enforcing or declaring the revocation of the right or license of complainant to carry on intrastate business in Alabama in consequence of the filing of the supplemental bill in this court.

The Central Trust Company of New York, trustee for the bondholders of the Central of Georgia Railway Company under what is known as the "Second Preference Mortgage," interest on which is payable only from the net earnings of the Central of Georgia Railway Company, also filed its bill against that company, and the other officers and persons named in the bill of the Central of Georgia Railway Company, praying the same relief as that asked by the Central of Georgia Railway Company, and also that the company be enjoined from putting the reduced rates in force. Affidavits were offered on both sides as to the value of the several railroads, their income from all sources, their cost, and the mode of conducting their business, and other pertinent matters as to the probable effect of the reduced rates. The applications for the preliminary injunctions were heard together, and the oral argument at the bar extended over a period of ten days, with the understanding that counsel might argue any matter deemed pertinent with leave to present such questions by formal modes after the court announced its opinion, when judgment would be rendered thereon.

Lawton & Cunningham and Steiner, Crum & Weil, for Central of Georgia Ry. Co.

John C. Spooner, Albert Rathbone, and Henry V. Poor (Hugh Nelson, of counsel), for Central Trust Co. of New York.

Henry L. Stone, Gregory L. Smith, Cabaniss & Bowic, George W. Jones, and J. Manly Foster, for Louisville & N. R. Co. and South & N. A. R. Co.

Gregory L. Smith, Claude Waller, and A. R. Goodhue, for Nashville, C. & St. L. Ry. Co.

Geo. P. Harrison and Steiner, Crum & Weil, for Western Railway of Alabama.

Alex. M. Garber, Atty. Gen., S. D. Weakley, Horace Stringfellow, and H. C. Selheimer, for respondents.

JONES, District Judge (after stating the facts as above). These cases involve the rights of the owners and the public in the use of vast properties devoted to state and interstate commerce, the relations of the states to the United States, the extent of its judicial power in the enforcement of the Constitution and laws, the power of the state under its own Constitution, and the rights of citizens under both the state and federal Constitutions. Counsel were invited to present their views unhampered by any limitation as to time or the mode of raising the issues, and the court has had the benefit of able and extended discussion at the bar.

If it be true, as respondents insist, that these cases are suits against the state, the bills must be dismissed, regardless of the merits of the grievance disclosed. Looking to the record, we find that complainants, who are citizens of other states and citizens of this state entitled to come into this court by reason of the federal question, seek to prevent certain citizens of Alabama from doing acts, under color of its laws, which complainants claim will illegally destroy a property right, protected by the Constitutions both of the state and of the United States. More fully stated, the case is this: Complainants are common carriers. Being engaged in that calling, it is competent for the Legislature to fix their maximum rates. The Legislature has done so. The rates so fixed are *prima facie* lawful. The Legislature has no power to fix rates which are unreasonable. The courts are the final arbiters of such questions. The carriers claim that the rates fixed are illegal, in that they do not permit an adequate return on the value of their property, and will deprive complainants of their property without due process of law, in violation of the fourteenth amendment and provisions of the Constitution of this state for the protection of property rights. Respondents insist the rates are reasonable, and permit an adequate return upon the value of the property, and threaten by civil suits against the carriers, and by indictments and prosecutions against complainants and their servants, to compel the carriers to observe the statutory rates. This is the entire scope of the controversy between the parties before the court. Plainly, in form, at least, the cases fall within the very letter of any definition of "cases in equity," and "controversies between citizens of different states," of which this court is given jurisdiction by the Constitution and laws, and the state is not sued.

The Bills are Not Suits Against the State.

In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1047, 1051, 38 L. Ed. 1014, the insistence was that the suit was against the state. The Supreme Court said:

"We are unable to yield to this argument. So far from the state being the real party in the case and upon whom the judgment effectively operates, it has, in the pecuniary sense, no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character and as an individual employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said the state is interested in the question, but only in a governmental sense. It is interested in the well-being of its citizens, in the just and

equal enforcement of its laws; but such governmental interest is not a pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, and none of its property will be affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes; and yet frequent and unquestioned exercise of jurisdiction of courts, state and federal, has been indulged in restraint of collection of taxes illegal in whole or in part."

In *Missouri Railway Co. v. Missouri Railroad Commission*, 183 U. S. 53, 60, 22 Sup. Ct. 18, 46 L. Ed. 78, it was insisted that the state was the real plaintiff, and, as the state was not a citizen within the meaning of the removal acts, a mandamus proceeding to compel the railway company to observe the rates could not be removed to the United States Court on the application of the railway company. The Supreme Court, however, held that the state was not the real party, and that the suit, other conditions permitting, could be removed. It said:

"It is not an action to recover any money for the state. Its results do not inure to the benefit of the state as a state, in any degree. It is a suit to compel compliance with an order of the Railroad Commissioners in respect to rates and charges. The parties interested are the railway company on the one hand and they who use the bridge on the other—one interested to have the charges maintained as they have been; the other, to have them reduced in compliance with the order of the Railroad Commission. They are the real parties in interest, in respect to whom the decree will operate."

It was also urged in that case that the "state had a direct pecuniary interest in the result of the litigation by virtue, first, of its possible liability for the costs, and, second, because, if the litigation were pushed to the extreme, there might be penalties imposed which would, when collected, possibly inure to the school fund of the state." The Supreme Court decided that did not alter the nature of the suit. It said:

"Whatever may be the result of any subsequent or ancillary proceeding, the direct effect of this suit is to obtain a decree of the court commanding the railway company to comply with the orders of the Commission. Such a decree is similar to the ordinary decrees of a court of equity. It is a familiar rule that a court of equity may enforce compliance with its orders and decrees by penalties upon the delinquent. So that, if this possible pecuniary result is sufficient to make the state the party plaintiff, it would follow that in Missouri the state is the real party plaintiff in every equity suit, because in every equity suit penalties could be imposed. Neither can it be held that the state's voluntary assumption of the costs, if the litigation is adverse to the Railroad Commissioners, makes it the real party plaintiff. That is simply an incidental matter, and does not determine its relation to the state, any more than its payment of the salary of the judge, the fees of the juror, or any other expense of the litigation. We are of opinion, therefore, that the party named in the record as the plaintiff is the real plaintiff, and that the voluntary assumption by the state of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from disobedience to the orders of the court, do not make it the party to whom alone the relief sought inures, and in whose favor a decree for the plaintiff will effectively operate."

The same ruling was made in *Smyth v. Ames*, 169 U. S. 518, 18 Sup. Ct. 418, 42 L. Ed. 819.

In *McNeill v. Southern Railway Company*, 202 U. S. 559, 26 Sup. Ct. 724, 50 L. Ed. 1142, the Supreme Court reiterated the doctrine of the earlier cases. It said:

"We think the real object of the bill may properly be said to have been the restraining of illegal interference with the property and interstate business of the railway company; the asserted right to interfere which it was the object of the bill to enjoin being based upon the assumed authority of a state statute, which the bill alleged to be in violation of the rights of the railway company, protected by the Constitution of the United States. In this aspect, the suit was not in any sense a suit against the state."

Statement of Respondents' Legal Propositions.

II. Respondents answer that the reason of these decisions cannot control the disposition of the supplemental bills, since the officials whose action was enjoined in the cases cited were "specially charged" with the execution of the laws; that this feature is wholly wanting in the supplemental bills, though it is positively averred in them that the state officials will enforce the rate legislation; that the officials who are defendants have now no official power to enforce the rate legislation; and that the laws which authorized them to be sued have been repealed. They insist the supplemental bills are suits against a sovereign state, of which this court has no jurisdiction. They go further, and urge that the original bills, which it is now admitted were not suits against the state at the time they were filed, have now become such suits, because, subsequent to their filing, the Legislature has stripped the defendants therein of all power to enforce the rate legislation, and repealed the legislation which permitted them to be made defendants in a suit by the carrier to determine the reasonableness of the rates. Irrespective of these defenses, they assert that the due process of law for which the Constitution provides is satisfied here, no matter how inadequate may be the remedy at law for the full protection of the right asserted, if in each case as it arises complainants be afforded in that particular case a fair trial in a court of justice according to the usual modes of procedure applicable to cases at law. While they do not assert in so many words the doctrine as the court here puts it, they inevitably deny, either that the usual remedies of equity in such cases form any part of the "law of the land," which complainants are entitled to invoke, or, else that the state, in its discretion in ordering persons and things within its dominions, may so adjust the relations of officials to the execution of a statute that no court can prevent its immediate enforcement, although the statute be unconstitutional and the officer be about to execute it, and the arrest of such action of the official be absolutely necessary, at the very threshold of the litigation, to save a property right from destruction. Counsel raise many other important questions which will be noticed in the order of their presentation.

By None of the Tests can the Bills be Held to be Suits Against the State.

Alabama is a sovereign state, except in the particulars wherein its rights and powers are curtailed by the Constitution of the United States. The full sovereignty of Alabama is not vested in any one of

the departments of its government, or in all of them combined, since the people have retained some of their power. Const. Ala. § 36. The government of the state is not to be confounded with the state itself. One is the servant; the other is the sovereign. Under our free institutions, no official can truthfully declare, "I am the state." The Constitution of the state distributes the sovereign power of the people among three co-ordinate departments, giving each so much of that power as deemed requisite to the accomplishment of the task committed to it. These three departments combined, save as limited by the state and federal Constitutions, represent the sovereignty of the people of Alabama. All the powers of these departments are subject to the checks and limitations of the Constitution of the state and of the United States. Within the scope of their delegated authority, the acts of state officers are the state's acts. When they transgress the limits of their authority, it is not the state which acts, "for as it can act and speak only by law, whatever it does say and do must be lawful," but is "the mere wrong and trespass of individuals, who falsely speak and act in its name." *Poindexter v. Greenhow*, 114 U. S. 290, 5 Sup. Ct. 914, 29 L. Ed. 185. If the acts of officers of these departments, outside of the scope of the power intrusted, cannot be effectively stayed when necessary to save the liberty and property of the citizen from illegal invasion under color of state laws, because such proceedings are suits against the state, which the citizen cannot maintain, there is an end of real constitutional government and liberty, and the enthronement in their stead of official absolutism. "The Constitution deals with substance, not shadows. Its inhibition was leveled at things, not the name. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." *Cummings v. Missouri*, 4 Wall. 277, 325, 18 L. Ed. 356.

Scrutinize as we may the insistence here, the acceptance of the argument in support of it inevitably leads, in its final complexion, to the fatal admission that somewhere in our constitutional system a safe shelter can be found for legislative evasion of its most sacred commands. Stripped of sophistry, the naked proposition is that the power of the Constitution to protect a property right must surrender to the deftness and cunning of the draughtsman in adjusting the relations of the officer to the execution of an unconstitutional statute; that the phrase maker, not the fundamental law, determines whether a constitutional right has any virtue. Mr. Justice Lamar, in an elaborate review of the decisions on this subject, in *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, declared:

"The general doctrine of *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would violate the rights and privileges of the complainant which have been guaranteed by the Constitution and would work irreparable damage and injury to him, has never been departed from."

In *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584, the court declared:

"It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of the state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of [the eleventh] amendment."

In this respect, the principle applied in the great judgment of Chief Justice Marshall in *Osborn v. Bank*, decided years before the adoption of the fourteenth amendment, has always been enforced. The effect of the fourteenth amendment upon the scope of the eleventh amendment was not directly passed upon by the Supreme Court, although involved in some cases, until the case of *Prout v. Starr*, supra, where it is said:

"It would be most unfortunate if the immunity of the individual state against suits by citizens of other states, provided for in the eleventh amendment, were to be interpreted as nullifying other provisions which confer power on Congress, * * * all of which provisions existed before the adoption of the eleventh amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding the constitutional limitations. Much less can the eleventh amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the fourteenth amendment have been disregarded by state enactment."

The Supreme Court has settled, beyond the pale of further controversy, that when the state is not an actual party to the record, and the judgment in the suit cannot take the state's property, or fasten liens upon it, or direct the disposition of funds in its treasury, or compel the state, indirectly, by controlling its officers, to perform any contract, or to pay any debt, or to govern the exercise of any discretion vested in the official in the execution of valid statutes, the state is not a real party, and the proceeding cannot be held to be a suit against the state. The state is not a party here. No decree which can be rendered here can invade its rights in any of the particulars named. The supplemental bills are not, therefore, in any sense suits against the state. *Poindexter v. Greenhow*, 114 U. S. 284, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584.

If we give any force whatever to the purpose which called forth the eleventh amendment, it destroys all foundation for respondents' argument, which one of complainants' counsel aptly describes as an assertion:

"If you make it anybody's business to enforce the legislation, a suit to prevent it is not a suit against the state. If you make it nobody's special business, and anybody can enforce the law, then a suit to stop it is a suit against the state."

Certainly, if, as the courts have repeatedly held, it is no invasion of the sovereign's prerogatives to prevent his chosen minister from obeying an illegal command which he is specially charged to execute, what warrant is there, in any system of logic, for claiming that this same sovereign can have any just cause of complaint, when restraining hands

are laid upon an official to prevent his doing a like illegal act, as to which the sovereign has laid no special command upon him?

Whether or Not Officer is "Specially Charged" to Execute the Statute, Whose Enforcement is Enjoined, Cannot Determine the Nature of the Suit or the Extent of the Remedy.

It is undeniable here, if complainants prove their bill, and for the purpose of this hearing it must be assumed that they may, that they will suffer irreparable wrong, unless they can immediately arrest the action of private individuals and the officials under the invalid statutes. Whether an officer or private individual be "specially charged," or whether it be left to his discretion, to enforce the unconstitutional statute, sheds no light whatever upon the validity of the statute, or the nature of the case, or of the wrong suffered, and cannot alter in the slightest degree the scope of the suit, or the effect of the judgment which may be rendered as to the execution of the statute. The injury and the wrong are the same in both cases. The character of the duty, and the validity of the statute which exacts it, are not changed by the fact that it is imposed by a special statute, instead of being fixed by the general law. The duty is the same in each case. When the contingency arises which calls for the performance of the duty under the general law, the officer is as peremptorily charged to execute it as when the duty arises under a special statute; and when he acts the consequences are the same, whether he acts under the compulsion of a special duty or simply volunteers to put the laws in motion. The officer's relations to the execution of the statute are material only in determining in the particular case whether he is a proper or necessary defendant to the suit to arrest the operation of the statute. The presumption from the special charging of the duty is that the officer will perform it, and, is therefore, the equivalent of an allegation that he will attempt to execute the statute. He stands, as regards the threatened property right, in the same attitude as the officer, who, though not specially charged, nevertheless threatens to enforce the statute. If the circumstances of the case, and the nature of the right about to be invaded, are such that the acts of the officer will result in irreparable injury and a multitude of suits unless his action be restrained, the courts must restrain an officer who, though not specially charged, threatens to execute the statute, just as it would an officer who is "specially charged," and upon the same principle upon which it would proceed against a private individual, who threatened a like wrong.

Legislative Cunning Cannot Overthrow the Force of a Constitutional Provision.

III. Every well-informed layman is aware that the great purpose of all civilized government is to protect life, liberty, and property. The protection of rights of property is next in importance only to protection of life and liberty. Indeed, there is little real liberty where rights of property are not respected and enforced. All enlightened governments seek to secure these rights from impairment by arbitrary acts of government, as well as from invasion by private individuals. Nowhere is this duty of government to protect property

rights more emphatically proclaimed than in our state Constitution of 1901, which, in section 35, declares:

"The sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions, it is usurpation and oppression."

The purpose of the fifth and fourteenth amendments to the Constitution of the United States is to prohibit, on every foot of American soil, all illegal acts of government, state or federal, invasive of the right to life, liberty, or property. Our constitutional systems, which parceled out the sovereignty of the people among separate and independent departments, each of which was forbidden to enter the orbit of the other, had left little play for the arbitrary exercise of the executive prerogative concerning the enjoyment of these rights. These amendments were designed chiefly to secure the enjoyment of these rights against arbitrary exercise of legislative power, and to give effective protection against such assaults upon the fundamental rights of the citizen, whenever attempted under the forms of law. It is well settled that a state cannot do or effect indirectly what it cannot do or effect directly, and that, in whatever language a statute may be framed, its purpose and its constitutional validity must depend upon "its natural and reasonable effect" upon the right involved. *Henderson v. Mayor*, 92 U. S. 259, 268, 23 L. Ed. 543; *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347. "It is the duty of the courts to be watchful of the constitutional rights of the citizen. A close, literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it were more in sound than in substance." *Boyd v. United States*, 116 U. S. 616-635, 6 Sup. Ct. 524, 535, 29 L. Ed. 746.

Effect and Purpose of the Statutory System for Enforcing Rates.

The statutes whose execution is here prayed to be arrested involve the business of carriers transacted in very many places, upon hundreds of miles of railway, in the operation of which a multitude of trains and thousands of employes are engaged. They transport daily thousands of passengers and thousands of parcels of freight. The transportation of every passenger and every piece of freight, and demanding or receiving greater compensation than the prescribed rates, is made a separate offense. The carrier, in a day's business, if it does not observe the rates, will necessarily commit several thousand violations of the statutes, for each of which he is subject to a fine of not exceeding \$2,000; and his employes, who knowingly engage in any violation of the rates, are subject to a fine of not less than \$100 nor more than \$500 for each offense. So far as the nonobservance of the statute involves a private wrong, any person may bring his civil action to redress it, and may swear out warrants for violations of the rate statutes so far as they constitute public offenses. No one who reads the history of the times aught can fail to realize that these suits and prosecutions would be begun and relentlessly pursued until the carrier put in the rates. Under such conditions, nonconformity to the rates for a single day would result in the forfeiture of the carrier's property worth many millions of dollars, and subject his servants and employes

to arrest and imprisonment, preventing the carrier from discharging his duties to individuals and the public. The inevitable outcome of the situation thus brought about by the legislation, if the rates be unreasonable and respondents' contention be correct, is that the carrier must at once observe the statutes, and thereby be deprived of property without just compensation, or else, in order to avoid the taking of his property, must refuse to obey the statutes, and thereby assume the frightful burden and costs of defense of a multitude of indictments in the law courts, in different places, at the same time, which, even if successful, would entail as great losses as the injury resulting from obedience to the statute, and, in addition, be forced to wager his entire property upon the successful outcome of his defense at law. Under this deliberately planned system of laws for enforcing the rate legislation and hampering the defenses thereto, the carrier, no matter what course he takes, is confronted with ruin.

Only a cursory examination of the practical operation of the statutes passed at the called session is needed to demonstrate that their intent is not only to enforce the rates, but also, as far as possible, to take from the carrier all effective means for the protection of his rights, if he desires to contest the rates. The design of the present statutes is to compel the rates to be put in force as soon as promulgated, no matter how destructive the result, by withholding any effective means to prevent the enforcement of rates until they have long been in operation. In the interval elapsing, under the present statutes, between the promulgation of the rates and the time when the carrier can get into the chancery court and have the rates enjoined, there must, in any event, be many days' delay. During that interval, as we have seen, he has no means of defense against the rates except by meeting innumerable suits at law and indictments and trials in the criminal courts. He is not permitted, as other persons would be under the same circumstances, to submit to the statutory rates and perform the service under protest, and sue to recover the balance necessary to make a fair reward for the use of his property. This mode of defense is deliberately prohibited. The demand or receipt of rates greater than those prescribed by statute is made as grave an offense as the refusal to transport at the rates fixed by statute, and necessarily every such suit would subject him to the statutory penalties. Under the present statutes, there is no tribunal which can absolve the carrier from the penalties incurred while he is contesting the rates in the courts. If the court of equity enjoins the execution of the statute, under its equity powers, pending final decision, and the carrier be cast in the suit, he remains exposed to the numberless penalties incurred while the case was in the courts. Every way of escaping this peril is blocked against him. A failure to observe the rates for a single day to make a test case, would subject his property to confiscation. He must incur that risk to make a test case of any sort, no matter how short the test. If one test case be made, he must observe the rates thereafter, in order to prevent confiscation from future penalties, during the long period necessary to determine the right in the courts. If, to conserve all his rights, he resists from the outset, he must waste his substance in meet-

ing innumerable assaults upon the right, although successful in finally beating them off in the courts. There is nothing in the nature of the right the carrier asserts, or the act out of which it grows, which can justify the erection of such barriers to its assertion. The service, the act of transportation for which the reward is claimed, whatever may be said of the charge for it, is not only lawful in itself, but laudable. The law requires it to be performed. The carrier's only offense is that he differs with the authorities as to the reasonableness of the reward the statute allows him for the use of his own property. It is the mere assertion of a conscientious difference of opinion as to the worth of the service. The exercise of the right is not harmful in itself, does not imperil either life, liberty, or property, nor the public peace or morals, or revenues of the state, and does not defy its authority. No one is guilty of a defiance of the law who seeks to test the validity of a statute in an orderly way in the courts of the country. No other property owner, no other person who renders service to another, is so hampered in the defense of a property right in the courts of justice, and subjected to such heavy burdens, even when he makes good his defense, and to such frightful penalties if he fails. It is idle to say that the carrier can be lawfully put in this plight, when he seeks to vindicate such a right in the courts, because he exercises a public calling, and has been granted a franchise by the state. The right to demand an adequate reward for the use of one's property is as much under the protection of the Constitution as a man's house or farm. True, the nature of the carrier's business and the obligations resulting from it to the public are such that he may incur liabilities and suffer penalties regarding the conduct of that business, which could not be entailed or enforced, under like circumstances, against persons not so engaged. When he comes into a court of justice to defend his property right, he is not exercising his calling as a carrier at all, but insisting upon a constitutional right secured to all alike. Justice must be done, without respect of persons, and is not subject to classification.

State Cannot Prevent Resort to Equity, in Proper Case, Either Under
Its Own Constitution and Laws, or Under the Con-
stitution and Laws of the United States.

Viewing the question solely under our state Constitution, it is not competent for the Legislature to take from the property owner the right of resort to a court of equity for preventive remedies for the protection of a property right, if his case falls within the established principles upon which courts of equity usually administer such relief. From its earliest history the state has administered equitable remedies in its courts of chancery. Authority to administer such relief in cases falling within equitable cognizance is inevitably included in the judicial power, which the state Constitution and laws vest in the courts of chancery. Whether or no the Legislature can abridge this equity power of the courts, by providing exclusive remedies at law, it is certain the Legislature cannot so legislate regarding a right, if it falls within the protection of a court of equity, that the property owner, who is not given an adequate remedy at law, can be shut off from a seasonable

resort to the chancery court for the exercise of its usual preventive remedies, when necessary to preserve a property right from destruction. The fourteenth amendment and the state Constitution alike require "the law of the land" to be administered in the courts of Alabama. The state courts of equity have always intervened for the protection of a property right, when necessary to save it from irreparable injury.

In these cases, however, the right to resort to equitable remedies does not at all depend upon the Constitution and laws of Alabama. The equity power to afford such relief, in proper cases, is part of the judicial power brought into being by the Constitution of the United States, a large part of which is distributed to the Circuit Courts of the United States, which are under duty and have authority to afford all those remedies for the protection of a property right which were administered by the High Court of Chancery in England at the time of the adoption of the Constitution of the United States. Although, therefore, the state law may afford an adequate remedy at law in a particular case, or, as in these cases, attempt to prevent any efficient remedy in its own courts of equity, yet, if the case properly falls within the principles upon which the High Court of Chancery in England at the time of the adoption of the Constitution of the United States gave a remedy, the courts of the United States cannot withhold it. *Mississippi Mills v. Cohn*, 150 U. S. 204, 14 Sup. Ct. 75, 37 L. Ed. 1052.

Right of Federal Court to Enjoin Illegal Use of State Power to Destroy a Constitutional Right.

IV. Section 1 of the fourteenth amendment ordains:

"Nor shall any state deprive any person of life, liberty or property without due process of laws; nor deny to any person within its jurisdiction the equal protection of the laws."

Congress is given power "to enforce" its provisions "by appropriate legislation." It has enacted "appropriate legislation," under which the courts enforce the rights secured by this section. In *Chicago & Burlington Railroad Co. v. Chicago*, 166 U. S. 226, 233, 17 Sup. Ct. 581, 583, 41 L. Ed. 979, it is said:

"It must be observed that the prohibitions of the amendment refer to all instrumentalities of the state, to its legislative, executive, and judicial authorities, and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with state power, his act is that of the state. This must be so, or, as we have said, the prohibition has no meaning, and the state has clothed one of its agents with power to annul or evade it." *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

It is a maxim of constitutional law that, when "the end is required, the means are given." Authority and duty to prevent an evil inevitably carry with them authority and duty to overcome all the means by which that evil can be accomplished. The amendment is directed against the wrongful use of state power. It is the wrongful use of state power,

and not who uses it, which determines when the prohibitions of the amendment apply. Citizens may swear out warrants of arrest, and go before grand juries and secure indictments, in order to enforce penalties, and thus compel submission to state statutes. The citizen, it is true, is not ordinarily vested with state power; but in this instance valid laws of the state permit him to put state power in motion to enforce the statute. The result is, to quote the language of one of complainant's counsel:

"Any one can sweep across the state like a blizzard or sirocco, and with his informations consume the property of these defendants. The enforcement of the acts does not depend upon the officers of the state. They have put it in the power of anybody to enforce them."

When the Legislature refrains from putting any special duty upon the officer, and expressly denies him power to enforce a statute, and leaves the state power to enforce the statute solely in the keeping of private citizens, and the citizen avails himself of the state power thus left at his disposal, can it reasonably be affirmed that state power has not been used, and wrongfully used, to that end, if the statute be invalid? Is not the individual, *pro hac vice*, made the state's officer in the initial steps for enforcing the invalid statute? Whether this be so or not, when warrants are sworn out, indictments found, or suits brought to enforce an unconstitutional statute, valid laws of the state are set in motion to enforce that statute, and declare the duty, as the case may be, respectively, of clerks, to issue summons and capiases, of sheriffs to serve summons and complaint and to make arrests, and of the solicitors to prosecute indictments. These lawsuits, indictments, arrests, and prosecutions are the means for bringing about the forbidden end. Without the use of such instrumentalities, the invalid enactment cannot be enforced, and the wrong cannot be accomplished. If the use of these instrumentalities be not restrained, the wrong will be done. The defense, to be effective, must be as broad as the assault, and deal with it in every form. It is inevitable, therefore, that the courts, in order to prevent the consummation of the wrong and to perform their duty under the Constitution of protecting property rights, must not only have the power, but must exercise it, to enjoin the lawsuits, the arrests, and the prosecutions. The exercise of such power is not only "appropriate," but it is the only means for the effective prevention of such wrong. In the exercise of such power in preventing the wrong, the court exerts no unusual or extraordinary authority, but simply follows ancient principles of justice, brought over by our ancestors from across the seas, and applies them to new conditions created by modern affairs and industrial development, and new state policies, whereby state officers are prevented from taking any steps, of their own motion, to bring offenders to justice. If the Constitution is to be followed, the court must arrest the wrongful use of the state's machinery of justice, put in motion by private citizens to enforce an unconstitutional statute, whenever necessary to prevent invasion in that way of rights the amendment secures, and on the same principles upon which it would interfere, when put in motion by officials specially intrusted with the duty of enforcing the illegal enact-

ment. If such proceeding against individuals wrongfully using state power to accomplish the forbidden end could be treated as suits against the state, the fourteenth amendment would necessarily authorize them. It was adopted long after the eleventh amendment. While both must be given a distinct field of operation as far as possible, yet to the extent of irreconcilable conflict the latest expression in the Constitution of the sovereign will of the people must control in all cases, where deprivation of property is attempted, without due process of law, by aggressive or affirmative action of state officials. If we hold that the protection of the amendment can be eluded, when private persons, and not officials, set state power in motion for the illegal destruction of a right it protects, it involves the maintenance of the baleful constitutional doctrine that the supreme law of the land can be halted and rendered helpless by the mere form in which the wrongdoer chooses to clothe his defiance of it.

The fourteenth amendment was not involved in *Poindexter v. Greenhow*, supra, though it was in *Chicago & Burlington R. R. Co. v. Chicago*, supra. Some have criticised the doctrine declared in those cases, as to when the action of state officials is the action of the state, as involving the inconsistent assertion that the action of an officer outside of the Constitution and laws of the state is not the action of the state, and yet, nevertheless, when the officer does so act, such conduct on his part is state action, which invokes the operation of the fourteenth amendment. The inconsistency, however, is more seeming than real. It is true that an unconstitutional act is no law, and the courts must ordinarily treat transactions under it as though the statute had never been passed. Yet, when the officer sets the state's machinery of justice in motion to enforce an unconstitutional enactment, he accomplishes his purpose by the use of valid laws of the state. Whether the particular statute sought to be enforced be unconstitutional or not, the laws of the state which provide for arresting, indicting, prosecuting, and punishing persons charged with offenses against the state are valid laws of the state, and state power is used in such prosecutions, in law and in fact, as effectually as when the prosecution is for the violation of a valid enactment of the state. It is, therefore, literally true, in the constitutional sense, although the effort be made to enforce an unconstitutional enactment, that the acts of state officers in the courts to that end are acts of the state, and wrongful use of its power, within the purview of the fourteenth amendment.

Fitts v. McGhee Controlled by Subsequent Decisions.

V. In answer to all this, respondents cite *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, and sturdily insist that it forbids the court to entertain these bills. Whatever doubt arose at one time as to the exact scope of the doctrine of that case has long since been dispelled by subsequent decisions on all the questions of which it treats. If it were not for the zeal of counsel in urging their insistence, the court would not make other answer than the citation of those decisions. The uniform doctrine of the Supreme Court at the time of that decision had always been that a suit against an officer of the state to arrest his action under an unconstitutional enactment which threat-

ened irreparable injury to a property right secured by the Constitution and laws of the United States is not a suit against the state, and the opinion in that case is careful to state that it is not intended to "im-pinge upon the principle" which justifies such suits. *Reagan v. Farmers' Loan & Trust Company*, supra, holds that a suit like this is not a suit against the state, and it is cited without disapproval in *Fitts v. McGhee*. The subsequent cases of *Prout v. Starr*, *Gunter v. Atlantic Coast Line*, and *McNeal v. Southern Railway Co.* likewise hold that such suits are not suits against the state, and *Fitts v. McGhee* is cited in them as authority for the ruling. It is equally clear that the court did not intend in *Fitts v. McGhee* to lay down any invariable rule that a court of equity has no power, in any event, to enjoin the execution of an invalid statute by criminal proceedings, when necessary for the protection of a property right, nor to hold that equity could not afford such relief when no other injury was to be apprehended than the institution of formal judicial proceedings to enforce the invalid criminal statute. That was the very situation in which the Supreme Court held such relief was proper in *Reagan v. Farmers' Loan & Trust Co.*, *Smyth v. Ames*, and *Prout v. Starr*, supra. In *Smyth v. Ames* the Supreme Court affirmed an order which enjoined the Attorney General, as Attorney General, "from bringing or aiding in bringing or causing to be brought any proceeding by way of mandamus, injunction, civil action, or indictment to enforce" the provisions of the statutes there under consideration. In the still later case of *Mississippi Railroad Commission v. Illinois Central Railroad Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209, the Commission "threatened by suit to enforce the order" to stop certain trains at certain stations as ordered by the Commission. The statute affixed a penalty of \$50 for each time the railroad company failed to stop its trains in obedience to the orders of the Commission. The equity of the bill was based upon the fact that "complainant would, therefore, be compelled to comply with the order, or be subject to a multiplicity of suits for penalties arising from each and every violation of the order, which imposed a direct burden upon interstate commerce," etc. The resort to judicial proceedings in the courts of the state was the only action threatened, and was what the Supreme Court held was properly enjoined. In *Reagan v. Farmers' Loan & Trust Co.*, supra, *Smyth v. Ames*, supra, and *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648, decided before *Fitts v. McGhee*, and in other subsequent cases, the Supreme Court has held there is no adequate remedy at law in cases of this kind. One of the latest cases on this point is *Cleveland v. Cleveland City Railroad Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, where the Supreme Court said:

"Respecting the contention that the case presented by the record was not within the jurisdiction of the equity court, it suffices to say, in view of all the controversies, confusions, risks, and multiplicity of suits which would result by the resistance of the respondents to the enforcement of the ordinance, and in view of the public interest and the vast number of people to be affected, the case is one within the jurisdiction of a court of equity."

The doctrine applies with much more force to the operation of a trunk line of a railway traversing the entire limits of a state.

Counsel say that the street railroad cases ought not to give the rule here, since a municipal corporation, and not the state, was the defendant. That fact, however, can make no difference in the righteousness of the principle or its application here. This is not a suit against the state. The same observations apply to the cases of *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778, and *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 25 Sup. Ct. 18, 49 L. Ed. 169, where it was ruled, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.

Counsel for respondents argue that the decision in *Prout v. Starr* went off on the ground that Prout was bound by a stipulation made by his predecessor, upon which judgment had been rendered, and from which no appeal could then be had, and that the decision is not, therefore, authority on the other point. That view is untenable. Prout insisted the proceeding against him was a suit against the state, and that the federal court could not enjoin him from enforcing the criminal laws of the state in the state courts. It was necessary to decide both questions. If the original proceeding against Prout's predecessor had been a suit against the state, the court below would have been without jurisdiction to entertain it, its orders would be void, and the Supreme Court would not have enforced the stipulation against Prout. If the controlling issue had been whether the judgment on the stipulation was *res adjudicata* as to a party who stood in privity with the original defendant, the court would not have gone beyond that question. Its habit is to refrain from discussing grave constitutional questions when possible to avoid them. It was necessary in that case to discuss the eleventh amendment, and the court, for the first time, treated of the bearing of the fourteenth amendment upon the eleventh amendment, and spoke of evasions of the "salutary provisions" of the former, under the cloak of the latter, when the citizen sought relief from official wrongs under color of unconstitutional statutes. It is sought to withdraw these cases from the influence of the doctrine of the Prout Case, because the Attorney General there was enjoined after the statute had been declared unconstitutional. Power to perpetually enjoin its operation after final judgment inevitably carries with it the power to maintain the status quo until the facts can be ascertained upon which the validity of the statute at any time depends. *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319. Otherwise, in cases like these, where the nature of the investigation compels long delay before any final judgment can be pronounced, the citizen would, in the meantime, be without any protection from the operation of an unconstitutional statute. The Constitution affords an ever-present protection to life, liberty, and property and has just as much power to protect a property right against the operation of an invalid enactment the moment after its passage as at any other period. Mr. Justice Harlan concurred in the subsequent cases cited, which decided all the points covered by *Fitts v. McGhee*. He concurred in the result in *Prout v. Starr*, though not "in all the reasoning" upon which it was based. That great judge, instead of concurring as he did, would certainly have dissented

in some one of the decisions we have cited, if he had intended to enunciate in *Fitts v. McGhee* any doctrine contrary to the principles declared in the subsequent cases.

Fitts v. McGhee Analyzed.

VI. Moreover, a careful analysis of the facts in *Fitts v. McGhee* will show that the court did not intend to decide, and did not in fact decide, any new doctrine as to what constitutes a suit against the state. The bill in that case was twice amended, but in each posture of the bill as amended it was a suit against the state. It was a mere effort of the owners of an incorporated bridge company to settle in a suit against the state and the state officials, who were not shown to be personal wrongdoers or to have threatened any personal wrong, the constitutionality of the statute which fixed rates of toll alleged to be confiscatory, etc. The dismissal of the state from the bill, and afterwards of the Governor, whose term had expired, leaving the controversy with the Attorney General, at the time the supplemental bill was filed, and then bringing in the solicitor, did not change the nature of the suit in this respect, so as to authorize the complainants in such a suit to obtain relief against the enforcement of the alleged confiscatory statute. Complainant's case, as made by the original and amended bills, leaving out of view for the present the supplemental bill, to which different considerations apply, was in substance this:

"We are the owners of an incorporated bridge. The Legislature, after chartering us, fixed rates of toll which are confiscatory. Numerous persons who used the bridge have threatened to sue us before justices of the peace for penalties inuring to them only. These same persons have threatened to procure the Governor and Attorney General to commence mandamus proceedings, and to institute suits for the forfeiture of the bridge franchise, in order to compel us to observe the confiscatory rates. We know, of course, that the Governor and Attorney General have nothing to do with these statutory penalties, which can be recovered only in a personal suit by the individuals aggrieved. We cannot affirm that either of these officials has been approached by the persons who used the bridge to bring either of the apprehended legal proceedings; much less can we say that these officials are about to do so. Nevertheless, while we have no better basis than our fears, we do fear that our property rights will be violated by the action of the Governor and Attorney General; and we therefore ask the court to prevent these officials, and all other persons, from taking the apprehended proceedings, so that in such a suit we can test our rights with the public and fix the status of our bridge as to the tolls."

When the case went to the Supreme Court, counsel for the bridge company denied that the suit was in reality one against the state, and cited a number of cases to sustain their view. The court replied:

"The officers in those cases had either 'committed or were about to commit some specific wrong or trespass to the injury of plaintiff's rights,' and these officers thus became personal wrongdoers. You do not charge any personal wrong on the officers here. They did not appear 'to be about to commit' any wrong, and you have not shown that they are under any duty to enforce the statutes of which you complain; nor have you alleged in any way that they are 'about' to put these laws in execution. You are, therefore, suing them only in their purely representative capacity, and not as individuals, who, as officials, under an unconstitutional statute, have done or threatened to do you any wrong. When the state's officers occupy that attitude, you cannot sue them in their purely representative capacity, without regard to any

threatened wrong on their part, in order to dictate the policy of the state government as to the execution of the statute concerning your bridge. Under such circumstances, your suit against these officials is nothing but a suit against the state."

That was the turning point in the case, and it was to emphasize the distinction between the attitude of the officials in the cases cited and that in hand that the court spoke of the officers being "specially charged," "specially directed," or holding "special relations to the particular statute" alleged to be unconstitutional. The court was merely defining these "special relations" to an unconstitutional statute, which would authorize a suit against the official to prevent his execution of it, without falling within the reason forbidding suits against the state. This test was several times emphatically declared. It was, in the language of the court, that the officers "were committing or were about to commit some specific wrong or trespass to the injury of plaintiff's rights." It is a self-evident fact that "specially charging" the officer could not, of and in itself, effect the wrong. The officer must in fact attempt, or be about to attempt, the execution of the statute, so that, if not prevented, wrong would be done. If he is not "specially charged" to do it, and has not threatened to do it, there can be no ground upon which to place the apprehension of injury, or upon which to base a suit on that account. The court did not intend to assert that there was any legal difference between the wrong and the remedy, simply because the wrong was consummated in one instance by an officer "specially charged," while in the other the same wrong was consummated by an official who, though not "specially directed," nevertheless executes an unconstitutional statute, in the exercise of the option the law left him in that respect. The solicitor was brought into the case long after the suit was commenced against the state, and the Governor and Attorney General merely as such, and not as personal wrongdoers, of which suit, for the reasons stated, the court never had jurisdiction. Mr. Justice Harlan was careful to say that:

"Whether the owners of the bridge and the plaintiffs, as their representatives, were denied by the state fair and reasonable compensation for the use of their property by the public, was a question which could not be considered in this case. That is not a matter to be determined in a suit against the state; for of such a suit the court could not take cognizance."

The suit, as thus presented, being still a suit of which the court could not take jurisdiction at the time the supplemental bill was filed, it was immaterial whether the statute relating to the tolls was valid or invalid. The court in that kind of a suit had no authority to determine and protect the right. Hence the solicitor, although he was acting, and, if the toll statute were confiscatory, had become a wrongdoer, within the meaning of the decisions cited to the court, could not be brought into the case by the supplemental bill, for the purpose of testing the statute, for two reasons: The court had no jurisdiction in that case to determine the validity of the right which was claimed to be destroyed by the prosecution of the indictments; and, in the second place, the court never having obtained jurisdiction of the matter to which the indictments related, though they were found long after the equity suit was commenced in the federal court, the state court ob-

tained prior jurisdiction. It would have been entirely improper, therefore, to interfere with the solicitor's prosecution of these indictments. In prosecuting them, he neither violated any valid order of the court, nor did he seek by the indictments to transfer to another tribunal the trial of the "very matter" of which the equity court had first acquired jurisdiction. If that had been the posture of the matter, the equity court would have had the right to maintain its exclusive jurisdiction, by injunction against any criminal or other proceeding which sought to transfer the very matter which stood for judgment before it to some other court. This is the doctrine stated in *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, which is cited in *Fitts v. McGhee*, regarding the authority of a court of equity to interfere against criminal proceedings, under an invalid statute, when invoked to protect a property right. While many of the expressions in the opinion in *Fitts v. McGhee*, supra, "went beyond the case," and were not "necessary to the ascertainment of the very right in question," the judgment there was rested upon the two controlling considerations we have pointed out, and the case is, therefore, reconcilable with the doctrine of the subsequent and prior decisions that when an official is "about" to execute an unconstitutional statute, to the injury of a right secured by the Constitution, the suit to arrest his action is not a suit against the state.

Jurisdiction of the Court Not Affected by the Repealing Laws.

VII. The original bills have not been converted into suits against the state by reason of any legislation enacted at the called session, or because, since their filing, the defendants have been stripped of all official power to enforce the rate statutes. The original bills charge that the defendants in them will do so. The defendants, however, are proper parties, irrespective of any duty or purpose to execute the rate statutes. The Railroad Commission is still the rate-making power. The state statutes endeavor to leave the Commission practically supreme in that respect. Save in the matter of enforcing rates after they are made, it is not shorn of any of its original authority. By the filing of the original bills this court has obtained exclusive jurisdiction to determine whether the statutes attacked therein can have any present or final operation, and, among them, whether the statute, which makes the rates in force on January 1, 1907, the maximum rates, save wherein other statutes have reduced them, shall finally be enforced or denied operation. The subject-matter of the controversy before the court, in view of the challenge of the right to confine the carrier to the rates in force on that date, necessarily presents a controversy as to the rightfulness of any reduction below those figures. If the Commission, one of the defendants in this litigation, were at liberty at this stage of the proceedings to step within the disputed area as to the reasonableness of the tolls, and make reductions, it would utterly defeat the power of the court to maintain the status quo pending final decision, unless it made new orders on further supplemental bills concerning what is really only another form of raising a question which is already pending in the court, and which it still has the right to decide.

It is the policy of our laws—indeed, their express command—that

litigation to determine the reasonableness of rates shall not be waged, except in suits where some tribunal intrusted with the duty of caring for the public interests in the matter of rate is made a party. The confusion, distress, and uncertainty which would result if such questions were determined in suits between carriers and private parties is apparent on the face of such a situation. There might be collusion. The burden of contesting rates would deter private parties from undertaking it. To leave such issues to be determined in suits by private parties, which would be prosecuted in different localities, in great numbers, in different courts, at the same time, in which variant decisions would frequently be reached, even on the same state of facts, would result in business paralysis and legal pandemonium. Uniformity and fixedness, which, next to the reasonableness and fairness of the rates, is so essential to the welfare of all who deal with the carrier or buy and sell in the markets, would be utterly destroyed. It was the realization of the evils of allowing such matters to be tested in suits between private parties, so often adverted to in the decisions of the courts, which caused the Legislature of Alabama, in the first instance, wisely to provide for a suit against the Railroad Commission and the Attorney General in a court of equity, wherein, by one comprehensive suit, the whole matter could be contested and adjusted in a way which would bind the carrier, the shipper, the passenger, and the public authorities alike. The legislation enacted at the called session, so far as concerns the parties to such litigation, substitutes the state itself as the adversary party in an appellate proceeding whenever an appeal is taken from an order increasing rates, and, when the carrier appeals from an order reducing rates, makes the Railroad Commission the appellee. That is the only change in its policy as to the parties with whom the contest as to rates shall be waged. The original defendants in these suits are not rendered improper parties in the further progress of this litigation, which was initiated in the very mode invited at the time by the state statutes, because subsequent statutes endeavor, at one and the same time, to effect the same wrong originally complained of by a different means and to take away the remedy given for the redress of the original wrong. The suits, when brought, were well brought against the proper defendants under the law in force at the time, even if it be conceded that the right to maintain the suits depends upon the state law. Rights lawfully acquired under a valid law while in force are not destroyed by the repeal of the act which gave them. The presumption is, when a statute is adopted providing a new mode for redressing an existing property right, that it is not intended to operate retrospectively upon pending suits, unless the words of the statute force that conclusion. However that may be as to a case pending in the state courts, state statutes cannot legislate out of the equity court of the United States a case, properly brought therein, to enforce a right secured by the Constitution and laws of the United States.

Original Bills Not Abated, but Supplemental Bills Well Filed.

VIII. The original bills have not abated, and do not require any revivor, by reason of the repeal of the commodity rate statute and the substitution of another schedule of rates, or by the withdrawal from

the Commission and the Attorney General of official power to enforce the rates statutes, or by the repeal of the act which authorized them to be sued. The legislation passed at the called session affects the subject-matter of the litigation in the original bills in one respect only. Those bills sought to arrest the operation of the statute which forfeits the right of carriers to do intrastate business if they venture into this court to test the reasonableness of the rates, and also to arrest the operation of the statute fixing passenger fares at $2\frac{1}{2}$ cents per mile, and the statute forbidding any increase of rates above those in force on the 1st day of January, 1904, as well as to enjoin the commodity rates. The grievance alleged as to the commodity freight rates might be stricken out of the bills, and still leave a perfect cause of action as to the other matters, which the subsequent legislation has not affected in any way. The original bills have merely become "defective" in the sense of equity rule 57, because, as originally filed, they set up a grievance as to the rates embodied in the commodity rate act, whereas, in consequence of the change in the legislation, the grievance as to the freight rates after the legislation at the called sessions is as regards what are known as the "Eight Group Acts," which take the place of the former freight rates. The change in legislation has happened subsequently to the filing of the original bills, and after they were at issue. The parties have not changed. The subject-matter of the litigation remains absolutely unaltered, and the right to relief as originally prayed is perfect as to three of the grievances. The bills as to three matters need no support from the supplemental matters. The grievance as to the new matter is different in degree, and not in kind. The scope of the relief prayed is not enlarged. This is not a case where the right asserted on either side has gone out of a party to the suit, and must, therefore, be waged thereafter with a different person, who is to be brought into the litigation. Under such circumstances, neither justice nor technicality will be subserved by refusing to allow the question to be raised by supplemental bill. If the new matter had been brought forward, as respondents insist should have been done, by an original bill in the nature of a supplemental bill, such a bill would be so closely related to the case made by the original bill that the court would unhesitatingly consolidate the suits. The supplemental bills are properly filed as such.

IX. There is another view equally conclusive of the right to maintain the original bills, regardless of the repeal of the commodity rate act and the act authorizing suits against the Commission. While the commodity rate act was in force, the carriers failed to observe it. The court enjoined shippers from bringing suits to enforce it, providing, in the meanwhile, for the protection of their rights by exacting indemnifying bonds, and allowing shippers to file claims for excess charges in this court. The carriage of every parcel of freight, under such circumstances, has ripened into an executed contract to pay each shipper any excess rate collected, if the rate statutes be not adjudged invalid. Each of these shipments, being an executed contract, gives a vested right of action for the excess charges, which it is not competent for the state to take away. *M. & G. R. R. Co. v. Peebles*, 47 Ala. 317.

Shippers not only did business with the carrier upon the terms specified in the orders made on the issue of the preliminary injunctions, but, as permitted by those orders, have filed their claims against some of the complainants to recover the excess in the rates charged them, and have thus become quasi parties to the suit. The commodity rate act is as effective and binding, as to completed transactions under that act while it was in force, as if it had never been repealed. As the statute is *prima facie* valid—strictly speaking, voidable, and not void, until so declared—the only way of escape for the carrier from the liabilities thus incurred is to bring his suit to procure a judicial determination of the invalidity of that act, as applied to him, during the time that it was in force. The object of the suit cannot be defeated by a repeal of that statute. The right of action after “suit has been commenced” to be rid of such liability cannot be taken away by subsequent legislation, among other reasons, because section 95 of the Constitution of Alabama of 1901 ordains:

“After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action,” etc.

A cause of action may consist as well in the right of the plaintiff in a suit to maintain a bill to get rid of an obligation threatened to be enforced against him by the defendant therein as in the right of the plaintiff to institute such a suit against a defendant to compel him to pay a debt or perform any other obligation. A familiar instance of a cause of action like that sought to be enforced by the original bill, as to the commodity rate act, is where a bill is filed to remove a cloud upon a title, which is purely a defensive proceeding. In *United States v. Schooner Little Charles*, 1 Brock. 347, 355, Fed. Cas. No. 15,612, Chief Justice Marshall said:

“It is a general principle that jurisdiction, once vested, is not divested, although a state of things should arise in which original jurisdiction could not be exercised.”

In that case it was contended that the court had lost its jurisdiction by losing possession of the things to be condemned; that the stipulation substituted for vessel was so irregularly taken that it could not be enforced, and, therefore, could not be considered as a substitute for the thing seized. Chief Justice Marshall said:

“The court will not render a judgment which operates on nothing; but this reason will not apply in any case, where the judgment will have any effect whatever—if, for example, the liability of the officer for making a seizure, for damages, be dependent on it.”

The Supreme Court has always so held. *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911; *Cooke v. United States*, 2 Wall. 218, 17 L. Ed. 755.

If the Legislature, instead of substituting the “Eight Group Act” for the “Commodity Rate Act,” had repealed the latter absolutely, enacting no other in its place the liability for the excess rates charged before that act was repealed, if that act be valid, would remain upon the carrier, and, that being so, the jurisdiction of this court to determine the question remains. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644, which is cited to support the contrary view, has no application here. When the

eleventh amendment was adopted, it destroyed all judicial power in a court of the United States to render judgment against the state, except where it consented to be sued. The power which created the court withdrew its jurisdiction over the cause, and necessarily, therefore, all power to render judgment was taken away. The jurisdiction here is not given by state laws, and they cannot take it away, and a cause of action still remains. The only way in which the state laws could affect the exercise of federal judicial power here would be by such absolute destruction of the subject-matter of the litigation that no right remained to be settled as to any matter arising out of the repealed statute. The repealing statute has not accomplished that condition of affairs. The state has no power to relieve the carrier of liability, under completed transactions, for the excess charges while the repealed law was in force, and no power over the jurisdiction of this court, once it has attached, to give the carrier relief in that respect, so long as that liability remains.

Immaterial Whether Statutes Allowing State to be Made a Party in Certain Cases is Valid or Not.

X. It is argued that the last enactment of the Legislature, which repealed the former mode of contesting rates and substituted an appellate proceeding in the chancery court of Montgomery county, or other state court having like jurisdiction, wherein the state of Alabama may appeal in certain cases, and the carrier may also appeal from the orders of the Commission reducing rates, in which latter event the Railroad Commission shall be the appellee, is void in toto, because the suit authorized against the Commission is, in effect, a suit against the state, and section 14 of the Constitution of the state of 1901 declares that the state shall never be made a defendant in any court of law or equity. *Holmes v. State*, 100 Ala. 291, 14 South. 51; *Girls' Industrial School v. Reynolds*, 143 Ala. 585, 42 South. 114. It is therefore insisted that there is now no valid law which authorizes any proceeding in equity by the carrier, which is necessarily confined to remedies at law against the grievance of which it complains. It is unnecessary, however, to discuss that branch of the question further than to say that a proceeding against the Commission in a court of justice to settle the reasonableness of rates is not a suit against the state, for the reasons heretofore stated. If the laws of the state providing for a review at the instance of the carrier in reality permitted a suit against the state by allowing the Commission to be sued, the statute, under the influence of the decisions cited above, would be void in toto. If the statute is not void as involving authority to sue the state, yet, if it prescribes an exclusive mode, the statute here would, nevertheless, be unconstitutional in that event also, since it is so framed as to prevent the carrier from having seasonable resort to preventive remedies of the courts to protect a property right from destruction. If the act be constitutional, and does not provide an exclusive remedy, it is cumulative merely, and effective only as prescribing the mode of obtaining equitable relief in the state courts against the enforcement of rates. The procedure there laid down cannot, of course, affect the procedure in the

courts of the United States in equity cases, which in no wise depend upon state statutes.

Penalties Under System for Enforcing Rates Void.

XI. In *Louisville & Nashville Railroad Co. et al. v. Railroad Commission of Alabama et al.* (C. C.) 157 Fed. 944, the court said:

"Mindful of the irreparable injury and multiplicity of suits which would be imposed upon the carrier, if it resisted the enforcement of rates it considered unreasonable and had no other mode of testing the reasonableness of rates than meeting indictments as they are found and suits as brought, the Legislature of Alabama wisely provided a mode of settlement, by bill in equity against the Commission and the Attorney General, which in one suit would settle every question, and bind the state, the public, and the carrier alike, and authorized the court, in the meanwhile, to suspend the execution of the rate laws. This enabled the carrier upon properly indemnifying shippers and passengers, to obtain a judicial ascertainment of its rights without hazarding its whole estate upon the rightfulness of its challenge of the rates. Without some such provision, our rate laws would deter the carrier from going into the court at all, and practically destroy its right to a judicial review as effectually as if the statute had in so many words denied its right to resort to the courts. Statutes making no such provision as ours for contest of a right of property without risking any such loss would be unconstitutional."

See, also, *Seaboard Air Line Railway Co. v. Railroad Commission et al.* (C. C.) 155 Fed. 798.

The repeal of the statutes then in force, and the enactment in lieu of them, of a statute which makes no provision for the suspension of the rate statute, and, consequently, of the penalties, pending contest, and leaving liability for them if the contest is unsuccessful, and so framed in its details as to prevent any timely resort to a court of equity for injunction, and to terrorize the carrier from resorting to the courts, creates the very state of affairs which the court then said could not be brought about if the Constitution be observed. The Constitution of Alabama of 1901 (section 13) declares that:

"All courts shall be open, and every person for any injury done him in his lands, goods, person or reputation shall have a remedy by due process of law, and right and justice shall be administered without sale, denial or delay; that excessive fines shall not be imposed, and that no one shall be deprived of life, liberty or property without due process of law."

When it is declared that the courts shall be "open," something more was commanded than sessions of the court, at stated times, to hear and determine cases when brought in the courts. If a private person, claiming the right to have another use his property in a particular way for his benefit, should tell the owner of the property, when he went to law to prevent the enforcement of the claim, that the claimant would destroy his estate if he did not win his lawsuit, he would commit a serious offense both in law and in morals. The statutes here put the state in the attitude of making just such a threat. These statutes attempt to declare as the law of the land that a citizen may go into the court, if he wishes, for the protection of a right, but, if he fails, all his property shall pay the forfeit, no matter how bona fide his resort to the judicial tribunal. Such threats, clothed in the form of law, close the doors of the courts to most suitors as effectually as when physical force is used to drive them away. The usual results

are shown in the petitions filed by the Southern Railway Company and its allied lines to withdraw the injunctions issued on their original bills. Justice, under such conditions, is not administered without sale. The legislation drives the property owner, against his will, either to stay out of the court or else to pay as the price for entering the court the value of the property he will lose, if unsuccessful in the suit. The penalties are designed to prevent resort to the courts. Different considerations might apply if the penalty were exacted after the owner of the property had been given his day in court. Of course, the general power of the state to prescribe penalties for the violation of its laws is not denied; but the scheme under which such penalties are enforced must have some just relation to the lawfulness of the conduct to be prevented and the nature of the right sought to be penalized. Defenses left open to all other persons similarly situated, to protect the exercise of a property right in the courts, must not be closed to him upon whom the penalty is visited. When a statute fixes a penalty upon the property owner for failure to perform a duty for the reward fixed by the statute, and prevents him from performing that duty under protest, and punishes him for going into the courts to recover his quantum meruit, the statute is neither more nor less than an effort to punish a suitor for resorting to the courts in defense of his property rights. The Legislature has no power to visit upon the property owner, for going into the courts of his country for the protection of a property right, any consequences other than those which ordinarily attach to all other persons under like circumstances, where they are the unsuccessful plaintiffs in civil suits.

Excessive Fines.

The command regarding the imposition of fines is addressed more directly to the courts, but also imposes limitations upon the exercise of legislative power. The Legislature must not coerce the discretion of the judges, by fixing the minimum fine on conviction so high as to compel an excessive fine. The courts, in the exercise of the discretion the statutes give as to the amount of the fine, must not impose fines so heavy as to be out of all proportion to the nature and degree of the offense and the object sought to be accomplished by the penalty. The business here, upon the doing of which the penalties are imposed, is an entirely lawful one, and so is the act of transportation for which the reward in excess of that fixed by the statute is demanded. The only offense is the endeavor to obtain a larger amount than the statute fixes as the reward for the service. It is the occupation, at last, which is affected, and intended to be affected. The numerous penalties are really designed to punish the carrier for doing business at all, if there be a demand for more than the statutory charge. In dealing with the business, it is not treated as one business, but is carved up into as many businesses, for the purpose of punishment under the statute, as there are transactions in a given day. Making a test case even for a single day subjects the carrier to heavy fines for thousands of transactions. It could be fined over \$1,000,000 a day. The imposition of a fine of \$1,000,000 a day for the failure of a railroad company to take out a license to transact a business, which is lawful in itself, would

"shock the conscience" of an ordinary man. That, in substance, is what the penalties are designed to accomplish, for they really strike at the right to do business at all if the statute is not observed. The tests the authorities lay down for determining whether a fine is excessive, in a given case, are quite unsatisfactory. They all unite, however, in declaring, if the amount of a fine will shock the conscience, it is "excessive" in the constitutional sense. The reasons why such penalties cannot be enforced are powerfully stated by Mr. Justice Brewer, in *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, which, though dicta in that case, are unanswerable. The same conclusion has been reached in a number of cases in the Circuit Courts. *Mercantile Trust Co. v. Texas Pacific Railway Co.* (C. C.) 51 Fed. 529; *L. & St. L. R. R. Co. v. McChord* (C. C.) 103 Fed. 216; *Consolidated Gas Co. v. Mayer* (C. C.) 146 Fed. 150; *Ex parte Wood* (C. C.) 155 Fed. 190. The Supreme Court of Alabama decided the same principle years ago in *S. & N. A. R. R. Co. v. Morris*, 65 Ala. 194, and has enforced it in a number of cases as late as *Randolph v. Builders' & Painters' Supply Co.*, 106 Ala. 501, 17 South. 721. See, also, *Wally's Heirs v. Kennedy*, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. The scheme of penalties for which the statutes provide is unconstitutional, as matter of law, in view of the known, direct, and inevitable effect of the penalties upon the right at which they are aimed. The indictments, arrests, and suits for penalties have no warrant of law to support them, and must be enjoined, as would any other illegal act which threatens irreparable injury, irrespective of the reasonableness of the rates prescribed. The provisions of the statutes on these subjects are not so dependent or intermingled as to leave any room to doubt the Legislature intended to enforce the rule of action the statute prescribes as to the tariff rates, although the penalties for their nonobservance might be stricken down.

Statutes Preventing Use of Gates at Stations to Keep Out Intending Passengers, When Tickets are Not Sold at Statutory Rates.

XII. Another statute, whose constitutionality is challenged, is that which provides, when the carrier fails to keep for sale or to sell on demand at passenger stations tickets at the rates prescribed by the statute, or such as may thereafter be prescribed by the Commission, it shall be unlawful for the carrier to maintain any fence or gates to prevent intending passengers from reaching the trains, under a penalty of not less than \$200 nor more than \$1,000. So far as the statute undertakes to impose punishment for the nonobservance of any rate the Commission may fix in lieu of the one prescribed by the statute, it is unconstitutional for the reasons hereinafter stated. Its validity is further questioned, because "the natural and reasonable effect" of the statute is to prevent a carrier who does not sell tickets at the prescribed rates from using fences and gates against the crowds of sight-seers and idlers who generally go about trains at stations. The carrier would have no practical means of identifying intending passengers, except

their declarations, and many persons who had no purpose to take passage on the train would not scruple to assert they intended to do so in order to gain entrance to the stations. The inevitable result would be the carrier, for fear he might use the gates against the wrong persons, would not use them against any one who claimed to be an intending passenger. All persons who chose to go about arriving and departing trains, and declared their purpose to take passage, could and would enter the stations and swell the crowds on the inside, creating conditions of danger against which railroad carriers always find it necessary to guard in populous localities, both in their own interests and in furtherance of the public safety. If the statute had said in so many words that a carrier who refused to sell tickets at the prescribed rates should not take proper precautions for the protection of life and limb on his own premises, no one would doubt its invalidity. That would be a species of outlawry. The statute inevitably accomplishes the same result by indirection. Punishment of the carrier or its servants for refusing to keep or sell the tickets would have accomplished all the ends of the statute, if lawful. It is the direct and natural mode of compelling observance of the duty. The duty to be enforced is primarily due to a private individual, and it is not a legitimate exercise of the police power to so frame a statute, designed to enforce such a duty, that its execution unnecessarily involves danger to life and limb of the public, and deprives the owner of property of the right to police it for a lawful purpose. But, this aside, if the schedule of rates sought to be enforced is unreasonable, the prohibition against bars and gates, and the penalty for using them against passengers, is unauthorized and illegal, and execution of the statute could rightly be enjoined pending inquiry as to the facts, which determines whether it can ever be treated as a law.

The justification attempted for those features of the statute which declare that it shall be no defense to a suit to recover forfeiture for keeping intending passengers out of stations, that a restraining order pendente lite has been granted against the enforcement of the rates, or that the carrier has been enjoined from putting the rates in force, rests on the theory that, the statute having authorized intending passengers to use the state's name and declared that the suit shall be the state's suit, no court can have the power to enjoin the bringing or prosecution of such suit, no matter what the equities of the particular case. This theory is plainly untenable. When a state becomes a plaintiff, although the suit is brought to redress its own rights, it is bound by the rules of justice ordinarily applicable to other suitors. It cannot demand of the court in which it brings its suit to uproot the law of the land for it, or to depart from the principles upon which justice is administered between man and man. *Walker v. United States* (C. C.) 139 Fed. 409. The courts, both state and federal, have jurisdiction to determine whether the rates fixed by the Legislature or the Commission are just and reasonable, and enjoin their enforcement as the facts of particular cases may warrant. When a court, either state or federal, has obtained jurisdiction of the person and subject-matter, its judgments and decrees as to the validity of rates are just as binding

upon the state as upon private individuals. There is no power in the General Assembly to declare, when suits are brought by the state, that decrees of courts in prior suits regarding the same subject-matter of litigation shall not be respected, or that orders made in such suits to preserve the status quo as to rates pending inquiry as to the facts shall in subsequent suits be treated as nullities. Any doctrine which upholds such power necessarily sustains legislative authority to destroy the judicial power and independence, and ignores the Constitution, which forbids the Legislature to exercise any power properly belonging to the judiciary. Besides, the suits for which the act provides are in no proper sense the state's suits. The state, as such, has no pecuniary interest in the transportation of the passenger, or in the breach of duty to him in the refusal to sell tickets at the prescribed rates, or in any other way save the general concern the government has in the welfare of the people, which relation never makes the state the party really interested in the suit. The fact that the state may, in certain contingencies, share in the recovery, does not make the suit the state's suit. *Missouri Railroad Co. v. Railroad Commission*, 183 U. S. 53, 22 Sup. Ct. 18, 46 L. Ed. 78. The courts always look behind the form to the substance of the proceeding. When the state merely lends its name to an individual, no immunity of the sovereign can be set up to prevent the court in which the litigation is waged from disposing of the case according to its equities and merits between the real, substantial parties to the suit. The proceeding not being a suit by the state, a court of equity may control the suit after it is brought, or enjoin the bringing of it, when equitable principles and the nature of the case render it essential to the ends of justice, just as it would in cases between individuals. As said by the Supreme Court of the United States in *Curtner v. United States*, 149 U. S. 673, 13 Sup. Ct. 989, 37 L. Ed. 890:

"The same principle must be applied as if the litigation were between private parties."

That case reiterates the doctrine applied in the prior case of *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121. See, also, *Miller v. State*, 38 Ala. 600.

Every Person Bound by Decree in Suit with Public Officials Adjudging Proper Rate.

XIII. Similar legislation along this line in another statute is based upon the idea that the shipper or passenger is not a party or privy to the judgment rendered by the courts in suits against public officers to determine the reasonableness of rates. The general principle that one not a party or privy to a judgment is not bound by it is, of course, admitted; but the principle has no application to decrees and orders made in this class of cases. The property, the manner of whose use is involved, is devoted to a public use, and, in consequence, all persons desiring transportation over it, have certain rights in the property. It is held under a franchise granted by the state. The property is impressed with a servitude. The servitude is for the benefit of every one who may have occasion to demand transportation, and the burden is

imposed upon the owner, to operate the property for the public at just and reasonable rates. Primarily the owner may fix the reward he will claim; but, as this may be unjust and unreasonable, the Legislature may intervene and fix just and reasonable rates. When the Legislature does prescribe rates, it determines, subject to final judgment of the courts, the status of the property as regards a public right in these respects. A suit by the carrier to enjoin the enforcement of rates, waged with a public officer, is an effort by the owner of the property to fix its status as to the public in this respect. The judgment rendered in such a proceeding determines that status. Every member of society is represented in that proceeding by the public authorities, and is bound by the judgment, though not a formal party to it. It is "a case where the few represent the many." In this respect, though it is not, strictly speaking, a proceeding *in rem*, the suit has many of the characteristics of such a proceeding, and the judgment rendered therein, like the judgment in bankruptcy, which fixes the status of insolvency, or the judgment of naturalization, which adjudges the status of citizenship, binds all the world, as to that status. No one can assail such a judgment or decree on collateral attack, except for want of jurisdiction in the court which rendered it. It is not meant to declare that a person or community aggrieved by a rate in fact unreasonable or unjust, approved and fixed by public authority, is without remedy; but he cannot change the status of the property, and of the rights of the public therein, as fixed by decree of a court in a proceeding to that end, by his private suit against the carrier, who is observing the rate declared by the court to be proper for the time being, and in that way overturn the effect of the judgment as a determination of the status of the property. He must first appeal to the public authorities to change the rate. Being unsuccessful in that, in a proper case, he can doubtless resort to his bill in chancery against the carrier and the representative of the public in the matter of rates, to have their enforcement enjoined as to him, and it may be, as to all other persons similarly situated, on the grounds stated, or because changed conditions make the rates improper. The Constitution putting the duty upon the carrier to transport at just and reasonable rates, and without unjust discrimination, and giving every person the right to demand such service, it cannot be that any person or community injured by unjust or discriminatory rates can be deprived of all judicial remedy against such rates, because the ratemaking tribunals approve them and refuse to change them.

Commission is Administrative Body, and Exercises Only Administrative Functions.

XIV. The nature of the power exercised by the Commission in making and unmaking rates of its own, and whether power can be conferred upon the Commission to make and unmake rates made by the Legislature itself, and to substitute Commission-made rates in their stead, has been much discussed at the bar. It is conceded, of course, on all sides, that authority may be conferred upon an administrative body to fix a schedule of maximum rates; but some of respondents' counsel claim that the power exercised by the Commission is legis-

lative, and therefore the court cannot properly restrain *pendente lite* promulgation of Commission-made rates, changing the rates now before the court, whatever it might do after such changes are promulgated. Complainants deny that the power exercised by the Commission in fixing rates is legislative, and earnestly insist that the Legislature cannot confer unconditional power upon the Commission to alter rates fixed by the Legislature itself, and to set up others in their places in their discretion, and assert that in consequence of the exercise of such power by the Commission much more favorable classifications and rates have been fixed for other carriers in all respects similarly situated as complainants, whereby they have been denied the equal protection of the laws.

The delegation of legislative power to the Commission would plainly violate the fundamental law of Alabama. In *Schultes v. Eberly*, 82 Ala. 242, 2 South. 345, *Clark & Murrell v. Port of Mobile*, 67 Ala. 217, and *Mitchell, Judge, etc., v. State ex rel., etc.*, 134 Ala. 412, 32 South. 687, the Supreme Court of Alabama has emphatically declared that the delegation of legislative power, except to municipal corporations, to which by immemorial custom a part of the legislative power of the state has always been delegated for the purpose of local administration, is wholly inadmissible. The Railroad Commission does not fall within the exception. It is not a municipal corporation, nor an agency for local purposes. Section 243 of the Constitution of Alabama of 1901 reads as follows:

"The power and authority of regulating railroad freight and passenger tariffs, the locating and building of freight and passenger depots, correcting abuses, preventing unjust discrimination and extortion, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the Legislature, whose duty it shall be to pass laws from time to time regulating freight and passenger tariffs, to prohibit unjust discrimination on the various railroads, canals and rivers of the state, and to prohibit the charging of other than just and reasonable rates, and enforce the same by adequate penalties."

When the section was under discussion in the constitutional convention of 1901, it was moved to amend the section so as to confer the power upon the Railroad Commission. It was objected, if this were done, it would take the power from the Legislature and put it within the keeping of the Commission. The amendment was voted down. The chairman of the committee reporting this article of the Constitution explained that the section, with the exception of the inclusion of canals and the power as to the location and building of freight and passenger depots, was taken verbatim from a section of the Georgia Constitution of 1877; the purpose in so doing being to authorize the Legislature to confer the same power, if it saw proper, upon the Commission of Alabama, as was conferred by the statutes of Georgia upon the Georgia Commission. There had been much agitation of this question at former sessions of the Legislature, as well as in the public prints and on the hustings, and the adoption of this section of the Georgia Constitution, and statutory power for the Commission as in that state, were urged as a remedy for the prevention of the evils of unreasonable rates and unjust discrimination. Georgia, whose Consti-

tution contained the provision which now forms section 243 of our Constitution of 1901 provided by statute for a Railroad Commission whose duty it should be to make just and reasonable rates of freight and passenger tariffs. It was sought to enjoin the execution of the statute on the ground that it was unconstitutional, since, under the Constitution, it was the duty of the Legislature to regulate the freight and passenger tariffs and it had delegated the power to the Commission. The Supreme Court of Georgia, however, in *Georgia Railroad Co. v. R. R. Commission*, 70 Ga. 694, sustained the statute. It said:

"It certainly was not contemplated that the details of rates to be fixed over many miles of railway in this state should be settled by the Legislature. The many influences that combine to cause changes in the ever-varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of controlling, by the Legislature, just and proper schedules for various roads, with their differences in length, locality, and business, appears to us to be so clear and manifest as that to have entertained it would be absolutely absurd, and especially so when it is remembered that schedules just and right for the months of winter may be ruinously unjust and wrong for the months of summer, and that such as are proper for the year of the meeting of the General Assembly might, in the succeeding year, well-nigh bankrupt every railroad corporation in the state."

The court further held that the Georgia act authorizing the Commission to make rates was not a delegation of legislative power. On this point it said:

"The difference between the power to pass a law, and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great; and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases legislative power is granted. The former would be unconstitutional, while the latter would not."

If the words of the section left any doubt as to its proper construction, that doubt would disappear in view of its history, and the familiar rule that a constitutional provision, copied from the fundamental law of another state, is presumed to have been adopted with the settled interpretation it had received in the state of its origin. Aside from this, it is clear from its language that the section does not authorize the grant of legislative power to the Commission. In the first place, the "power and authority" are "conferred upon the Legislature." The duty is put "upon the Legislature," and the particular mode by which it shall be discharged is also specified. The Legislature must discharge the duty by the passage of laws. It must pass these "laws from time to time." These laws are the means to cure "extortion and unjust discrimination." The purpose is plain, whatever instrumentalities may be employed to execute these laws, that the duty imposed upon them shall be merely to enforce the rules of conduct prescribed by these particular laws, under and according to the laws which impose them. The language and spirit of the section forbid us to impute to the framers of the Constitution any purpose to confer any power upon the Legislature to delegate to a Railroad Commission or any other department of government the exercise of the legislative function of declaring "what the law shall be." Giving power to a Railroad Commission like ours to fix rates is sustained because it is a mere administra-

tive body for ascertaining, in accordance with rules the law itself promulgates in advance, what, under the facts and circumstances of the particular cases, are just and reasonable rates. The conferring of power upon the Railroad Commission here to promulgate rates is not the delegation to that body of the power to make the law. The common law, the statutes, and the decisions of the courts have already declared the rules which fix the reasonableness of rates. The duty put upon the Commission is to apply rules and principles the law has already prescribed to the facts of particular cases, and by the application of these rules to the particular facts to ascertain as matter of fact what are just and reasonable rates in the given case. Undoubtedly the power which declares the rule of action and fixes the principles which determine when rates are reasonable is legislative, while the power exercised by the Commission in applying the principles the law has already declared to the facts of particular cases, to ascertain and declare reasonable rates, is judicial in its nature. The Commission, however, is a mere administrative body, or executive auxiliary. The fact that the exercise of judgment and discretion are requisite to the proper discharge of the duties committed to it does not make it a judicial body, in the constitutional sense; for the exercise of such faculties is requisite to the proper discharge of the duties committed to every functionary, and does not necessarily determine to which of the great departments of government it belongs. The Railroad Commission, in the exercise of its ordinary authority, in making and unmaking its own rates is a purely administrative body, and does not exercise legislative authority. The power being administrative, the court may enjoin its enforcement *pendente lite*, whenever essential to the ends of justice. The reason why it was held improper in *Smyth v. Ames* and *Reagan v. Farmers' Loan & Trust Co.*, *supra*, to make a final decree enjoining the future exercise of power to make rates, was not because the power by a commission is legislative. It was held improper there, because the court itself, having no power to make rates, could not set up any rates of its own in lieu of the rates stricken down, and circumstances might so change as to make rates which are unjust to the carrier at one time perfectly just and reasonable at another. Aside from these considerations, injunctions in these cases against the future reduction of rates by the Commission will be entirely proper, if the Commission has no legal power to reduce the maximum rates now fixed by law.

XV. Has the Legislature attempted to delegate legislative power to the Commission in the authority conferred upon it to make and unmake rates and classifications established by statutes? The act of August 9, 1907, provides in the first section:

"That in all cases where any classification of railroads or of any articles of freight or any maximum rates or charges for the transportation of passengers or freight over any railroad in this state, have been, or may hereafter be prescribed by statute, or any prevailing rates or charges for such transportation have been, or may hereafter be, by statute made the maximum rates or charges, the Railroad Commission of Alabama shall have the power and is hereby authorized to change such classifications and such rates or charges, or any of them, from time to time as conditions may, in its judgment render expedient or proper so to do, whether the effect of such changes

be to increase or reduce any of the rates or charges, and to establish and order to be put in force in lieu thereof any new classification or rate or charge which it may deem reasonable and proper; and the classifications, rates or charges so established by it shall be the lawful classifications, rates or charges until further changed by said Railroad Commission."

Like power is given as to the rates and classifications in the acts known as the "Eight Group Acts."

Legislative Power has been Attempted to be Delegated to the Commission as to Change of Statutory Rates and Classifications.

XVI. The will of legislators never becomes the law, unless expressed in the mode and form the Constitution commands. The Legislature, in framing a statute, may provide for its unchanged operation until it is repealed, or it may provide for contingencies arising after it goes into effect, which in its wisdom may require change in the law, and provide for the change, in view of the happening of these contingencies, upon the occurrence of which the lawmaker himself declares in the statute what the change shall be. But, whatever the intent of the lawmaker, a statute, in order to ripen into a law, must always be a perfect expression of the legislative will, upon every contingency with which the statute deals, as it leaves the hands of the lawmaking power. When the Legislature declares its will as to contingencies, it may lawfully make the taking effect of the statute in the first instance, or its suspension or abrogation afterwards, and the substitution of some other law, depend upon the ascertainment of some particular state of facts by an executive officer. But, to be a perfect expression of the legislative will as to these matters, the statute itself must ascertain or prescribe a state of facts which constitute the condition or contingency upon which the change may be made, and what change shall be effected in the prior law, when that contingency is ascertained. Under a statute so framed, the Legislature has delegated no legislative authority to the executive officer. It has simply made use of his services to ascertain a state of facts, upon the ascertainment of which the Legislature itself declares, in advance, its own judgment as to "what the law shall be" under the changed conditions. The contingency upon which the change shall take place in the operation of a law must be a state of facts which the Legislature either ascertains in so many words, or defines or prescribes by general definition, and upon the finding of which state of facts the Legislature, and not some other body, forms the opinion, and declares that it is expedient and proper to change the operation of the law. The propriety and expediency of changing a law is the very question which the Constitution commits exclusively to the wisdom of the Legislature, and it must express its own judgment and will in the statute as to these questions. If the opinion or judgment of some other department as to the happening of some undefined event, and the effect such event should have upon the legislative policy, is to determine whether there shall be a change in the law, it is the judgment and will of the officer as to the expediency of a change, and not the opinion and will of the lawmaking power, which effects the changes. The statute here makes the expediency and propriety of a change, which shall be made when the

officer so determines, depend solely upon the discretion and will of an executive officer, and not upon the happening of any state of facts upon which the Legislature itself has passed its judgment and uttered its commands. The statutes in that posture are neither more nor less than a legislative declaration that there shall be a change in the legislative will because an executive officer deems it expedient, and that because the executive officer so wills thereafter the legislative will shall be only what an executive officer prescribes. This is nothing more nor less than the entire abdication of the duty of the Legislature to determine the expediency and propriety of legislation, and the surrender of legislative power to an executive officer, to use as he pleases in the future.

The court has struggled hard to find some way, consistent with obedience to the Constitution, to avoid the consequences and inconveniences, both public and private, which must follow from striking down the powers here attempted to be conferred upon the Commission. Finding no escape on principle, the duty of the court is plain. It must enforce the Constitution. The Legislature doubtless intended in the passage of these statutes to leave the whole matter of rates and classifications in the keeping of the Commission, and thought it had done so. It could have done so by an absolute repeal of the schedules and classifications fixed by it, leaving the Commission, as an administrative body, to work out under rules and principles fixed by the Constitution, the statutes, and the common law, what are reasonable classifications and rates, in view of the facts in the particular cases with which the Commission deals. The Legislature could also have retained the "Group Acts" as a general guide for the Commission, and yet given the Commission power to change them, by providing in those statutes that upon the happening of a certain state of facts therein declared or defined, not upon the mere opinion or judgment of the Commission on undefined conditions of which the commission is the sole judge, and upon which the Legislature itself made no declaration "what the law shall be," the Commission might thereupon change the classifications and rates, within certain limitations, which the statutes themselves would state or define. But nothing of that kind was provided for in any of the statutes. The Legislature has not repealed or changed them. The constitutional trouble with the statute is that the legislative power has specifically declared its will upon the wisdom and expediency of the particular classifications and rates, and put them upon the statute books as the law of the land. It takes the lawmaking power to repeal or change a law, as well as to make a law; and the power of repealing or changing a law, or substituting another law in its stead, cannot be delegated to any other department, much less to a statutory board. Turn the proposition over as we may, and scan it from every constitutional point of view, we are always confronted with the fact that, in order to change the laws now in existence as to rates and classifications, they must be repealed or altered by the legislative power which made them. The legislative power which made them has not repealed or altered them. It has merely attempted to let another body undo what the Legislature has done. It has not declared in any of those

statutes its own will as to "what the law shall be" on any changed state of facts which the lawmakers have defined or prescribed, nor, when that state of facts is ascertained, what shall be either the nature or extent of the changes which the lawmakers will shall result therefrom, except that the wisdom and judgment of the Commission shall be the legislative will as to the change. On these questions, upon which the Legislature must speak if the Constitution be obeyed, it has declared no will of its own as to "what the law shall be." It has simply declared to the Commission that it is authorized, for any reasons it may think of sufficient importance, to unmake what the Legislature has declared to be the law of the land, and set up other standards of its own, which shall stand as the law until again changed by order of the Commission. In short, it has referred the whole matter of "what the law shall be" to the Railroad Commission as a "committee with power to act," and declared that the legislative will as to the future shall be whatever the Commission may will and declare.

Of the wisdom of the Legislature's determining for itself what are just and reasonable rates and classifications, and imbedding those rates and classifications in statutes, whereby they become the law of the land and cannot be altered except by an act of the lawmaking power itself, the Legislature must determine for itself; but, when the Legislature does so determine, the Constitution fastens upon their act, and provides the only mode in which the requirements of such enactments can be undone or changed. While some inconvenience, both public and private, must result from following the Constitution in this case, the evil is of small consequence as compared with the greater evils which would result in allowing such departures from the fundamental law. It is vital to the welfare and happiness of the people that the law shall not be made and unmade, or changed, save by the lawmaking power itself. To-day it is the carrier and those who deal with him who are attempted to be subjected to the doctrine that administrative officers may change the law as enacted by the Legislature, and prescribe different rules of conduct from those made by the supreme lawmaking power, varying the law according to their own notions whenever, "in their judgment," it is "expedient and proper so to do." If such power can lawfully be conferred upon administrative officers in these cases, it cannot be denied to executive officers in other cases. It is an alarming doctrine to proclaim in a free country that the laws for the control of the rights and business of citizens, under the complex conditions of modern life, can be made to give place to different obligations and rules made by executive officers, "whenever conditions may, in their judgment, render it expedient or proper so to do." The whole matter is exhaustively discussed in *Field v. Clark*, 143 U. S. 694, 12 Sup. Ct. 505, 36 L. Ed. 294, wherein is quoted with approval the words of the Supreme Court of Ohio (*Railroad Co. v. Clinton County Com'rs*, 1 Ohio St. 88) that:

"The true distinction is between the delegation of power to make a law, which necessarily involves a discretion as to what it shall be, and the conferring of authority and discretion as to its execution, to be exercised under and in pursuance of law. The first cannot be done; to the latter, no valid objection can be made."

In the one case the official overrides the law and substitutes his own judgment for it; in the other, he does not change the law, but merely conforms to it. A late instructive case is *State v. Great Northern Railway Company*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250. Our own cases of *Mitchell, Judge, etc., v. State ex rel., etc.*, 134 Ala. 392, 32 South. 687, and *Harlan v. State ex rel.*, 136 Ala. 155, 33 South. 858, are conclusive on this point. Whether the legislative department of a state, under its Constitution, can delegate legislative power, involves no federal question. The decisions of the highest court of the state are binding upon the federal courts on such a question. Few cases can be found where a Legislature has ever attempted to authorize any other department of the government to strike down an explicit legislative command, and substitute, in its unshackled discretion, some other command; and no case can be found where such an attempt ever succeeded. See *State v. Morris County*, 36 N. J. Law, 72, 13 Am. Rep. 422.

Preliminary Injunction Discretionary.

XVII. Complainants have the undoubted right to restrain the operation of the rates, if they will not produce a just return upon the value of the property devoted to intrastate commerce. The right, as a matter of law, is unquestioned. The only issue is whether the facts as ultimately shown will entitle complainant to injunctive relief on final decree. In this class of cases four dominant factors, roughly stated, must control the exercise of the court's discretion: First, what is the value of the property devoted to intrastate service? Second, what is the fair net income from the operations of the carrier, if done at reasonable rates, without unjust discrimination, after deducting cost of service, and excluding in the accounting credit to the carrier for interest paid on mortgages which represent debts incurred in the purchase of the property, or money which went into its construction, and any charge made out of the income for permanent improvements of the plant? Third, what percentage of profit upon the fair value of the property devoted to intrastate business is equitable and just, in view of the hazards of the business, the locality and conditions where it is carried on, and other matters which enter into the cost and value of the transportation done by the particular carrier? Fourth, what, in view of the issues raised by the parties and the proof submitted on the hearing, is the probability as to the adequacy or inadequacy of just compensation, from observance or nonobservance of the rates; and what will be effect upon the rights of the contending parties of granting or withholding the preliminary injunction?

In the earlier cases, when it was held that the Legislature could fix any schedules of rates it deemed proper, so long as it did not take the carrier's property by depriving him of any profit whatever, there was no ground to enjoin the enforcement of rates because the probable margin of profit was small, if it appeared there would be some profit. When, however, the earlier decisions were abandoned, and the Supreme Court declared that the Legislature could not make rates which would not permit "adequate" or "just" compensation, and that the courts were

the final arbiters of such questions, a different rule necessarily arose. The preliminary injunction was no longer to be denied merely because the proof shows some profit. The pertinent and controlling inquiry necessarily changed. The question then arose, in view of the legal presumption that statutory rates are reasonable, whether the volume of profit probable on the face of the situation creates, *prima facie*, a fair preponderance of probabilities that the business done under the reduced rates would afford adequate or just compensation upon the real value of the property employed in the business. In *Tilley v. Railroad Company* (C. C.) 5 Fed. 641, Justice Woods, under the doctrine then prevailing, held the court had no power to interfere with the rates, so long as any profit was probable. It was apparent in that case there would be a considerable profit. The Georgia Commission claimed the schedule allowed 8 per cent. upon the value of the property. The railroad company claimed that the value of the property was assessed entirely too low, and that the result of the tariff of rates upon the value of the railroad as fixed by the commission would amount to confiscation. So far as the percentum of compensation was concerned, it was really a difference between 8 and 10 per cent. profit. It being apparent that there would in any event be some profit, Justice Woods held, of course, that the courts had no power to interfere; for there could be no confiscation when there would be some profit. What he decided was that, some profit being apparent, and whatever it was being sufficient, if it amounted to any profit at all, the only way to determine whether the amount would be so small as to work confiscation, as claimed, would be to try the rates. Justice Brewer, while circuit judge, in *Railroad Co. v. Dey* (C. C.) 38 Fed. 664, quoted Justice Wood's language, saying:

"I do not indorse it as of universal application, but only under the circumstances of the present case. Where the effect of the rates is doubtful, with a probability that they will prove compensatory, and the amount of business to be thereby affected is comparatively small, I think the courts may as well wait for the test of experience."

In that case 4 per cent. of the local traffic was affected. Here the whole intrastate tariff is involved, and the aggregate sum of the reductions is very large. When Judge Brewer spoke of the rates proving "compensatory," he was speaking of them in the sense in which he used the term "compensatory" in a former case between the same parties (35 Fed. 879, 1 L. R. A. 744), in which that judge decided:

"The right of judicial interference exists when the schedule of rates established will fail to secure to the owners of the property some compensation from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the Legislature is the sole judge."

Judge Brewer found on the second hearing there was "a probability" there would be sufficient income, according to the standard then prevailing, or, in other words, that the carrier would get "some compensation," all he was entitled to receive under the law at that time, and therefore refused the preliminary injunction. Under the present rule, when it is shown that the carrier will derive "some compensation," it does not at all follow that it is adequate, and therefore does

not necessarily raise any controlling presumption, in the particular case, that the carrier will receive such reward as the Constitution secures to him. Judge Brewer's decision in that case is, therefore, direct authority that, although it be apparent on the facts presented the carrier will receive some compensation, yet, if there is a probability that it will not amount to adequate compensation, there should be no experimenting, in the preliminary stages of the litigation, to determine the justice of a tariff which involves the whole body of rates.

Mr. Justice McKenna, then circuit judge, declined to experiment with grain rates in *Southern Pac. Co. v. Board of Commissioners* (C. C.) 78 Fed. 238. Circuit Judge McCormick declined to speculate as to the effect of rates in the cases reported in the Supreme Court under the title of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. Circuit Judge Shelby did the same thing in *Palatka Waterworks v. City of Palatka* (C. C.) 127 Fed. 161. Circuit Judge Pardee declined to experiment with rates in *L. & N. R. Co. v. Railroad Commission* (C. C.) 123 Fed. 947. In *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92, Circuit Judge Thayer dealt with a bill to enjoin the enforcement of charges for slaughtering cattle, and after final hearing dissolved the injunction and dismissed the bill. Yet he ordered the injunction reinstated, if appeal should be taken, in view of the heavy loss which would fall upon the stockyard companies if his decree should be reversed. His course met with the approval of the Supreme Court, which, in *Hovey v. McDonald*, 109 U. S. 150, 161, 3 Sup. Ct. 136, 143, 27 L. Ed. 888, discussed the power of the court "to order a continuance of the status quo, if the purposes of justice required it." The court there said:

"This power undoubtedly exists, and should always be exercised when irreparable injury may result from the effect of the decree as rendered;" but it is a discretionary power, and "its exercise or nonexercise is not reviewable here."

When complaint is made of threatened irreparable injury from the enforcement of reduced rates, there is no more legal or moral duty on the part of the court to decide that question against the complainant, by putting the rates in force at once, than there is to adopt a like course in the preliminary stages of any other litigation, when irreparable injury is threatened to any other kind of property right by any other means. Each case must depend upon its own facts and circumstances, and no useful purpose will be subserved by attempting to analyze the cases where the courts have tested the reasonableness of the rates by putting them in force, and where they have declined to do so, in the preliminary stages of the litigation. The duty of the courts is to protect property rights, and not speculate with them, pending investigation of the facts upon which the ultimate right depends, when the equities are matter of doubt, and there is any reasonable probability of irreparable injury if temporary relief be withheld. When a decision putting rates in force in the earlier stages of the litigation may amount to a practical denial of the right, although the complainant finally succeeds, a court of equity, especially when it can fully guard all the

rights of both parties meanwhile, should preserve the status quo as to the rates until final proof enables it to determine where the right lays, and gives it the means of making a final determination of the rights of the parties, which will justly settle and protect them from the beginning, without requiring either to hazard loss meanwhile. As has been frequently pointed out by other courts, what is said on this subject in *San Diego Land Co. v. National City*, 174 U. S. 754, 19 Sup. Ct. 804, 43 L. Ed. 1154, has reference only to the principles which govern the court in interfering with rates on final decree on full proof. The question of the duty or power of the court to preserve the status quo pending final decree was neither involved nor decided in that case. It would undermine one of the most beneficent and ancient principles of equity to hold that a court of equity, although it finds that there is a fair probability of irreparable injury, is yet, nevertheless, powerless to prevent it, unless it can go further and see beyond all doubt, in the preliminary stages of the litigation, that complainant is entitled to final decree. Such a doctrine would in effect require the court to render a decree as to the final right in the preliminary stages of the case, at a time when it has no means of determining the ultimate rights of the parties.

What Per Cent. of Profit is the Carrier Entitled to Earn Upon the Investment?

XVIII. No court has undertaken to determine any exact percentage of profit which the carrier is entitled to earn upon the value of the property devoted to the service. It depends upon so many contingencies that the courts have deemed it best to lay down general principles only, and leave their application to the facts of the particular case. The general doctrine is stated by the Supreme Court in *Smyth v. Ames*, 169 U. S. 546, 547, 18 Sup. Ct. 418, 434, 42 L. Ed. 819:

"The basis of all calculations as to the reasonableness of rates to be charged by a corporation must be the fair value of the property used by it for the convenience of the public; and in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present, as compared with the original, cost of construction, the probable earning capacity of the property under the particular rates prescribed by the statute, and the sum required to meet operating expenses, are all matters of consideration, and are to be given such weight as may be just and right in each case. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience; and, on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The carrier is made by law an insurer of freight, and is required to use the highest degree of skill known to the art to prevent injury to passengers. It must have and keep its equipment up to the standard of modern excellence. Necessity and policy alike demand that it maintain a sufficiently high standard of wages to attract and retain the services of competent and faithful men in all its departments. Its business is in a degree hazardous when best conducted, and shares for good or ill the fortunes of the communities and localities it serves, and it must

maintain and increase its facilities as their wants require. In all these matters its interests and those of the public are in a large sense, legally and morally, identical. If a schedule of rates does not permit the carrier to earn a sufficient income to properly discharge these duties, the rights of the public, as well as the private interests of the owners, are invaded. The right to remuneration for the cost of whatever is requisite to maintain its service so as to meet the just wants of the public and fully discharge the duties exacted of it by law, is, therefore, as vital to the public welfare as to the well-being of the property owner, and when we state the rights of the carrier, and enforce them in that respect, it is only another mode of stating and enforcing the rights of the public. The same principle is applicable to the right of the carrier to earn a fair amount, above the cost of service, upon the value of the capital employed in the business. It is well said in *Beale & Wyman, Railroad Rate Regulation*, § 406:

"It ought always be plain that those who invest their funds in some public employment are going to get a fair per cent. upon their investment, because unless they are assured of this, they will employ their money elsewhere, and many enterprises necessary for the public convenience will not be undertaken, nor will existing plants be extended. It is, then, not only due consideration for the rights of others who have already invested their money in public service companies, but also an enlightened selfishness with a view to the future, which dictates the policy that a reasonable return upon the value of the property used in the public service shall be held to be protected by the Constitution."

While the Supreme Court has not fixed any particular percentum of net profit the carrier is entitled to demand when his charges for the service are just, the state courts and the lower federal courts have generally adopted as the standard of an adequate return at least as high a measure of profit as the current rate of return upon enterprises of a similar character in the localities where the carrier's business is transacted. In *L. & N. R. R. Co. v. Brown et al.*, *Railroad Com'rs of Florida* (C. C.) 123 Fed. 947, Judge Pardee held that a railroad company in that state, so long as its rates are reasonable, and its business is done without unjust discrimination, is usually entitled to earn an amount on the value of its road devoted to intrastate business equal to the legal rate of interest in that locality. In *New Memphis Gas & Light Co. v. Memphis* (C. C.) 72 Fed. 952, it was held that a gas company has a right to earn such gross revenue as will enable it to pay all legitimate operating expenses, to pay interest in valid fixed charges upon bonds or securities, so far as they represent expenditures actually made in good faith, and to pay reasonable dividends on stock that represents actual investment in the enterprise. In *Spring Valley Waterworks Co. v. City and County of San Francisco* (C. C.) 124 Fed. 574, where the rates fixed would not permit annual net earnings of over 4.4 per cent. on the value of the property employed in the service, it was held that the return allowed by the schedule of rates was too low to be reasonable and just, in view of the annual net income from capital invested in similar large enterprises on the Pacific Coast, which earned not less than 6 per cent. In *Milwaukee Electric Railway & Light Co. v. City of Milwaukee* (C. C.) 87 Fed. 577-585, where it was shown that 6 per cent. on real estate mortgages and like securities was the pre-

vailing rate, it was held that a schedule of rates which prevented earning that much upon the value of the property was unreasonable. The leading authorities are collected in Beale & Wyman, *Railroad Rate Regulation*. See *Re Advance in Freight Rates*, 9 Int. Com. Com'n R. 382; *Canada Southern Railway Company v. International Bridge Company*, L. R. 8 App. Cas. 723; *Troutman v. Smith*, 105 Ky. 231, 48 S. W. 1084; *Cotting v. Kansas City Stockyards Co.*, 173 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

Some interesting questions have been here mooted, which do not call for decision, at least at this time. In *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the Supreme Court declared that:

"What the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

When the rights of the public are protected by a schedule of just rates in that respect, has the Legislature the power, in the face of the prohibitions of the fourteenth amendment, to go further, either by fixing an express limitation in the statute, or by necessary operation of the rates for which it provides, and prevent the carrier from earning any profit above a certain percentum of the value of the property, although its business be done at just and reasonable rates for the services, and without unjust discrimination? *Lochner v. New York*, 198 U. S. 45, 46, 25 Sup. Ct. 539, 49 L. Ed. 937. Has the state any such right under its own Constitution? Section 243 of the state Constitution of 1901 vests "the power and authority" of preventing "unjust discrimination" and of "requiring just and reasonable rates" in the Legislature. The section specifically prescribes how this power shall be exercised. It declares that the duty of the Legislature shall be "to pass laws from time to time" regulating freight and passenger tariffs, and to "prohibit unjust discrimination," and to "prohibit the charging of other than just and reasonable rates, and to enforce the same by adequate penal ties." It particularizes the evil to be prevented, and specifies the mode of preventing it. Does or does not the affirmative grant of power as to this particular subject, and the mandatory requirements as to the mode in which it shall be exercised for the purpose of "requiring reasonable and just rates of freight and passenger tariffs," by necessary implication withdraw from the Legislature any power over the subject other than to require just and reasonable rates? The power to fix reasonable charges for the service is born of necessity, and specially conferred, to prevent extortion and injustice by the carrier, who is bound to serve customers who are compelled to deal with him. When that result is effected, is not all further power over the subject exhausted? If the Legislature attempted to go further, would it not assume these "other functions" which section 35 of our state Constitution characterizes as "usurpation and oppression"?

The property of railroad corporations belongs to the individual stockholders. The Constitution of the United States, leaving out of view for the present the equivalent provisions of the Constitution of the state, not only forbids the denial of their right to just compensation, but shields them as well against the denial of the equal protection

of the laws. The state fixes 8 per cent. per annum as the return for the use of property in the shape of loans of money, the medium by which the value of property and its various uses is measured, and does not in any way, save by the requirement as to just and reasonable rates, attempt to limit the percentum of profit gained upon the value of the property invested in street railway, waterworks, gas, electric, telephone, and telegraph companies, and manufacturing establishments in all their variety, mining enterprises, cotton compresses, cotton mills and other like enterprises. In this state of the law, can the owners of railroad property be made the subject of invidious discrimination in this respect, in order to limit the extent of their profit upon the value of the property used by them, by the enforcement of a schedule of rates, affecting the owners of railroad property alone, which prevents them from earning the usual current profit from the use of their property, which the owners of other property used in like investments are permitted to earn upon the value thereof? Would, or would not, that be a denial to them of the equal protection of the laws? That question was mooted, but not decided, in *Covington Turnpike Co. v. Sandford*, 164 U. S. 598, 17 Sup. Ct. 198, 41 L. Ed. 560. See, also, *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 49 L. Ed. 92; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Smith v. L. & N. R. Co.*, 75 Ala. 449-451; *Cooley*, Constitutional Limitations, §§ 484, 486. Our state Constitution of 1901 (section 238), while reserving the power "to alter, amend, or repeal" the charters of corporations, is careful to provide that the power shall be exercised "in such manner, however, that no injustice shall be done the stockholders." While the Legislature of the state has no power to "alter or amend or repeal" the charters of foreign corporations, these complainants purchased their property under laws which provided that they should be subject in all respects to the laws of Alabama as the property and franchises of domestic corporations, and the state, as regards the rates of foreign corporations and the profit gained from their intrastate business, may exercise the same power over them as it can over its own corporations.

Whatever may be the proper decision of these questions, it is clear that the fundamental law, both state and federal, compels the Legislature to regulate rates "in such manner that no injustice shall be done" to the property owner. He must have "just" compensation. Any schedule of rates is forbidden which produces injustice. The quantum of injustice is immaterial. There must be "no injustice." All will admit that a schedule of maximum rates which confines the carrier's reward for the service to the amount expended in the physical act alone of receiving, moving, and discharging passengers and freight, without computing in the cost of that service the value of the use of its stations, tracks, roadway, bridges, and the service of its staff of officials who direct its business, would do injustice, both to the public and the carrier. It would not only take from the carrier the ability to discharge his important duties to the public, which the law imposes upon the highest considerations of the general welfare, but deprive it as well of any return for the use of a very large portion of the property it employs in its business. To conserve the rights both of the

carrier and the public, some return must be allowed the carrier for the use of every portion of his property necessarily employed in the business. When so many different kinds of property and service are involved simultaneously in the movement of the same freight or passenger train, it is impossible to ascertain, with any sort of mathematical certainty, what is the precise cost of rendering any particular service. The best standard which the courts and business men have been able to find for testing such questions is to ascertain whether, when the service is done at just and reasonable rates, the carrier obtains for the service as a whole a fair return upon the value of all the property employed in the business. The courts have, therefore, generally taken as the standard of proper return the legal rate of interest, contrasted with the current rate of profit from the use of other property in like kinds of business. While the percentum of profit allowed upon loans of money between private individuals is not, in many respects, a fair standard for determining just profits from the use of other kinds of property under conditions of greater hazard, yet the rate is the result of long experience, and is tantamount to a legislative declaration that such measure of profit is in general a just return upon investments in property. The evidence shows that the current rate of profit upon property used in business enterprises similar to railroads gives a net income, upon the value of such property, not lower than 8 per cent. per annum. Whether we take the legal rate of profit by way of interest on loans of money, or the rate of profit which common experience shows to be the average; and, therefore, approximately a just, return from the use of other forms of property, both modes lead to the same result. We can find no better standard by which to measure what is a fair and just return for the use of railroad property under the conditions governing the business of conducting railroad transportation in this state. The court, therefore, holds that these complainants can rightly complain of any schedule of maximum rates which prevents them from earning, upon the fair value of that portion of their property employed in intrastate business, a profit, above the necessary expense of conducting such business, equal to 8 per cent. per annum upon the value of the property so employed, so long as the business is done without unjust discrimination, and at just and reasonable rates. Any schedule of maximum rates which prevents them from earning that much net profit, under those conditions, denies that just compensation which the Constitutions, both state and federal, secure to them.

Why Preliminary Injunction Should Issue.

XIX. Voluminous evidence has been offered as to the effect of the reduced rates, and the court has given much time to a very careful examination of the mass of testimony offered on that point. The labors of the court in this respect have been lessened by the exhaustive comments of counsel on both sides as to the tendencies of this mass of evidence. It would be impossible, without writing a book, to deal with all the phases of the testimony which counsel have presented and urged in support of their respective contentions upon the facts.

On a preliminary hearing the court should refrain, as far as possible,

not only from expressing, but from forming, any opinion as to the final merits. In passing upon this branch of the case at this time, the court will deal only with the dominant features which appear *prima facie* to be clearly established by the evidence. The value of the property employed in the business is one of the main factors upon which the reasonableness of the rates depends. The value of this kind of property depends upon so many considerations that testimony as to its value is largely what is denominated "opinion evidence," in which there is generally a wide margin of honest difference. Upon one valuation of a railroad the income under a schedule of rates may be entirely insufficient, while upon a less value it may be adequate. So, too, in finding what constitutes the net results of domestic business, as distinguished from interstate commerce, much depends upon the methods of keeping the accounts, and whether what is really one business is treated as the other business. All these are disturbing factors in the calculation. Until the court can ascertain the value of the property, as well as what method has been adopted in determining what is state and what is interstate business, it cannot determine whether any particular calculation leads with any certainty to the truth of the disputed issue. In argument counsel for respondents, tacitly at least, admitted upon the evidence as it now stands that the Nashville, Chattanooga & St. Louis Railway Company, under the rates prescribed, would conduct its business at an absolute loss. The resistance to a preliminary injunction has been mainly directed to the cases of the Louisville & Nashville Railroad Company, the South & North Alabama Railroad Company, and the Central of Georgia Railway Company. It is insisted in each of these cases that there has been a radical error in the mode of determining what constitutes interstate business, much of which it is insisted is in reality domestic business, and should be so treated in the calculations in ascertaining the volume of profit from domestic business. It is also insisted, as to the first two of the companies last named above, that the valuations put upon the property used in intrastate business are entirely too high, and that upon a fair valuation, and a correct method of keeping books, and treating as domestic business everything which is really such, the return upon the proportion of value devoted to intrastate business will be adequate. The affidavits filed on these points, mainly on the part of the complainants, make a printed volume of several hundred pages, dealing with the history of the railroad companies concerned, from the time of the building of the roads down to the present day, showing the vicissitudes of the various properties, and contain elaborate statements as to details, including the method of keeping accounts and of conducting business, the character of the tonnage, the cost of transportation, and the reasons which justify the present rates. Upon premises each draws from this evidence, respondents insist that it does not appear that complainants will not receive an adequate return under the reduced rates, and, therefore, they should be tried now; while complainants present a series of calculations showing, on the contrary, that in the most unfavorable view permissible under the evidence against complainants, some of them will have a net income of about 1 per

cent., while others will conduct their business at a loss of hundreds of thousands of dollars.

One of the most satisfactory tests, aside from putting a tariff into operation, as to the effect a reduction in rates would have upon the business of the carrier, is to take the business for two or three years preceding, if it can be assumed that the future business will be conducted at the same cost and in the same volume under like conditions, and then see what effect the reductions, if applied to the business, would have had upon the income of the carrier in these years. The Supreme Court has approved this method as a very proper one. The evidence shows, without conflict, that the two years preceding the legislation of which complaint is made were the most prosperous years in the history of the carriers, and tends to show that during those years none of the complainants, though operating under a higher schedule of freight and passenger rates than those enacted at the last session of the Legislature, earned much above 3 per cent. per annum upon the value, which they insist is the true value, of their property devoted to intrastate commerce, and most of them much less. Indulging the widest possible latitude against complainants, under the evidence as to swollen estimates as to the value of the property, and errors in crediting income from certain classes of freight to interstate business, instead of domestic business, the evidence leaves scarcely any room to doubt that the most favorably situated of the complainants, under the reduced rates, will not earn as much as 4 per cent. upon the real value of their property devoted to interstate business. The calculations complainants make in the case of the Central of Georgia Railway Company are based upon the valuation of the property as fixed by the authorities for taxation. It is further alleged that the classifications made in the "Eight Group Act" are purely arbitrary, and wholly unjustifiable under the existing conditions, and that the effect of the scheme of classifications and rates is to give large advantages to other carriers, similarly situated as complainants, who decline to continue to litigate the rates, while invidious burdens are imposed upon the carriers who insist upon asserting their rights in the courts. If this be true, it would nullify the whole scheme of rates as to the complainants, regardless of the reasonableness of the rates complained of. Under these circumstances, is the court justified, in the exercise of a reasonable discretion, in ruling that the reduced rates shall be put into actual operation, pending final ascertainment of the facts upon which their reasonableness depends?

In 2 High on Injunctions, § 1512, it is said:

"If the question of fact upon which the injunction depends is evenly balanced upon affidavits on motion to dissolve, the motion should be denied, and the injunction retained until the final hearing."

In 22 Encyc. 978, the rule is thus stated:

"So, where the dissolution would work irreparable injury to the complainant, or greater injury to him than its continuance would cause to defendant, the injunction should be continued. If the continuance would work no injury, but will merely maintain the status quo, the injunction will not be dissolved."

Other authorities state the rule:

"That where there are questions of doubt on the facts, on which additional light is requisite to satisfy the court before deciding the rights of the parties, the dissolution of a restraining order should not be granted."

Indeed, this is the general language of the authorities, especially when, as here, the injunction is not ancillary to some other relief sought by the action, but is itself the principal relief desired, and a refusal of a preliminary injunction would be pro tanto a denial of the right, for the time being, no matter if complainants succeed on the final decree.

The whole country at this time is suffering from a severe depression, particularly in manufacturing and industrial enterprises, which has been fully reflected in its effect upon transportation companies. Their traffic has greatly fallen off, though there has been a general improvement, which it is to be hoped will continue; but the important fact cannot be lost sight of that the conditions now, or as they may reasonably be expected in the near future, are not near so favorable to the railroad companies as when the original bills were filed in these cases. The carriers have been compelled by the falling off of their business to curtail expenses in every possible way, and dispense with the services of hundreds of faithful employes. The general business of the country has not yet recovered from lack of confidence, which was the cause of the currency panic. This is a presidential year, when there is always a disposition on the part of men to wait before entering into new business enterprises. Who can prudently affirm, in view of all these considerations, that a reduction in the rates will produce more business, or, granting that it would, that the loss in rates would not more than counterbalance the increased profit in volume of business? The probabilities all point to decreased volume of business. If the new rates are enforced, pending final decree, the entire aggregate burden of the loss, although complainants may finally succeed, will be concentrated upon the carriers, and there is no way in which they can save themselves from heavy losses, except by preventive remedies now. On the other hand, the parties from whom the old rates are exacted pendent lite are numerous, and the injury, even though they lost the amount in each individual case, would be comparatively small. Is there any reason here why a preliminary decree cannot be made, which will not subject either of the parties to any risk in the final outcome, whatever it may be, and will mete out to each his exact right? The court can do equity between the parties in such a situation as this, at the present stage of the litigation, by making a decree which absolutely protects the rights of both parties. It will, therefore, order a preliminary injunction, upon the carrier's executing bond, with surety in an amount which the court will fix, to reimburse shippers and passengers for any excess rate exacted of them during the litigation, if complainants fail to make good their contention that the rates are unreasonable.

States' Rights Not Involved.

XX. Nothing seems plainer than that "states' rights" are in no wise involved in the relief given in these cases. The principle here

applied is older than American institutions. Life would be intolerable in any government, claiming to be at all free, wherein the citizen had no effective redress against wrongs done by officials in the name of the law. No Anglo-Saxon people would ever submit to such a condition of affairs. While the people of the mother country submitted, as was inevitable, under their form of government, to the inviolability of the person of the monarch, and held him to be above the process of the law, and declared the "king could do no wrong," they nevertheless, from a very early period in their history, emphasized the instinct of personal liberty by the demand that the king's ministers be held personally responsible for any wrong done in his name, though they acted on the direct order of the sovereign, and made that doctrine a part of the British Constitution. The fiction that the king could do no wrong was completely offset by the other fiction that when he did wrong he had been badly advised, and that those who gave the bad advice were the responsible authors of the wrong. Centuries ago, the "law of the land" took the place of the "pleasure of the king," and the House of Commons impeached the advisers of the king, and the courts punished the lesser officials, and shielded the subject from their arbitrary acts. In our country no one person or department, or all combined, can embody the sovereignty of the people, or claim that they constitute the state. The departments of government, like the king, must act by agents, and the authority of those agents is bounded by the Constitution. When they exceed the limits of their trust, the law imputes their illegal acts, not to the state itself, but to the agent, who no longer speaks for the state, but becomes a trespasser and wrongdoer, who "falsely speaks and acts in its name." The principle is the same, whether applied to the acts of officials of the state or of the United States, and its maintenance is essential to liberty and free government. Can the righteousness of the principle change to unrighteousness, because one tribunal, rather than another, in a particular case expounds and enforces its teachings? The Constitution of the United States towers above the governments both of the states and of the United States. The doctrine has been repeatedly declared by the Supreme Court of the United States that:

"Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States which can shield or defend him from their just authority; and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of the state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216.

The objection to interference with unlawful acts of state officers by the federal courts, therefore, amounts only to this: There is nothing wrong in the principle itself, but the wrong is committed because a tribunal established by the fathers, in the exercise of its unquestioned jurisdiction over "controversies between citizens of different states"

and cases involving the application of the Constitution, applies this great principle to prevent citizens of Alabama from doing wrong, under color of an unconstitutional act, to citizens of this or a sister state. But how can it be a violation of the rights of the state for that tribunal to exercise such power, when the Constitution of the United States gives the jurisdiction in express terms? The argument, in its last analysis, is a protest against the principle of the Union, which creates tribunals in every state to which in certain cases citizens of the particular state as well as citizens of other states may resort for the protection of their rights. That the Constitution gives such power is not matter of fair dispute. The jurisdiction is given in so many words. Certainly the states surrendered all the powers which the Constitution confers upon the government of the United States. The lack of federal courts was one of the great evils which "crowned the defects" of the Confederation, whose fatal weakness and discord for a time caused lovers of liberty to despair of the experiment of republican government, and finally forced the states to take refuge from themselves in the Constitution, whereby a government supreme in its sphere was set up over the state governments and the people of the states. The right of the citizen of one state to sue a citizen of another, and sometimes of citizens of the same state to sue each other, in the federal court, if they desire, is imbedded in the Constitution, and cannot be destroyed without repudiating that instrument. The reasons which made the right a valuable one were universally recognized at the time, and few reflecting people will now deny that local conditions, of which these cases present striking illustrations, may make it eminently proper for the citizen to have a constitutional right in certain classes of cases to choose the forum in which to test his rights. The right of a federal court, like the right of a state court, in a proper case, to strike down a void legislative act, whether of Congress or of the state Legislature, in no way impugns "the right of a state to control its own affairs." It is vital to the protection of life, liberty, and property, and the pursuit of happiness that the Legislature, neither state nor federal, shall "control local affairs" by methods and means which the Constitution condemns. The people have never committed to either government any power to control local or general affairs outside of the law, or in defiance of the safeguards prescribed by the fundamental law. No thoughtful man wishes any person, no matter how humble, to bow to the behest of officials who have no valid authority for their exactions. Surely the state can have no interest in the execution of an unconstitutional law. When one of the state's statutes is refused operation by a court, whether state or federal, because it transgresses the fundamental law, state sovereignty is not insulted or its authority defied. The judgment of a court arresting affirmative action on the part of an officer in the execution of an unconstitutional act to the injury of the citizen does not interfere with any property of the state. It does not utter any command to the state. It does not compel the state to pay any debt or perform any contract. It does not control the exercise of any discretion committed to the officer under any valid laws; for the state can have no policy contrary to that of the fundamental law, and no citizen or official can ever be intrusted

with, or have any discretion to trample down, any of its commands. How, then, and wherein, is it possible for "states' rights" to be involved, much less assailed?

There are two grounds for the jurisdiction of the court in these cases: The first is that they invoke the application of the Constitution and laws of the United States; and the second is that the suits are "controversies between citizens of different states." If the fourteenth amendment had never been adopted, this court, in the suits wherein the plaintiffs are citizens of different states, could, by virtue of the constitutional provision giving jurisdiction of such suits, have afforded, in the administration of the state Constitution and laws, the identical relief which is now granted. Moreover, as to the controversies between citizens of different states, this court, if it had been administering the Confederate Constitution, would have had authority in the administration of the Constitution and laws of Alabama to grant the relief which has been so far afforded in these suits. The fourteenth amendment created no new rights, but simply created another power to protect them. All of its prohibitions as to the deprivation of life, liberty, and property without due process of law, and the denial of the equal protection of the laws, had been incorporated into our Constitution when the state was admitted into the Union. The able men who formed the Constitution of the Confederate States were quite familiar with the doctrine of the great cases of *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204, and *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169. There is not a line in the Constitution of the Confederate States, where it deals with suits against the state or elsewhere, that indicates any purpose whatever to overrule or undermine the principles of these great decisions. Certainly, the Constitution of the Confederate States may be said to embody the principles on that side of the struggle which ended at Appomattox. It was not a struggle, in any sense, against the principles of the Union, but rather an effort by a part of the people of the United States, for reasons deemed satisfactory to themselves, to set up a separate government for certain of the states, which adopted as their fundamental law the fundamental law as made by our fathers, as construed by the Supreme Court at the time the Confederacy was formed. This was the spirit and the plan of government for which the people of those states then struggled. Yet some, forgetful of the history of the country and the devotion of the people of this section of our common country to the principles of the Union, now seek to revive the embers of a buried strife, and appeal to the tender memories which the heroism and sacrifices of those days always evoke to bolster up the contention that the true principles of states' rights require men to protest that the state is outraged, when the execution of an unconstitutional statute is arrested by one of the courts of our common country, if it happen that the responsibility of administering the fundamental law in that case falls upon the federal, instead of the state, court. Those who teach this doctrine also shut their eyes to the fact that one of the many causes which finally culminated in the civil strife was the resistance in some quarters of the Union to the enforcement by the federal courts of rights which the Constitution guaranteed, and whose enforcement by the federal courts was

characterized then, as now, in some quarters, as unwarranted meddling with "local affairs" and an "insult to the sovereignty of the state." The just balance between the powers of the state and federal governments as to the execution of the laws of the Union and of the states in proper cases by the federal courts had been settled as firmly as a judicial decision could settle anything, long before the unhappy days of the Civil War, by the great judgments of Story and Marshall. Some words of Chief Justice Taney, who was a firm supporter of the rights of the states, may here be appropriately recalled:

"Nor is there anything in the supremacy of the general government or the jurisdiction of its judicial tribunals to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government nor the power of which we are speaking were forced upon the states. The Constitution of the United States, with all the powers conferred by it on the general government and surrendered by the states, was the voluntary act of the people of the several states, deliberately done for their protection and safety against injustice from one another. * * * And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority on the part of a state, is proved by the clause which requires the members of the state Legislature, and all executive and judicial officers of the several states (as well as those of the general government), shall be bound by an oath or affirmation to support the Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the Convention, and it was in that form, and with those powers, that the Constitution was submitted to the people of the several states for their consideration and decision. * * * Now, it certainly can be no humiliation to the citizens of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. * * * Nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of the Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every state has pledged to the other states to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution." *Ableman v. Booth*, 21 How. 506, 524, 16 L. Ed. 169.

In accordance with the understanding with counsel, the court will not now make any decree or order as to the motions and pleadings which were proposed to be filed at the time of the argument. They will be treated as filed of that date, and upon some day upon which counsel may agree among themselves, after they have had opportunity to examine this opinion, the issues they desire to make may be presented in such mode as to them seems best, and formal judgment will then be rendered in conformity to this opinion.

NOTE.—The Supreme Court handed down its decisions in the *Minnesota* (Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. —), and *North Carolina* (Hunter v. Wood, 209 U. S. 205, 28 Sup. Ct. 472, 52 L. Ed. —), rate cases after the above opinion had been filed and printed for distribution among counsel. Otherwise, the court would merely have cited those decisions, instead of discussing at length the points wherein the cases involve the same constitutional questions.

FOREST PRODUCTS CO. v. RUSSELL et al.

(Circuit Court, S. D. Mississippi. December 26, 1907.)

No. 732.

1. PUBLIC LANDS—MISSISSIPPI SCHOOL LANDS—STATUTORY RIGHTS OF LESSEE.

Under Miss. Act Feb. 27, 1833, authorizing the leasing by the state of sixteenth section school lands for a term of 99 years based on an appraisal, which statute contained no provision against waste, a lessee acquired as full and complete ownership of the land as though his title was in fee subject only to termination at the end of the term, and where the value of the land was in the timber he has the right to cut and sell the same with all rights of action with respect thereto as a fee-simple owner.

2. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Federal courts, in determining the rights of parties acquired under a state statute prior to the date of a change of opinion by the Supreme Court of the state as to its construction, will exercise its own independent judgment, and are not bound to follow the latest decision of the state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 951.

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 463.]

In Equity. On exceptions to answer.

Green & Green, for complainant.

R. P. Willing, for defendants.

NILES, District Judge. This cause is before this court without a reference to a master on complainant's exceptions to the answer, and which, in substance, covers all the matters of defense set up, on the ground, in effect, that they constitute no defense, and that they were adjudged adversely to the defendants by the decree overruling the demurrer to the original bill. These exceptions have been argued as if upon rehearing of the demurrer. In view of the questions involved, and the difference in opinion between this court and the latest decision of the state Supreme Court, the argument and consideration have taken a wider range than the record would ordinarily justify. This court held upon the demurrer in this cause that the demurrer should be overruled.

"The lessee of sixteenth section lands in the state of Mississippi has as full and complete ownership as if the title was in fee," in the language of Judge Truly, "subject only to the condition that the holding was to terminate at a specific date; in other words, the lease was intended to operate as a fee determinable at the end of ninety-nine years at common law, and action for waste lay only against tenants by courtesy, tenants in dower, and guardians whose estate was created by act of law; but tenants for life, or years, had an interest in the land by the act of the lessor, who might and ought to have provided against waste by some express covenant or condition, and such tenants were not liable at common law, either for voluntary or permissive waste, on the assumption that if it was to be it would have been so expressed in the lease."

To adopt the language of Mr. Justice Calhoun:

"We have no statute of waste, and our common law is what this court may declare it; and why should not our judgment be with the early judges of England—that a tenant for ninety-nine years shall not be liable for waste, because

if it were intended he should be it would have been so declared in the statute providing for such a lease."

Upon this hearing there have been reargued and reconsidered these questions: First. The estate of the lessee, under a conveyance of a sixteenth section of school lands made in pursuance of an act of the Legislature of the state of Mississippi approved Feb. 27, 1833, entitled an "act to authorize the trustees of the school lands within each township in this state to lease the sixteenth section lands within the same for ninety-nine years, and for other purposes." Second. Whether this court, as a federal court, is bound to follow the opinion of a majority of the Supreme Court of Mississippi in *Moss Point Lumber Company v. The Board of Supervisors of Harrison County*, 42 South. 296; or whether, in this class of cases, upon the facts in the record of these particular cases, this court may and should follow its independent judgment.

In the determination of the questions involved it is not material as to whether the title of these lands came from the national government or from the state of Georgia. The real question is, what title did the lessees of these lands derive from the state of Mississippi under the act of 1833 authorizing the leasing of the same? The lease of the Moss Point Lumber Company was under the Code of 1880 and not under the act of 1833. Before the act of 1833, there were a number of acts of the Legislature authorizing the leasing of these sixteenth section lands for a short period of time, providing in each act against waste. Under former acts of the Legislature, for some reason or other, the lands were not leased to any great extent. They were generally regarded as worthless and unfit for agricultural purposes. But under the act of 1833, which authorized the conveying of the "right, title, use, interest, and occupation" of said lands for a period of 99 years, parties began to lease these lands, believing that they had a right, under the terms of the act, to use the timber on such lands as if they had a title in fee; the act of 1833 not providing against waste, but repealing all acts or parts of acts contravening the provisions of said acts.

Section 8 of said act of 1833 provides as follows:

"That all acts and parts of acts, contravening the provisions of this act be and the same are hereby repealed."

This act was approved February 27, 1833; and from that date for a long number of years the general opinion was that lessees of these lands had conveyed to them, upon compliance with the terms of said act, absolute ownership for the period of 99 years. Where parties without authority cut timber from lands leased under the act of 1833 the lessee of such lands could replevy the timber or recover the value of the same, the legal title to the timber being in the lessee of the land. See acts of Mississippi Legislature, 1841, p. 127, c. 25. To use the language of Judge J. A. P. Campbell:

"Here the statute (1880) contained the terms of the lease. By it the land was to be appraised, and the land was to be leased for ninety-nine years. No

distinction is made between the term and the fee, but the right of the best bidder was that of the lessee for ninety-nine years. It must be that he acquired the right to make such use of it, and all constituting part of it, as it was capable of, adapted to, and suitable for. He could make use of it surely as was the customary and approved use of like lands in the region in which it lay. He could not sell it, except for his unexpired term. He would have no right to destroy it if he could; but he has the right to occupy it and use it and make profit of it by devoting it to the purposes to which such lands were devoted by the custom of the country, and for which alone it was suitable. If it was suitable for agriculture, he could convert it into a plantation; if it was a lake, valuable for water and fish, etc., he could make use of it, but would have no right to destroy it by draining or otherwise. If it was fit only for the trees growing on it, he had the right to fell and dispose of them for his own profit, if that was the customary use made of it, for which alone it was suitable. He got that or nothing if that was all the land was adapted to. Such must have been the understanding of the lawmakers and of all the actors in the making of the lease. It is not for the courts to undertake to correct what they may now think was improvident legislation a quarter of a century ago."

When these leases were authorized to be made—more than 73 years ago—a large part of these lands in the southern part of the state were almost valueless and the pine lands of South Mississippi were so considered by many. And, as Judge J. A. P. Campbell further says, "There were many thousands of acres of land held by the United States and offered for sale at \$1.25 per acre." He also adds:

"It cannot be doubted that the universal popular understanding was that the lessee got the right to appropriate all the timber during his lease. The only factors of value were the trees. It is important to remember that this is not the case of arable lands, but of those whose value consisted in the pine trees. It certainly was intended by the law and by all the actors that the lessee should get the right to use the land for his own profit, according to its nature and capability. If valuable only for timber, he must have the right to use the timber; and, if any, what limit can be placed on his right."

But after the building of lines of railroad through that section of the country, and increased population, the timber became valuable, and the land without the timber was of little value. As the years passed away, these lands were assessed for their intrinsic value, and there was a uniform acquiescence by all parties for many years that the lessees were, to all intent and purposes, the owners of these lands for the time, because, under the act of 1833, it was the duty of the lessor, upon the lessee complying with the terms of the act, to convey the right, title, use, interest, and occupation of said lands. The act of the Mississippi Legislature before the act of 1833 provided against waste; but, in the act of 1833, they not only increased the duration of the lease, but omitted or neglected to place a provision in said act against waste as the Legislature had seen fit to do in former acts, and in doing this, in my opinion, it was clearly the intention of the Legislature to vest in the purchaser of the sixteenth section school lands as full and complete ownership as if the title was in fee for the period of 99 years.

Now, is this court precluded from adhering to its opinion in the decree overruling the demurrer to the original bill by the last expression of the Supreme Court of this state in *Moss Point Lumber Company v. Board of Supervisors*? The opinion in this case was rendered

after a change in the personnel of that court. As antecedent rights accrued before the last decision in the Moss Point Lumber Company Case, this court should and will exercise its independent judgment, because it never, as to antecedent rights, surrendered those rights to conform to a decision of the state Supreme Court when this court had reached a different conclusion as to the law.

"Acting under the opinion thus deliberately given by this court, we can hardly be required by any comity or respect for the state court to surrender our judgment to decisions since made in the state, and declare contracts to be void which, upon full consideration, we have pronounced to be valid. Undoubtedly, this court will always feel itself bound to respect the decisions of the state courts, and from the time they are made will regard these as conclusive in all cases upon the construction of their own Constitution and laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were lawfully made." *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800; *Carroll County v. Smith*, 111 U. S. 562, 28 L. Ed. 517.

In *Southern Pine Co. v. Hall*, 105 Fed. 85, 44 C. C. A. 363, the following language is used by the court:

"A federal court will exercise an independent judgment as to the construction of a state statute in a case involving rights acquired thereunder before it had received a construction by the state courts, notwithstanding it has since been construed by such courts."

In *Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403, Mr. Justice Swain said:

"It is also settled that the laws which subsisted at the time and place of making a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms."

I think the rule is uniform that a federal court, in interpreting the rights of parties under transactions made prior to the date of the change of opinion of the Supreme Court of the state, will exercise its own independent judgment, and follow its own decisions made prior to such change. *Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Carroll County v. Smith*, 111 U. S. 562, 4 Sup. Ct. 539, 28 L. Ed. 517.

In *Bartholomew v. Austin*, 85 Fed. 359, 29 C. C. A. 568 (Circuit Court of Appeals, Fifth Circuit), Judge Pardee said:

"When contracts or transactions have been entered into, and rights have accrued thereunder, before the state laws applicable to them have been construed by the state courts, the federal courts will place their own interpretation on such laws, though the state courts have since adopted a different construction."

Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, holds:

"When contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued." See *Great Southern Fireproof Hotel Company v. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778.

And Chief Justice Taney, in *Ohio Life Insurance & Trust Co. v. Debolt*, 16 How. 432, 14 L. Ed. 997, says:

"Indeed, the duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory if we were bound to follow these changes in judicial decisions which lapse of time and change in judicial offices will often produce. The writ of error to a state court would be no protection to a contract if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for the revision here." Citing cases. "These cases thoroughly establish the proposition that in no way can obligation of the federal courts, under the Constitution, be discharged, than by rigidly adhering to the right and duty to maintain the ultimate right of the federal courts to protect the citizens of the United States, and of every state in which enjoyment of rights and privileges are guaranteed by the federal Constitution." See *Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co.*, 137 Fed. 34, 71 C. C. A. 1.

When these contracts were made granting these estates, there was no suggestion that there was any limitation upon the right of enjoyment of the premises. The United States government was selling the lands adjacent to these lands, fully timbered, at a \$1.25 per acre, and conveying an estate in fee simple. The prices paid by the lessee for these sixteenth section lands exceed in value, in many instances, the price paid the government. The lessee of these lands was taxed upon the intrinsic value of the land, and not upon any term in the land; and the causes of action of a fee-simple owner were conferred upon the lessee except as against the lessor. "With the causes of action of a fee-simple owner and the payment of the taxes upon the intrinsic value of the land, I cannot doubt that such a grantee, under such a contract, should have the right to use the timber on the land, and for whatsoever purposes he sees fit, and without accountability therefore during the period of the lease."

I therefore conclude that the exceptions to the answer should be sustained.

UNITED STATES v. SIMS.

(Circuit Court, N. D. Alabama, S. D. December 23, 1907.)

1. WITNESSES—COMPETENCY—HOW PROVEN.

The competency of a witness, as affected by a former conviction of crime, must be determined alone from the record of a court of competent jurisdiction in which the conviction was obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 199.]

2. COURTS—COMMON LAW PREVAILS.

The rule in relation to the competency of witnesses, as affected by state statutes, does not apply in criminal cases in the courts of the United States, but their competency must be determined therein under the common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 925.]

3. WITNESSES—COMMON LAW—EMBEZZLEMENT.

Under the common law a conviction of the crime of embezzlement, as described in section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497), does

not disqualify a witness, because such offense is not embraced within the three disqualifying classes, treason, felony, and the *crimen falsi* (citing Words and Phrases, vol. 2, p. 1741).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 109–118.]

4. SAME—CONVICTION UNDER FEDERAL STATUTE.

Embezzlement, of the kind provided for in section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497), is a misdemeanor, and under the common law was merely a breach of trust; hence a conviction thereunder does not disqualify a witness in a criminal case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 109–118.]

5. SAME—MODERN LEGISLATION AND DECISIONS.

It is the tendency of modern legislation and decision to broaden the field of the competency of witnesses and to restrict that of incompetency. No witness, therefore, who has been convicted of crime, should be excluded from the stand, unless settled principles or precedents absolutely force such a construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 109–118.]

(Syllabus by the Court.)

Indictment for Aiding and Abetting in Embezzling the Funds of a National Bank. Upon motion to exclude from the witnesses sworn for the government Alexander R. Chisolm, a witness formerly convicted of embezzlement in the Circuit Court of the United States.

O. D. Street, U. S. Dist. Atty., and Lee Bradley, special counsel, for the United States.

James Weatherly, John H. Bankhead, Jr., and Lee Cowart, for defendant.

HUNDLEY, District Judge. The question here presented is one of great moment, not only to the prosecution in this case, but to the defendant as well. The result of the conclusion reached by the court may determine, possibly, the guilt or innocence of this defendant. I have listened with interest and instruction to the able arguments made by counsel for the government, as well as for the defendant. The government now seeks to introduce as a witness upon the trial of this cause Alexander R. Chisolm, who was formerly convicted in this court of the offense of embezzlement of the funds of a national banking association. The defense objects to this person being sworn as a witness, upon the grounds that he is disqualified to testify on account of such conviction, and moves that he be excluded from the witness stand. The conviction of Chisolm was under section 5209, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3497), which is the same statute under which this defendant was indicted and is now upon trial. In support of this motion, and in addition to the records showing the conviction, sentence, and incarceration in the federal penitentiary of the witness Chisolm, certain oral evidence is sought to be introduced by the defendant, tending to show the nature of the testimony upon which Chisolm was convicted. Such oral testimony is not such evidence as the court may look to in deciding the question at issue. The competency or incompetency of a witness on account of a former conviction

for an offense must be determined, and determined only, upon the record of that conviction before a court of competent jurisdiction.

The rule as to the competency of witnesses, as laid down by the statutes of the various states, does not apply in the courts of the United States in the trial of criminal cases. The statute of Alabama relating to the competency of witnesses, therefore, has no application here. The question of the competency of Chisolm as a witness must be determined upon common-law principles, except in so far as those principles may have been modified by federal statute and the decisions of the federal courts. We must consider the question, also, in the light of modern legislation and the tendency of the courts to broaden the field of the competency of witnesses and to restrict that of incompetency. Therefore no witness, who has been convicted of a crime, should be excluded from the witness stand, unless settled principles or precedents absolutely force such a construction. Comparing the theory of the common law with modern tendencies as to the competency of witnesses, the Supreme Court of the United States, in the case of *Benson v. United States*, 146 U. S. 336, 337, 13 Sup. Ct. 63, 36 L. Ed. 991, says:

"Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last 50 years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion."

It is upon the broad principles as thus stated by the Supreme Court that I shall consider the competency vel non of the witness Chisolm. Many authorities are cited and argument is made to me by counsel for the defendant that the Supreme Court of the United States, in deciding the question of whether or not a party can be proceeded against under this statute (section 5209; supra) for the commission of the offense therein designated by information instead of indictment, has held that where the party is charged with an offense infamous in its nature he must be proceeded against by indictment rather than by information. The argument is made here also in this same connection that, if a party must be proceeded against by indictment rather than by information for an offense created by the statute, a person convicted of such offense is disqualified to testify as a witness in a court of justice because he is rendered infamous by such conviction. There is no doubt about the proposition that for such an offense as this the party must be proceeded against by indictment, rather than by information; but what is the reason for the rule thus laid down by the Supreme Court of the United States in such cases? It is based upon the principle that in such cases the interests of the defendant primarily are at stake, and his rights as prescribed by the Constitution of the United States are invoked for his protection. Upon such a question the Supreme Court of the United States follows the general rule of the courts of this country, which is to give every man charged with an

offense of a serious nature the highest protection afforded him by the Constitution and laws of the country, so as to insure to him the constitutional guaranty that he must be proceeded against only by due form of law. Upon the question merely of the competency of a witness to testify, the interests of the defendant are not alone involved, but those of the government are involved as well. It is the good order of society which is at stake, and the right that the "whole truth and nothing but the truth" shall be presented before the court, rather than the technical guaranty to him of being proceeded against according to the forms of law. The distinction is well stated in the case of *Ex parte Wilson*, 114 U. S. 423, 58 Sup. Ct. 938, 29 L. Ed. 89, as follows:

"Whether a convict shall be permitted to testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others. But whether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow citizens depends upon the consequences to himself if he shall be found guilty."

This broadening of the lines of judicial construction upon the competency of a witness has been wrought in this country partly by legislation and partly by judicial construction. By Act Cong. July 2, 1864, c. 210, 13 Stat. 351 (Rev. St. § 858), it was enacted that:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to, or interested in, the issue tried."

With a proviso by and against executors, etc., on March 16, 1878, Congress also passed an act permitting the defendant in criminal cases to testify at his own request. Act March 16, 1878, c. 37, 20 Stat. 30 (U. S. Comp. St. 1901, p. 660). Under the statute under which the indictment in this case is filed, if there had been no severance and the defendants had been tried jointly, either would have been a competent witness in the case, if he so desired, and, though the testimony of one bore against the other, it would have been none the less competent. The statute in terms places no limitation on the scope of testimony, for its language is:

"The person so charged shall of his own request, but not otherwise, be a competent witness."

His competency being thus established, the limits of examination are those which apply to all other witnesses. Legislation of a similar import prevails in most of the states. The spirit of this legislation has controlled the decisions of the courts, and steadily one by one the merely technical barriers which excluded witnesses from the stand have been removed, until it is now generally, though not universally, held that no one is excluded therefrom, unless the lips of the originally adverse party are closed in death, or unless some one of those peculiarly confidential relations, like those of husband and wife, forbids the breaking of silence. *Benson Case*, *supra*.

It is contended by counsel for the defendant that, if the competency of this witness must be determined by the rule of the common law, then it must be determined, not alone by what is termed the common

law of England, but also by what is known as the common law of America. In this connection it is contended that the common law of America also included the statutes of England, and that under the statutory enactments of England (St. 21 Hen. VIII, c. 7) embezzlement is a felony, and therefore one convicted of embezzlement is disqualified as a witness to testify in any case. Because that statute was enacted prior to the settlement of America, the conclusion is drawn that the statute became a part of our common law. It is well settled that at common law the only offenses that disqualify a witness are of three classes, and three classes only, viz., treason, felony, and the crimen falsi. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; 16 A. & E. Enc. of L. (2d Ed.) pp. 246, 247; 2 Words & Phrases, p. 1741. The offense of which Chisolm was convicted is, of course, not treason; neither is it, under the federal statutes, a felony. Section 5209, Rev. St. It is insisted, however, that, if embezzlement was a felony at common law, then its disqualifying effects are the same, though the federal statute reduces it to the grade of a misdemeanor, and the case of *Sylvester v. State*, 71 Ala. 25, is cited in support of this proposition; but I do not think that case decisive of the question at issue. It is true in that case that the court says:

"At common law persons convicted of crimes, which are in themselves infamous, were excluded from being a witness."

But the court goes further, and states what kinds of crimes were designated as infamous at common law, and states the rule to be:

"An infamous crime was regarded as comprehending treason, felony, and the crimen falsi."

See, also, *Taylor v. State*, 62 Ala. 164.

Again, comparing the facts constituting the offense described in section 5209, Rev. St., with the common-law rule, I am of the opinion that there is ample authority to sustain the proposition that embezzlement of this kind was at common law no offense at all, but a mere breach of trust. The following authorities sustain this statement of the law: In the case of *Planters' & Merchants' Insurance Company v. Tunstall*, 72 Ala. 142, the court says:

"It may be that, if the statute declares criminal acts which at common law were civil wrongs only, a conviction of them, though the punishment is felonious, would not render a person infamous and disqualify him as a witness." *Harrison v. State*, 55 Ala. 239.

See, also, *In re Richter* (D. C.) 100 Fed. 295; 2 Bishop on Criminal Law, §§ 318-320; 3 Words & Phrases, p. 2353; *Wright v. Lindsay*, 20 Ala. 428; 15 Cyc. 488-490; 10 A. & E. Enc. of L. (2d Ed.) p. 978; 2 Sup. A. & E. Enc. of L. p. 314, note 3; 6 A. & E. Enc. of L. (1st Ed.) p. 451.

In the face of all these numerous authorities, it is contended with great earnestness and a display of great ability by counsel for the defendant that during the reign of Henry VIII an embezzlement statute of a very limited character was enacted by the Parliament of England, and, inasmuch as that was prior to the settlement of America, this

statute became a part of the common law of America. In only two states have I been able to find that this statute became a part of the common law, viz., Pennsylvania and Vermont. In Pennsylvania, at least, this conclusion is traceable to a statutory enactment, which provides for the adoption in Pennsylvania, not only of England's common law, but of England's statutes down to a comparatively recent date. But, whatever may be the rule in Pennsylvania or Vermont, it is very clear that embezzlement was no crime under the common law of Alabama. It is worthy of note that Mr. Bishop, in discussing this statute of Henry VIII, pronounces it as having provided for no more than what was already larceny at common law. 2 Bish. Crim. Law, §§ 318-320. It must not be forgotten that it is well settled that at common law the infamy which disqualified a convict as a witness depended upon the character of his crime and not upon the nature of his punishment. *Schuylkill County v. Copley*, 67 Pa. 386, 5 Am. Rep. 441; 1 Greenleaf's Ev. § 372, note 3; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. While the punishment under the statute—section 5209, Rev. St.—may be by imprisonment in the penitentiary, yet the crime designated thereby is only a misdemeanor.

Again, the argument is made in this connection that if larceny was infamous at common law, and disqualified a witness convicted thereof, and as there is no difference between larceny and embezzlement, except the technical difference of *asportavit* in the one case and not in the other, then embezzlement also disqualifies. This is not the only difference. In larceny there must be not only the taking, but the *animus furandi*. This criminal intent is the more vital element distinguishing larceny from embezzlement than that of the taking, though it is true that both distinctions exist between these two crimes. The observations of the Supreme Court of the United States on the difference between abstraction and embezzlement in the *Northway Case*, 120 U. S. 335, 7 Sup. Ct. 585, 30 L. Ed. 664, are justified as pertinent to the distinction between embezzlement and larceny. Says the Supreme Court in that case:

"But in the next place, we do not admit the proposition that the offense of 'abstracting' the funds of the bank under this section is necessarily equivalent to the offense of larceny. The offense of larceny is not complete without the *animus furandi*, the intent to deprive the owner of his property; but under section 5209 an officer of the bank may be guilty of 'abstracting' the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other company, body politic or corporate, or individual person, than the banking association whose property is abstracted, or merely to deceive some other officer of the association, or an agent appointed to examine its affairs. This intent may exist in a case of abstracting, without that intent which is necessary to constitute the offense of stealing."

Upon a careful reading of St. 21 Hen. VIII, c. 7, which is cited and relied upon by counsel for defendant to establish the doctrine that embezzlement is a felony at common law, and comparing that statute with section 5209, Rev. St., it will be seen that the distinction drawn in the *Northway Case*, supra, readily appears. In the English statute, the

embezzlement or appropriation of a thing taken must be "with like purpose to steal it." 2 Bishop, Crim. Law, § 319. The "purpose to steal" is not designated in section 5209, but the purpose or intent therein stated is "to injure or defraud the association, or some other company," etc. It is plain, therefore, that embezzlement of the kind designated in section 5209, Rev. St. U. S., is not larceny as defined at common law. The Supreme Court of Alabama in the case of *Planters' & Merchants' Insurance Company v. Tunstall*, 72 Ala. 142, very clearly draws the distinction that, while a conviction of the common-law offense of larceny renders a person incompetent as a witness, a conviction of the statutory offense of embezzlement does not have that effect, unless the particular act would have been larceny at common law. Again, the statute of Henry VIII contains a proviso that the act shall not extend to "any apprentice or apprentices, nor to any person within the age of eighteen years," etc. Thus it will be seen that, if I apply the rule as to the competency of this witness contended for by defendant's counsel, I must hold that if Chisolm was an apprentice, or within the age of 18 years, he is a competent witness; otherwise, he is not. I know of no state in which any such rule has ever been enforced. From the conclusions herein reached, I am forced, therefore, to the conclusion that embezzlement by a national bank officer, as defined by section 5209, is a felony neither at common law nor by statute.

The only remaining question is, does embezzlement fall within the meaning of the term, "crimen falsi"? It is abundantly settled that, in order to fall within this designation, a crime must be of such a character that it not only carries with it the element of falsehood, but it must be of such a nature as tends to obstruct the administration of public justice. It is clear that the offense of which Chisolm was convicted fulfills neither of these conditions. It is not a crime of falsehood, neither does it tend in any wise to obstruct the administration of justice.

The witness Chisolm is competent to testify in this case, the weight to be given to his testimony to be determined by the jury in connection with the fact of his conviction and under the rules of law relating to the testimony of accomplices. The motion to exclude Chisolm as a witness is therefore overruled.

THE JOB H. JACKSON.

(District Court, E. D. North Carolina. May 23, 1908.)

1. SALVAGE—NATURE OF AWARD.

The underlying idea in all salvage allowance is a reward or bounty for services in saving property from impending danger or imminent peril of loss to the owner by one on whom no legal obligation rests to perform such service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 1.

For other definitions, see Words and Phrases, vol. 7, pp. 6312, 6315; vol. 8, p. 7794.]

2. SAME—COMPENSATION—SALVING OF DERELICT.

The Schooner Jackson, loaded with lumber, bound from Savannah to New York, was wrecked in a storm, and became a derelict off Frying Pan Shoals in the track of coastwise commerce. Some days afterward the steamship Merrimac, with passengers and cargo, from Philadelphia, went out of her course, picked up the Jackson and towed her to an anchorage near the Cape Fear bar and signaled for tugs. The next morning a fishing steamer towed the Jackson inside the bar, and a tug then towed her to Wilmington. The Merrimac was worth from \$300,000 to \$400,000, and the service was attended with some danger from the Shoals. The Jackson before the wreck was worth \$50,000. After being salvaged she was appraised at \$2,250, and her cargo at \$5,360. She was afterwards repaired. *Held*, that the service of the Merrimac was a salvage service, and that she was entitled to an award of \$2,500, two-fifths to her officers and crew; that the tugs rendered only towage service, and were entitled to its value as such only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 7–11.

Awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Geo. Rountree, for libelants.

E. K. Bryan, for tugs.

Jno. D. Bellamy, for respondents.

PURNELL, District Judge. On or about the 20th of September, 1906, the schooner Job H. Jackson loaded with a cargo of lumber, bound from Savannah, Ga., to New York and Philadelphia, was a derelict, having been dismasted and water-logged by a storm or hurricane and abandoned at sea. The schooner was drifting on the outer edge of Frying Pan Shoals, in the track of vessels engaged in commerce north and south on the Atlantic coast, and a menace to commerce. She was reported as a derelict and as having lost three of her crew by two United States cruisers, which report was published in the publications relied on by those interested in South Atlantic commerce. In this condition the said Job H. Jackson was sighted by the master of the steamship Merrimac, a freight and passenger steamship plying on a regular schedule between Philadelphia, Pa., and Savannah, Ga. The steamship Merrimac left Baltimore with a cargo and 75 passengers on September 18, 1906, and upon sighting the derelict on her starboard bow changed her course, against the protest of all the crew,

except the second officer, and passengers, got a hawser attached to the Jackson, and towed the derelict schooner to a point about one mile inside the bell buoy, a mile or so from Ball Head light, near the Cape Fear bar, where she was anchored in a bike in about five fathoms of water. Unless a storm arose during the night, this was safe anchorage, and there was no storm that night. The sea was calm. There was little or no wind. The wind freshened after night, but the sea at no time became rough or dangerous. The Jackson was a three-masted schooner. All masts, except the mainmast were lying across or on the deck, with sails and much other wreckage; but the schooner, though having shipped much water from the wash of the sea, was not leaking to any extent. The Job H. Jackson intact was worth \$50,000, as testified to by a shipowner. The appraisers appointed for this purpose, men of the highest character, valued the ship at \$2,250, and the cargo of lumber at \$10 per thousand; there being according to the manifest 536,000 feet in the cargo. The Job H. Jackson has since been repaired, her name changed, and is now in commerce—"sailing the seas." The steamship Merrimac had also been recently overhauled and is valued at \$300,000 or \$400,000.

After the schooner Jackson was anchored as before stated, the Merrimac, in attempting to rig a bridle on the schooner and on her own the steamship's stern, fearing the hawser would become foul in her propeller, stopped her engines, and dropped her anchor. A signal for a tug was then hoisted. A gasoline launch first came alongside; but this craft does not figure in the controversy. No claim is made for this launch, and no service was rendered by it upon which to base a claim. Afterwards the Sanders, a fishing steamer returning from sea, where she had been pursuing her usual business of fishing, "not chartered for towing," but engaged in fat back or meherrin fishing, and the Blanche, a tug doing a regular towing business on the Cape Fear river, and outside the bar at Ft. Caswell and Ball Head, came alongside the Merrimac; but, after some chaffering about towing the Jackson into port, decided not to attempt to tow her inside the bar that night, on account of the darkness and a shortness in the supply of coal. The tugs returned to Southport for the night. The second officer of the Merrimac was on the schooner, and remained aboard in charge of her until she was turned over to the underwriters at Wilmington some days later. The next morning the Sanders returned to the scene and towed the Jackson across the bar. She was anchored by the second officer of the Merrimac off Battery Island inside the harbor. The Sanders then proceeded up the river 10 miles to the factory for coal; the second officer of the Merrimac being aboard. On the return down the river those on the Sanders met the Blanche with the Jackson in tow. Both these tugs filed an intervening libel for salvage, and it is strenuously insisted they are entitled to an allowance in this behalf. It is admitted the Merrimac is entitled to salvage; the only question being as to what would be a fair and equitable allowance. The main controversy is: Were the services rendered by the tug Blanche and the fishing steamer Sanders salvage services or a mere towage?

What is salvage? Every one will speak glibly of salvage, and nearly every one thinks he knows what it means. Hughes, in his work on Admiralty, thus defines it:

"Salvage is the reward allowed for a service rendered to marine property at risk or in distress by those under no legal obligation to render it, which results in benefit to the property if eventually saved."

Tested by the decisions, this definition will be found defective in many particulars. But the decisions are in many particulars contradictory, even those cited as authority for this definition. The definition given in Flanders on Maritime Law is more full and supported by at least higher authority. Says Flanders:

"Salvage is founded on the equity of remunerating private and individual services performed in saving in whole or in part a ship or its cargo from impending peril, or recovering them after actual loss. It is a compensation for actual services rendered to the property charged with it, and is allowed for meritorious conduct of the salvor, and in consideration of a benefit conferred upon the person whose property he has saved. A claim for salvage rests on the principle that, unless the property be in fact saved by those who claim the compensation, it cannot be allowed, however benevolent their intention and however heroic their conduct."

As authority for this definition is cited *The Amelia*, 1 Cranch, 1, 2 L. Ed. 15; *The Alberta*, 9 Cranch, 369, 3 L. Ed. 758; *Clarke v. Dodge Healy*, 4 Wash. C. C. 651, Fed. Cas. No. 2,849; *The Henry Ewbank*, 1 Sumn. 417, Fed. Cas. No. 6,376. So Bouvier's Law Dictionary thus defines salvage:

"In maritime law: A compensation given by the maritime law for service rendered in saving property or rescuing it from impending peril on the sea or wrecked on the coast of the sea, or in the United States on a public navigable river or lake where interstate or foreign commerce is carried on."

For this definition, among other authorities, *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068 is cited, which citation is misleading; but these definitions might be multiplied indefinitely.

There is, too, other salvage than maritime, such as for property saved from impending danger from fire on land, etc.; but it will be noted that the underlying idea in all salvage, or an allowance reward or bounty to the salvor, is "for services in saving property from impending danger or imminent peril of loss to the owner, by one on whom no legal obligation rests to perform such service." The service to the schooner *Jackson* by the *Merrimac* was such service as is recognized and conceded in the present case by even the owners of the *Jackson*. The *Merrimac* was a passenger and freight steamer engaged in a legitimate business on a regular voyage. No obligation rested on her to remove derelicts from the track of commerce, except the duty owed to humanity and the safety of the business in which she was engaged. Other ships are charged with this duty. Changing her course at great inconvenience to her passengers and delay to the steamship in making her regular schedule, not being fitted for towing purposes, on one of the most dangerous parts of the Atlantic coast, with hidden, shifting sand shoals, just after a storm, when lightships and buoys are displaced, she changed her course and towed, by means of temporary rig-

ging, the derelict to a place of comparative safety, and anchored her in a bike of sufficient depth to enable her to ride out the night, stood by until the derelict was taken away by tugs summoned by the steamship, attended by the second officer of the Merrimac, and towed to a haven of safety. True, it was not accompanied by any great risk of life, further than the risk attending the danger of the steamship grounding in those dangerous waters with the shifting sand shoals, of which a chart cannot be made which can be relied on for any length of time, and becoming a partial, if not a complete, loss. This was heroic salvage service, to which the owners of the derelict schooner are indebted for all that was saved of their vessel and her cargo. Had a government ship come in contact with the derelict, she would have been dynamited or destroyed; and had she grounded on one of the sand shoals, 10 or 20 miles from shore, she and her cargo would have been as effectually lost.

What of the tugs? They came in compliance with a signal "for a tug" hoisted by the principal salvor, with apparently no view but a towage contract. They took no risk. The derelict was really saved before they were summoned, and the tugs rendered no service except a towage service—true, in aid of the salvor, but only in aid. They saved nothing, rescued nothing. There was no imminent danger to the derelict at the time they came, and they might have looked to the Merrimac in a civil action for services rendered at her instance and procurement. It was not a towing of a vessel in distress on the high seas, as all the cases cited by the proctor for these tugs were, and in holding this was a mere towage, not a salvage service, entitling the tugs *Blanche* and *Sanders* to an allowance on this score, this court is not to be understood as controverting the principle decided in the cases cited by the proctor, but as deciding this case on the facts of the case and distinguishing it from the cases cited. The cases are easily distinguishable. It is frequently difficult to draw the distinction between a towage and a salvage service, which may commence as one and end as the other; but there does not seem to be any of the elements of a salvage service in that under consideration. *The J. C. Pfluger* (D. C.) 109 Fed. 93.

There is no fixed rule for salvage allowance. The old rule in cases of a derelict was 50 per cent. of the property saved; but under modern decisions and practice it may be less, or it may be more. The allowance rests in the sound discretion of the court or judge, who hears the case, hears the witnesses testify, looks into their eyes, and is acquainted with the environments of the rescue. Such judge or court is generally more competent to fix a fair and equitable allowance than an appellate court, by whom the allowance may be reviewed on appeal, and reduced or increased, at long range. An allowance for salvage should not be weighed in golden scales, but should be made as a reward for meritorious voluntary services, rendered at a time when danger of loss is imminent, as a reward for such services so rendered, and for the purpose of encouraging others in like services. It is not a result of contract or chaffering. The bitter remarks of the proctor for respondent touching the greed of those who flock around a ship

in distress and its effect on shipping to this port may be justified by facts known to the proctor, who resides and has resided from birth in Wilmington; but this is a misfortune of the port, not for consideration by the court. Such remarks are aliunde the record—a privilege of counsel. The court must at best attempt, with the lights set before it, by the admissions in the pleadings, the testimony of the witnesses, whom the court has seen and heard testify, the value of the property, both of the salvor and that salvaged, the risk to the former, and the benefit to the latter, to make, under the law of salvage, a fair and equitable allowance to the salvor, without oppression to the owners of the salvaged property; and considering the desperate condition of the *Jackson*, her masts down, without any means of navigation, at sea, in the track of ships, a menace to commerce—in short, in a condition to be destroyed by a revenue cutter as such menace—the action of the passenger steamer in rescuing her at a risk of \$400,000 worth of property, to say nothing of her 75 passengers, the allowance of about 70 or 75 per cent. of the appraised value of the salvaged property, ship and cargo, which, notwithstanding the high character of the appraisers, seems to have been very low. The cost is not stated in the testimony; but she was repaired and is now sailing the seas, engaged in commerce, and the only testimony on this point is that intact this vessel was worth \$50,000. But, taking the valuation or appraisal to be correct in her wrecked, water-logged condition, away from her home port, the allowance should be liberal. It was a minimum appraisal. In *The Lyman M. Law* (D. C.) 122 Fed. 816, \$1,200 was adjudged proper as salvage by a passenger steamer valued at \$460,000, a case very similar to the one at bar. In *The Edith Allen*, 129 Fed. 209, 63 C. C. A. 367, a salvage award of \$6,500 for the rescue of a schooner and her cargo stranded on the coast of New Jersey was reduced on appeal by the Circuit Court of Appeals, Second Circuit, to \$4,500, “because it appeared” to that court “to have been increased to some extent by a misapprehension by the trial judge of the facts shown by the evidence as to the peril of the stranded vessel.”

There is no misapprehension of the facts in the case at bar. The court is familiar with the coast at Frying Pan Shoals and the dangers thereof, lurking below the surface of the waters. In fact, there is really no controversy on this point. The facts are not controverted. The *Lamington*, 86 Fed. 685, 30 C. C. A. 271, and *The Myrtle Tunnel* (D. C.) 155 Fed. 476, a wreck occurring on Frying Pan Shoals, will be found interesting reading as to allowances in the case of derelicts, which cases are commended to the proctors and other lawyers in derelict cases. The 50 per cent. rule is not absolute or binding on the court. The allowance may be more. *The William Smith* (D. C.) 59 Fed. 615. The expenses of towing, pumping, and guarding the vessel must first be paid to the parties who performed such services or paid such expenses; but those seem to go to the vessels or their owners, and are not to be divided among the crews. *The Pfluger* (D. C.) 109 Fed. 93.

It is ordered and decreed that the expenses incurred by the *Merri-mac* in this behalf, of which an itemized bill is filed amounting to

\$59.88, be allowed and paid; also \$118 for towing the derelict to Southport, or Battery Island, the usual towing charge for taking a vessel to Southport of this tonnage, plus 20 per cent. on account of probable increased power required by reason of the tow being water-logged, be paid the fishing steamer Sanders. The following claims are to be allowed and paid:

To the Sanders:

Towing derelict to a point off Southport.....	\$ 98 00
Extra on account of water-logged condition of tow.....	100 00
Paid watchman.....	75 00
	<hr/>
	\$263 00

To the steam tug Blanche:

Towing derelict from Southport to Wilmington.....	\$100 00
Extra for water-logged condition of tow.....	100 00
Three days' working on Jackson, pumping, etc., at \$50 per day.....	150 00
	<hr/>
	\$350 00

To the Merrimac:

Salvage	\$2,500 00
To bill rendered as stated.....	59 88
	<hr/>
	\$2,559 88

This last allowance as salvage to be divided between the ship and the officers and crew, three-fifths to the vessel, or her owners, and two-fifths to the officers and crew of the steamship in proportion to their pay and the services performed, of which the court has no evidence upon which to base a division, being furnished with simply a list of the crew. The master or captain, Thos. P. Pratt, and the second officer, seem to have been more the moving spirits in what meritorious services were rendered than other members of the ship's crew. If any evil had come to the steamship Merrimac, they under the circumstances might have been held responsible therefor. The other officers and crew protested, hence these officers should be compensated accordingly. There being no data at hand upon which the court can make an equitable division of this allowance of two-fifths to the officers and crew, the matter, if it cannot be settled by agreement, will be referred to a commissioner for this purpose. The court has no hesitancy in saying, though it does not so hold at this time, these officers should have one-half of this two-fifths allowance, and the owners of the salvaged property should consider they have gotten out of misfortune very fortunately and cheaply.

UNITED STATES v. HUGHES et al.

(Circuit Court, S. D. New York. June 5, 1908.)

1. PARTNERSHIP—ACTION AGAINST PARTNERS—CONTRACT—BREACH.

Where a bill charged that a firm and its individual members wholly failed to perform a contract with complainant, to complainant's damage in a sum stated, it alleged a cause of action against the firm and the individuals composing it; their liability being joint and several.

2. SAME—ACTIONS AGAINST DECEASED PARTNER.

In case of breach of contract by a firm, the creditor may proceed directly against the administrator of a deceased partner, making the surviving partner a party, without suing the firm or surviving partner.

In Equity. Hearing on separate demurrers by defendants to bill of complaint.

Henry L. Stimpson, for the United States.

Kellogg & Rose, for defendant Bangs.

Thomas Hogan, for defendant Hughes.

RAY, District Judge. No judgment or decree is sought or demanded against the defendant Bangs. He is made a party defendant on the theory that he is a proper, if not a necessary, party, inasmuch as he has an interest in the controversy and in defending the action. July 31, 1899, James Hughes, Eugene Hughes, and Anson M. Bangs were co-partners, doing business under the firm name of Hughes Bros. & Bangs. On that date this firm entered into a written contract with the United States, represented by Smith S. Leach, Corps of Engineers, U. S. Army, "to do certain dredging in Bridgeport harbor, Conn., in accordance with the terms of said contract and with certain specifications and proposal forming part thereof." On the same day, and simultaneously with the execution of the contract, said firm, under its firm name as principal, and the American Surety Company of New York, duly executed and delivered to the United States a bond conditional:

"The condition of this obligation is such that whereas, the above-bounden Hughes Bros. & Bangs have, on the 31st day of July, 1899, entered into a contract with the United States, represented by Maj. Smith S. Leach, Corps of Engineers, U. S. A., for dredging and stone work in Bridgeport harbor, Conn.: Now, therefore, if the above-bounden Hughes Bros. & Bangs' heirs, executors, or administrators, shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Hughes Bros. & Bangs to be observed and performed, according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying them with labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue."

This bond is attached to and made a part of the bill of complaint, but the agreement or contract is not. In fact, the United States has furnished a full bill of particulars of its demands, setting out various

provisions of the contract and its damages; but this is not printed in the demurrer book. The bill of complaint then alleges:

"Third. That neither said firm of Hughes Bros. & Bangs, nor any of the aforementioned partners thereof, performed the work agreed and covenanted by them to be performed in said contract, which also is referred to in the condition of said bond, but, on the contrary, wholly neglected and failed diligently and faithfully to prosecute and complete the said work, in accordance with the specifications and requirements of said contract.

"Fourth. That thereafter Maj. Harry Taylor, Corps of Engineers, United States Army, the successor legally appointed to said Maj. Smith S. Leach, did on behalf of the United States, and pursuant to the provisions of said contract, direct and forward a letter, dated May 10, 1906, to said Hughes Bros. & Bangs, a copy of which is hereto annexed, marked 'Exhibit B' and made a part hereof, which said letter was duly received by them."

The letter referred to reads as follows:

"You are hereby notified that under authority of the Chief Engineer the contract entered into by you under date of July 31, 1899, for dredging and delivering riprap stone in Bridgeport harbor, Conn., is this day annulled on account of your failure to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract. In accordance with the terms of the contract, moneys heretofore retained on payments which have been made you are forfeited to the United States, and you and your bondsmen will be held responsible for any extra expense to which the United States may be put for finishing the work over and above the amount which it would have cost under your contract prices."

The bill of complaint then alleges that the United States did perform and has performed all of its obligations in the premises; that "by reason of the premises, and of said failure and neglect to perform the terms and conditions of said contract, which is also referred to in said condition of said bond, the plaintiff was damaged in the sum of \$82,928.72." That demand of payment of said damages has been duly made, but that no part of same has been paid. The bill then charges that said Eugene Hughes died intestate December 19, 1902, leaving a large estate more than sufficient to pay all claims and demands against him; that James Hughes and Mary Hughes were duly appointed administrators of his estate and qualified as such; that thereafter, and December 13, 1906, said James Hughes died at Cleveland, Ohio, leaving a last will and testament, which was there duly proved, and that one Margaret K. Hughes was duly appointed executrix thereof; and that she and said estate are without the jurisdiction of this court. The prayer is that Mary Hughes, as administratrix of Eugene Hughes, may make discovery of his estate and be decreed to pay such damages; also that she and Bangs may be directed to appear and a full and true answer make to the premises and abide the order of the court. From the facts stated it appears that Bangs is the sole surviving partner of the firm, although nothing is said about it. It is not charged that the firm was insolvent, or has no visible assets, or that any proceedings have been taken against the surviving partner. It is claimed that no cause of action in equity is alleged; that there is an improper joinder of parties, etc.

The bill of complaint not only alleges that Hughes Bros. & Bangs agreed to do the work of dredging in Bridgeport harbor, Conn., but

that the firm was to do it diligently and faithfully in accordance with specifications and requirements. This last appears from the bond, which went with the main contract. The bill then charges that the firm and its individual members wholly failed to perform, to the damage of the United States in the sum stated. This states a cause of action clearly. It is settled that the liability of the firm and of the individuals composing it was joint and several. It is also settled in the courts of the United States that the creditor may proceed directly against the administrators of the deceased partner, making the surviving partner a party. *Nelson v. Hill*, 5 How. (U. S.) 127, 133, 12 L. Ed. 81; *Lewis v. United States*, 92 U. S. 622, 623, 23 L. Ed. 513; *Story on Partnership* (6th Ed.) pp. 578-580, § 362, and cases cited in notes. Says Story:

"Another important consideration in cases of a dissolution by death is as to the rights of the joint creditors against the estate of the deceased partner. We have seen that at law the sole right of action of the joint creditors is against the survivors; and the inquiry here naturally presented is whether they have any remedy in equity. The doctrine formerly held upon this subject seems to have been that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners were at the time, or subsequently became, insolvent or bankrupt. But that doctrine has been since overturned; and it is now held that in equity all partnership debts are to be deemed joint and several, and consequently the joint creditors have in all cases a right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent, or bankrupt, or not. The consequence is that the joint creditors need not now wait until the partnership affairs are wound up and a final adjustment thereof is made; but they may at once proceed as upon a joint and several contract in equity against the estate of the deceased partner, although in any such suit the surviving partners must be made parties, as persons interested in taking the account."

It would be presumptuous for me to overrule these authorities. But it is said that the bill of complaint shows that the United States has ended the contract sued on and declared the sum paid and earned, but withheld, if any, forfeited to the United States, and that this deprives it of the right to claim or recover anything further as damages. *O'Brien v. United States* (2d Circuit, Jan., 1908) 159 Fed. 671, is cited. Whether that case is decisive of this depends on all the terms, etc., of the contract. It is not before the court in its entirety. Those matters are to be pleaded in defense. *O'Brien v. United States* may or may not be decisive. All the facts will appear on the trial.

Demurrer overruled, with costs. Defendants may answer in 20 days after being served with copy of order to be entered pursuant hereto.